UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In The Matter of:	)	
ARIZONA PROCESSING, INC.	)	Docket RCRA-09-87-0004
Respondent.	)	

Resource Conservation Recovery Act (hereinafter "RCRA"):

1. Accellerated Decision: Where the Answer essentially admits the factual allegations in the Complaint, the issuance o an Accellerated Decision is appropriate.

RCRA:

2. Activities Controlled By the Act: The deposition of a sludge with a Ph of 2 or less onto the ground in unlined pits constitutes the disposal and treatment of such material since it is a hazardous waste.

RCRA:

3. Penalty Calculation: The Court is without authority to assess a penalty for the possible future violation of the Compliance Order associated with the Complaint.

APPEARANCES

For Complainant: David M. Jones, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region IX
215 Fremont Street
San Francisco, California 94105

For Respondent: Robert H. Allen, Esquire
Allen, Kimerer and Lavelle
2715 North Third Street
Phoenix, Arizona 85004-1190

INITIAL DECISION

This matter is before me on a Motion for an Accellerated Decision filed by the Complianant and a Cross-Motion for the same relief filed by the Respondent, both pursuant to 40 C.F.R. §22.20.

This case was instituted by the filing of a Complaint and Compliance Order issued by the Director of the Toxics and Waste Management Division of Region IX of EPA on June 16, 1987. The Complaint alleged that the Respondent was engaged in the management of hazardous waste and had failed to notify the Agency of such activity pursuant to §3010 of RCRA and was operating a regulated facility without a permit. The Complaint sought a $25,000.00 penalty for each of these violations for a total penalty of $50,000.00.

The Respondent filed its Answer denying that it was engaged in any activity regulated by RCRA and requested that the Complaint be dismissed.

FACTUAL BACKGROUND AND DISCUSSION

The Respondent is engaged in the cotton seed de-linting business. The Respondent obtains cotton seed from cotton ginning operators. When received this seed has attached to it a quantity of cotton lint which must be removed in order to render the seed usable for planting. The lint removal is accomplished by washing the seeds in a sulfuric acid solution which dissolves the lint and allows the seeds to be later rinsed, dried, treated and sold.

The Respondent uses a 93% to 98% concentration of sulfuric acid to clean the seeds. Over time the cleaning solution becomes so contaminated with cotton lint that it must be discarded. The resulting sludge is

placed in several unlined earthen lagoons. After the sludge which is a calculated 7% acid solution has interacted with the alkaline soil and most of the liquids have evaporated, the resulting soil and sludge residue is sold to local farmers as a fertilizer or soil amendment.

The Agency contends that the acid-lint sludge is a hazardous waste which the Respondent is disposing of by placing it on the ground. The Respondent argues that the sludge or "mulch" is not a hazardous waste under any of the definitions there of contained in the law or regulations promulgated pursuant thereto but is a "co-product" which it sells in the open market.

The Respondent contends that it is not subject to the Act because the "mulch" (its description of the sludge) is not a "solid waste." It points out that 40 C.F.R. §261.2(a)(2) defines a solid waste as a "discarded material" as a material that is "abandoned", "recycled" or "inherently waste-like." It argues that its mulch does not meet any of these criteria. The Respondent contends that the mulch is excluded as a solid waste by the language at 40 C.F.R. §261.2(e)(1)(ii) since it is "used or reused as effective substitutes for commercial products;" in this case as a soil amendment.

The Agency's theory is that the sludge or "mulch" which the Respondent places on the ground in the lagoons is a hazardous waste since it exhibits the characteristic of corrosivity as its Ph is less than 2. Thus the Agency contends that the sludge is a "by-product" of the delinting process "exhibiting a characteristic of hazardous waste." Since the analysis performed by the Agency personnel showed a PH of 0.91 the sludge deposited on the land is a characteristic waste in the corrosive category.

The Agency further argues that the use or reuse for commercial products exemption mentioned above is not available to this Respondent since 40 C.F.R. §261.2(e)(2)(i) states that:

> "The following materials are solid waste, even if the recycling involves use, reuse, or return to the original process (described in paras.(e)(1)(i) through (iii) of this section):
>
> (i)Materials used in a manner consistuting disposal, or used to produce products that are applied to the land;"

The other problem with Respondent's argument that the sludge is a co-product is that a co-product is a material that is produced for use by the general public and suitable for end use essentially as-is (See Preamble to 1985 regs. Vol. 50, No. 3 at page 625). Clearly the sludge or "mulch" discharged to the ponds or lagoons is not suitable for use as-is. It must first be treated by interaction with the alkaline soil and by evaporation or perculation of the excess liquids before it is usable as a soil amendment or fertilizer. The Respondent also over looks the foot note on the same page which says that:

> "we note, however, that products or co-products that include hazardous wastes as ingredients are classified as wastes when they are to be burned for energy recovery or placed directly on the land for beneficial use."

The used sulfuric acid with a Ph below 2 is clearly a hazardous ingredient of the sludge or "mulch".

That material is disposed on the soil and subjected to treatment as described above. Clearly, the placing of this material on the ground in unlined ponds constitutes the treatment of a hazardous waste. See 40 C.F.R. §260.10 which defines treatment as:

> "...any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste, or so as to recover energy or material resources from the waste, or so as to render such waste non-hazardous....."

It is quite likely that were the native soil not naturally so alkaline, the Respondent would have to apply some alkaline material to the sludge in order to render it fit for use as a soil amendment. The fact that nature has provided the neutralizing material free of charge to the Respondent does not in any way change the result. The Respondent deposits a hazardous waste and ends up with a non-hazardous product of some commercial value. What happens between deposition and end-product clearly meets the definition of "treatment" defined above.

The Respondent argues that the end-product, which is a combination of the treated deposited sludge and soil has a Ph of over 2. This is probably true but entirely irrellevant. We are not concerned about the characteristics of the end-product but about the nature of the acid/lint mixture initially deposited on the land. As discussed above, this mixture exhibits the corrosive characteristics of a hazardous waste and that is the controlling factor.

I am therefore of the opinion that the Respondent is engaging in the management of a hazardous waste by operating a treatment facility. It has therefore violated the two counts in the Complaint, i.e., failure to notify under §3010 of the Act and operating a RCRA covered facility without having obtained or filed an application for a hazardous waste permit in violation of §3005(a) of RCRA and 40 C.F.R. §270.10(e) of the RCRA regulations.

THE PENALTY

The Complaint seeks a $25,000.00 penalty for each of the violations set out in the Complaint. This figure was arrived at by using the Agency Penalty Policy and determining that the violations were in the major category, both as to extent of deviation from the regulations and potential for harm. Applying this determination to the penalty matrix results in a range of potential penalty of from $20,000.00 to $25,000.00. The Agency chose to elect the upper figure of this range.

According to the Affidavit of Gary S. Lance (attachment No. 7 of the Motion) who calculated the penalty for the Agency, he considered the fact that the Respondent's facility is located on the Gila River Indian Reservation in the midst of an area where the local population, including children and various domestic animials are present. He also considered the "effect of economic benefit of non-compliance" but this resulted in such a huge figure that the Agency elected to choose a one-time penalty of $25,000.00 per count, provided a proper closure of the facility could be achieved.

In its Motion, the Agency also moves the Court to assess a daily penalty of $1,000.00 per day against the Respondent for each day beginning on the day the Respondent received the Complaint until the date of my Order and a penalty of $3,000.00 per day for each day on and after my Order until a clean closure is effected at the facility. I am of the opinion that these two penalties are beyond my power to assess.

As to the first penalty, the effect of the Complaince Order was stayed upon the filing of the Answer and does not take effect until its terms are included in a Final Decision of the Agency. Such Final Decision can occur

by the passage of time following the issuance of this Initial Decision or, if appealed, by the issuance of a Final Decision by the Administrator. In any event no penalty attaches until it is shown that the Respondent has violated the terms of a Final Compliance Order and such a penalty must be recovered in a separate action brought in the future. Therefore, I also lack the power to assess the second portion of the requested daily penalty.

As to the gravity based penalty of $25,000.00 per count, I agree that the deviation from the requirements is in the major category since the Respondent completely failed to either notify the Agency or file for or obtain a permit to operate its facility. Due to the nature of the waste treated and the fact that the sludge is neutralized upon its mixture with the alkaline soil I am of the opinion that the potential for harm is in the moderate category. The Affidavit attached to the Response of the Respondent states that the nearest home is located about three miles from the plant premises and no children or domestic animials have ever been observed in the area of the impoundments. The impoundments, however, are not fenced and thus the potential for harm still exists although its level is reduced by the relative isolation of the facility. Due to the nature of the deposited sludge and the high alkalinity of the soil, I do not feel that the treatment engaged in poses any real threat to ground water or domestic wells located in the area. Reference to the penalty matrix shows that for a major category deviation and a moderate potential for harm, a range of $8,000.00 to $10,999.00 is suggested. Considering all of the circumstances in this case, I feel that a penalty of $9,000.00 per count is appropriate, making a total of $18,000.00.

In passing it should be noted that the Respondent has installed a closed system and will no longer be depositing its sludge or mulch on the ground in the future.

All Contentions, Arguments or Motions by the parties or either of them, not hereinafter addressed are hereby overruled or denied.

Upon consideration of the entire record involving the Affidavits and Exhibits submitted by the parties, I recommend entry of the following:

ORDER[1]

Pursuant to Section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. §6928, the following Order is entered against Respondent Arizona Processing, Inc.:

1. A civil penalty in the amount of $9,000.00 is assessed against said Respondent on Count I of the Complaint;

2. A civil penalty in the amount of $9,000.00 is assessed against said Respondent on Count II of the Complaint;

3. Payment of the total amount of $18,000.00 shall be made within sixty (60) days after receipt of the Final Order, 40 C.F.R. §22.31(b), by submitting a

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1 Since this Decision disposes of all issues in controversy, it is deemed to be an Initial Decision which, pursuant to 40 C.F.R. §22.27(c) becomes the Final Order of the Administrator within 45 days of its service upon the parties, unless an Appeal is taken by one of the parties or the Administrator elects to review it. Section 20.30(a) provides for an Appeal from this Initial Decision within 20 days.

certified or cashiers check payable to the Treasurer United States of America, mailed to:

E.P.A. Region IX
Regional Hearing Clerk
P.O. Box 360863M
Pittsburgh, PA 15251

4. The following Compliance Order is also issued against the Respodent:

COMPLIANCE ORDER

Respondent is hereby ordered to submit, within fifteen (15) days of the Final Order, a Notification of Hazardous Waste Activity, as required by Section 3010 of RCRA [42 U.S.C.]

In addition, Respondent is hereby ordered to submit to Complainant, a completed Part A of the hazardous waste permit application, as required by Section 3005(e) of RCRA [42 U.S.C. 6925(e)], and implemented by 40 C.F.R. 270.10(e)(3) of the RCRA regulations.

Respondent shall prepare and submit, within 30 consecutive days of the receipt of the Final Order, a closure plan for EPA review and approval. The closure plan shall be prepared in accordance with 40 C.F.R. 265.112 and include the following:

1) A sampling and analysis program to determine the nature and extent of soil and ground water contamination in the vicinity of the surface impondments. This program shall consider the hazardous wastes and hazardous waste constituents identified at the facility and the parameters identified in 40 C.F.R. 265.92.

2) A detailed description and schedule of the steps needed to remove or decontaminate all hazardous waste residues and contaminated containment system components, equipment, structures and soil identified as a result of the sampling and analysis program required in Paragraph 1 above.

Respondent shall initiate, within 10 days of EPA's approval, the provisions contained in the approved closure plan.

In addition, Respondent shall immediately cease the disposal of hazardous waste on site.

The documentation of compliance required by this Order shall be submitted within the time period specified above, and be addressed to Chief, Toxics and Waste Programs Branch, U.S. Environmental Protection Agency, 215 Fremont Street, San Francisco, CA 94105.

Dated: 11/30/87

Thomas B. Yost
Administrative Law Judge

CERTIFICATION OF SERVICE

I hereby certify that the original of the foregoing letter was served on the Regional Hearing Clerk, USEPA Region IX (service by first class U.S. mail) , and that true and correct copies were served on counsel for Complainant and Respondent and the Hearing Clerk (service by certified mail return reciept requested). Dated in Atlanta, Georgia this ~~1st~~ 2nd day of December, 1987.

Marsha P. Dryden
Secretary to Judge Yost

JUDGE THOMAS B. YOST
U.S. ENVIRONMENTAL PROTECTION AGENCY
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