UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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| IN THE MATTER OF | : | |
| National Marine Services, Inc. | : | Docket No. RCRA-V-W-85-R-27 |
| Respondent | : | |

ORDER DENYING MOTIONS TO DISMISS AND FOR ACCELERATED DECISION

Respondent herein filed (1) a motion to dismiss, alleging various deficiencies in the complaint and urging that the Environmental Protection Agency lacks jurisdiction to maintain this action; and (2) a motion for "accellerated decision" based upon the assertion that certain of its barge cleaning operations fall within an exemption for residues of hazardous waste in empty containers set out at 40 CFR §261.7. If the latter argument were to be sustained, such operations would not be subject to regulation under Parts 261-265 and Part 270 of the Code of Federal Regulations, numerous violations of which are alleged in the complaint filed in this matter.

The motion to dismiss argues that the U. S. Environmental Protection Agency lacks jurisdiction in this matter because the State of Illinois, where the respondent is located, was granted authority by the EPA to enforce its own hazardous waste

program and because there has been no demonstration that the State either took no action regarding the respondent or that its actions were inadequate. Respondent cites In the Matter of BKK Corporation, Docket No. IX-84-0012, RCRA (3008) 84-5, in support of this contention. Respondent points out that the Illinois Environmental Protection Agency (IEPA) inspected respondent's facility three times in eighteen months before the issuance of the complaint herein, that respondent and the IEPA have been "in contact . . . on many other occasions," and that there was additional evidence that IEPA and the respondent "were working together to resolve any perceived problems at the site". 1/

Whether or not this was the case, on September 28, 1984, IEPA referred the matter of perceived problems at the site to USEPA Region V, specifically requesting that an "Administrative Order be issued to the [respondent] for violation of RCRA Interim Status Standards requirements." IEPA pointed out that "(T)he owner/operator of the facility was notified of the violations and given ample time to correct them. To date, no promised 'definitive' response to such notification has been received despite assurances from National Marine Services. . . " . This letter

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1/ For example, some of the violations found during IEPA's June 21, 1983, inspection were apparently not found during the May 15, 1984 inspection, i. e. they were not repeated in the portion of the complaint that relates to violations found during the May 15, 1984, IEPA inspection (see paragraph 12 of the complaint). Conversely, of course, some of the same violations allegedly were found. And, on October 31, 1984, nearly eighteen months after the June 21, 1983, inspection, some of the same alleged violations were again noted, including "failure to establish an upgradient well capable of monitoring the uppermost aquifer, and providing samples of background groundwater quality not affected by the facility;" "failure to establish downgradient wells at appropriate locations and of appropriate depths to detect migration of contaminants . . . ;" and "failure to develop and follow an adequate groundwater sampling and analysis plan which includes procedures . . . for chain of custody control. . . ." Respondent did not note that, during the May 15, 1984 and October 31, 1984 inspections, IEPA found additional violations not noted during the previous visits, according to the complaint (see paragraphs 12 and 14). Therefore, it may be questionable how well IEPA and the respondent were able to work together to remedy perceived problems at the site.

clearly shows that the State of Illinois believed administrative enforcement by USEPA was necessary in order to achieve compliance with hazardous waste requirements at the respondent's facility. Indeed, the letter requesting such enforcement preceded the October 31, 1984, inspection at which some of the June 21, 1983, alleged violations were still unremedied, and "new" perceived violations, i. e. since June, 1983 and May, 1984, were said to have been found (see paragraph 14 of the complaint). In these circumstances, it is hardly necessary for USEPA to determine, as respondent says it must under the the holding of In the Matter of BKK Corporation, 2/ that IEPA's actions concerning the [respondent's] facility were unreasonable or inappropriate. 3/ There is no question here that USEPA has authority to proceed, 42 USC §6928 (a)(2).

Respondent next argues in its motion to dismiss that the complaint, at page 18 in the "Assessment of Civil Penalty" section, does not state authority for the assessment of a civil penalty for past violations. However, the opening sentence of the complaint states that "(T)his complaint and Compliance Order is issued pursuant to Section 3008 (a)(1) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), 42 USC §6928 (a)(1). . . ." Authority for the assessment of a civil penalty for current and past violations of the Act is clearly set forth in Section 3008(a)(1), 42 USC §6928. Moreover, it can be argued that the citation to Section 3008(g) in the Assessment of Penalty portion of the complaint is appropriate, since it specifically provides that persons who violate "any requirement of this subtitle [i. e. Subtitle C, Hazardous Waste Management] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000

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2/ It is noted that, by order of the Administrator dated October 23, 1985, the final order in the BKK matter was vacated and declared to have "no precedential effect," Docket No. IX-84-0012, Order on Petition for Reconsideration.

3/ IEPA was notified by USEPA on December 6, 1984, in accordance with Section 3008(a)(2), 42 USC §6928(a)(2); see Jurisdiction portion of the complaint, lines 12-13.

for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation." This is not to say that it would not be reasonable to cite Section 3008(a)(1) of the Act, 42 USC §6928, in the "Assessment of Civil Penalty" portion of the complaint, as well as in the first sentence of the complaint.

Respondent next argues in its motion to dismiss that the complaint fails to provide a statement "explaining the reasoning behind the proposed penalty," as required by 40 CFR §22.14(a)(5); and that the penalty recommended was not determined "in accordance with any criteria . . . set forth in the Solid Waste Disposal Act or its amendments or with any civil penalty guidelines issued under that Act, as . . . required by 40 CFR §22.14(c)".

40 CFR §22.14(a)(5) provides that a complaint for the assessment of a civil penalty must include "a statement explaining the reasoning behind the proposed civil penalty." Objections that USEPA complaints do not contain the required statement regarding civil penalty reasoning are made often, particularly where, as here, the statement that is obviously intended to fulfill the requirement of §22.14(a)(5) is very brief and not particularly informative. Nevertheless, the statement that appears in this complaint 4/ is legally sufficient. Its brevity is not a basis for dismissing the complaint or for striking the proposed penalty assessment.

40 CFR §22.14(c), Derivation of the Proposed Civil Penalty, provides that "(T)he dollar amount of the proposed civil penalty shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of civil penalty and

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4/ Page 18 of the complaint: "The proposed penalty has been set at the indicated level based upon an analysis of the seriousness of the violations cited herein and the conduct of the Respondent."

with any other civil penalty guidelines issued under the Act." This section does not require that information relating to guidelines or criteria in the Act be set forth in the complaint. If the complainant has determined the proposed penalty in accordance with the requirements of 40 CFR §22.14(c), that is sufficient. No evidence before me suggests that the requirements were not observed. Complainant's counsel states in the Response to Motion to Dismiss and for Accellerated Decision, p. 14, that civil penalty guidelines were issued by USEPA, and that these guidelines were followed in computing the penalty proposed to be assessed. 5/, 6/

Section 3008(a)(3) of the Act, 42 USC §6928(a)(3), provides in pertinent part that "(I)n assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements." Since the statement in the complaint that "the proposed penalty has been set at the indicated level based upon an analysis of the seriousness of the violations cited herein and the conduct of the Respondent" does speak to the requirements of Section 3008(a)(3), there is no basis here for dismissal of the complaint or for striking the proposed penalty assessment.

Respondent seeks dismissal of such portions of the complaint as are based upon 40 CFR §270.10 arguing that this section is "merely informational in nature" and not capable of violation.

Numerous portions of §270.10 contain language that is capable of violation, such as [§270.10(a)] "(P)ersons currently authorized with interim status shall

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5/ See (1) affidavit of Kevin Pierard, who declared that he did this, and (2) RCRA penalty policy, both attached to complainant's Response.

6/ Respondent also cites 40 CFR §21.14 (page 4 of its motion for dismissal). Presumably this is a typographical error. Further, §22.4(4) is cited as authority for the requirement set forth at 40 CFR §22.14(c), and it is assumed that this, too, is an error (page 6 of the motion).

apply for permits when required by the Director," and [§270.10(e)] ". . . . owners and operators of hazardous waste management facilities . . . must submit Part A of their permit application no later than (i) six months after the date of publication of regulations which first require them to comply with the standards set forth in 40 CFR Part 265 or 266 . . . ." It is clear that §270.10 is in fact capable of violation. Accordingly, since the basis of this portion of the motion to dismiss is that §270.10 cannot be violated, such portions of the complaint as are based upon 40 CFR §270.10 cannot be dismissed. 6/

For the reasons cited above, respondent's motion to dismiss is denied.

In its motion for "accellerated decision," respondent argues that the barge cleaning operations that complainant believes are subject to hazardous waste regulation are in fact exempt because the barges are "empty containers" within the meaning of 40 CFR §261.7. 7/ It further states that "no barges have been cleaned which contained waste listed at 40 CFR §261.33 (c)." 8/

Respondent must show, in order to fall within the exemption provided by the "empty container" rule, that the barges it cleans are "containers" as that term is defined at 40 CFR §260.10. Next, if they are containers, they must be "empty" as defined at §261.7(b)(1).

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6/ Respondent also points out that the complaint contains no factual allegations to support a charge of violation of 40 CFR §270.72, although §270.72 is noted in the complaint preamble as being one of the sections respondent has allegedly violated. However, since there appear to be no charges in the complaint relating to this section, there is nothing to dismiss. Complainant's counsel states (page 15, Response) that the inclusion of §270.72 was a typographical error.

7/ 40 CFR §261.7, Residues of Hazardous Waste in Empty Containers, provides in pertinent part, that . . . (A)ny hazardous waste remaining in . . . an empty container as defined in paragraph (b) . . . is not subject to regulation . . . ."

8/ 40 CFR §261.33 pertains to "discarded commercial chemical products, off specification species, container residues, and spill residues thereof".

"Container" is defined as "any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled, 40 CFR §260.10. "Portable" is defined as "that (which) can be carried, and "easily carried or moved, especially by hand (a portable TV)" by Webster's New World Dictionary, College Edition, 1974, and as "capable of being easily carried" by the Winston Senior Dictionary, 1972; as "capable of being carried or moved about" from the Latin verb portare (to carry) by Webster's New College Dictionary, 1979; and as "capable of being carried easily, or conveniently transported, light or manageable enough to be readily moved" by Webster's Third New International (Unabridged) Dictionary, 1967. It is apparent from commonly consulted authorities 9/ that "portable" suggests that the containers referred to in §261.7(a) can be carried or moved about easily.

Although it is possible to find a definition of "portable" that includes objects of great size, 10/ it does not seem reasonable to attach this far less usual meaning to the definition of "container" at 40 CFR §260.10 without clear indications -- absent here-- that the definition includes this meaning. If the words "any portable device" in the definition of "container" (40 CFR 260.10) referred to everything that could be moved by any method and to items as large as barges, the "empty container" rule would exempt virtually everything except, perhaps, holes in the ground. Everything capable of holding anything would be a "portable device". Again, such a result cannot be reached in the absence of clear indications that it was intended. If such a result were intended, it would have been easy enough to substitute the word

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9/ Dictionaries purport to list definitions and common usage: "(I)n the arrangement of definitions, the rule has been, with very few exceptions, to list first the meaning which is now most commonly and immediately attached to the word defined," The Winston Senior Dictionary, at p. iv.

10/ Webster's New International Dictionary, 1906, gives one definition of "portable" as "capable of being transported through belonging to a class of objects usually unmovable; as a portable bed, desk, engine . . . a portable house . . . .".

"anything" for the words "any portable device." The material provided by respondent at page 4 of its motion is not persuasive in this regard, because references therein to drums and barrels suggest that residue from something smaller than a barge was being discussed. For purposes of this motion, it is unnecessary to decide how big a device exceed the definition of "portable," because barges are clearly not the "containers" contemplated by 40 CFR 261.7.

It is concluded that barges are not "portable" and are therefore not "containers" within the meaning of 40 CFR §260.10. As a consequence, it is not necessary to determine whether they are also "empty" as defined at 40 CFR 261.7(b)(1). It seems more likely, from the moving papers and the government's response, that barge cleaning operations are referred to at 40 CFR §261.4(c), which speaks to hazardous wastes generated in product or raw material storage tanks, transport vehicles, and vessels; it specifies that, upon removal therefrom, such wastes becomes subject to regulations. 11/

Last, respondent seeks an "accellerated decision" on the point that the USEPA may not enforce the Illinois Environmental Protection Act. This is closely related to its argument in the motion to dismiss that USEPA may not bring a complaint here because Illinois has been authorized by USEPA to carry out its own hazardous waste enforcement program. However, as noted supra, pp. 1-3, as a general matter USEPA clearly has authority pursuant to Section 3008 (a)(2) of the Act, 42 USC 6928 (a)(2) to bring an an enforcement action, so long as the state has been notified as required by the Act.

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11/ In this connection, see generally 45 Federal Register 72024-28, October 30, 1980. See particularly pp. 72926-72927 and p. 72924: "(T)his regulation also amends 40 CFR §260.10 to modify the definition of 'generator' so that it clearly covers persons who remove hazardous wastes from product or raw material . . . transport . . . vessels. . . in which the hazardous waste is generated."

In a state which has been authorized to carry out its own program, it is the state's legislation that is to be enforced. Further, the grant of authority to the state presupposes [Section 3006(b), 42 USC 6926(b)] that the state's program is substantially equivalent to the Act.

Respondent's motion for "accellerated decision" is denied.

The parties' cross motions to strike are denied.

J. F. Greene
Administrative Law Judge

Washington, D. C.
January 13, 1987

## CERTIFICATE OF SERVICE

I hereby certify that the Original of this Order was sent to the Regional Hearing Clerk and copies were sent to counsel for the complainant and counsel for the respondent on January 15, 1988.

Shirley Smith
Secretary to Judge Greene

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