9/24/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ACME BRASS AND ALUMINUM FOUNDRY, INC.,	)	[RCRA] Docket No. VII-90-H-0025
	)	
	)	
Respondent	)	

ORDER GRANTING IN PART AND DENYING IN PART
MOTIONS FOR AN ACCELERATED DECISION AND TO DISMISS

I. Background

The Respondent has filed a motion to dismiss the complaint and the Complainant, in turn, has filed a motion for an accelerated decision as to liability in this matter.

The complaint was filed on August 23, 1990, by the United States Environmental Protection Agency (EPA or Complainant) under Section 3008(a) and (g) of the Resource Conservation and Recovery Act of 1976 (RCRA, the Act), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. § 6928(a) and (g). The two-count complaint concerns Respondent's facility located in Marshalltown, Iowa, which produces brass and aluminum castings. In the first count, Complainant alleges that the Respondent violated Section 3005 of RCRA, 42 U.S.C. § 6925, by operating a hazardous waste treatment facility without having achieved interim status or applied for and been issued a RCRA permit.[1] In the second count,

[1]Complaint at 5.

Complainant alleges that Respondent failed to conduct a hazardous waste determination of the baghouse dust waste generated at its facility thereby violating 40 C.F.R. § 262.11.[2]

More specifically, Count I alleges that Respondent, from November 1980 until August 1988, generated 3,069 kilograms of baghouse dust waste, a hazardous waste, at its facility and conducted treatment of that hazardous waste by mixing it with non-hazardous waste core sand produced at the facility without having interim status or a RCRA permit.[3] Count II alleges that Respondent failed to conduct a hazardous waste determination on the baghouse dust waste in accordance with 40 C.F.R. § 262.11 until approximately April 8, 1988.

II. Respondent's Motion

In its answer, which includes the motion to dismiss, Respondent admits that it generated the bag house dust waste and mixed it with non-hazardous waste core sand.[4] Respondent also admits that it did not have interim status or a RCRA permit.[5] However, in its defense as to liability, Respondent contends that:

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[2]Id. at 6.

[3]Id. at 2-3.

[4]Answer at 1-2.

[5]Id. at 2.

1. The mixing of the baghouse dust and core sand does not constitute treatment within the meaning of that term as defined in 40 C.F.R. § 260.10;[6]

2. Respondent is entitled to qualification as a conditionally exempt small quantity generator pursuant to the provisions of 40 C.F.R. § 261.5 and is authorized expressly under 40 C.F.R. § 261.5(h) to engage in its admitted practice of mixing the baghouse dust hazardous waste with non-hazardous core sand and to dispose of the resulting non-hazardous mixture at a State-permitted landfill without a RCRA permit or interim status;[7]

3. Respondent, as evidenced by an affidavit of the President of the Acme Brass and Aluminum Foundry, made the necessary hazardous waste determination under the method described in 40 C.F.R. § 262.11(c)(2);[8] and

4. Respondent's facility was inspected annually from 1980 to 1985 by State officials and no notice of violation or other enforcement action was initiated by the state and as a consequence, EPA is equitably estopped from alleging any violation during that same time period.[9]

For these same reasons, Respondent urges that the complaint be dismissed.

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[6] Id. at 3.

[7] Id. at 4-5.

[8] Id. at 3-4.

[9] Id. at 4.

III. Complainant's Motion

In its motion for an accelerated decision as to liability Complainant rejects Respondent's contentions and asserts that:

1. Respondent's mixing of hazardous baghouse dust and core sand constituted treatment as defined by 40 C.F.R. § 260.10;[10]

2. The mixing of the hazardous baghouse dust and core sand without a RCRA permit or interim status is a violation of Section 3005 of RCRA, 42 U.S.C. § 6925;[11]

3. Although Respondent was admittedly a conditionally exempt small quantity generator during the period in which the alleged violations occurred, in order for its waste to be exempt from full regulation, it must comply with certain conditions precedent, including the requirements of 40 C.F.R. § 261.5(g) which it has failed to do;[12]

4. The affidavit of the president of Acme Brass and Aluminum Foundry, claiming that Respondent had made the requisite hazardous waste determination should be dismissed as insufficient, inconclusive, ambiguous, defective on its face, unreliable and self-serving in that the affidavit fails to establish that Respondent conducted the required determination under 40 C.F.R. § 262.11, as incorporated in 40 C.F.R. § 261.5(g)(1);[13]

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[10]Complainant's Motion for Accelerated Decision and Response to Respondent's Motion to Dismiss (Complainant's Motion) at 10-16.

[11]Id. at 16-17.

[12]Id. at 17-19.

[13]Id. at 5-9.

5. Assuming arguendo that Respondent had performed the hazardous waste determination required by 40 C.F.R. § 262.11, it nevertheless has failed to comply with the specific regulatory requirements, set forth at 40 C.F.R. § 261.5(g)(3), for on-site treatment of hazardous waste by a conditionally exempt small quantity generator, and Respondent's reliance upon 40 C.F.R. § 261.5(h) is misplaced because that provision pertains only to the regulatory status of the mixture and not to the act of mixing itself;[14] and

6. EPA is not equitably estopped from asserting the alleged violations because of any action or inaction by the State because: (a) EPA retains concurrent independent authority to enforce state RCRA rules in an authorized state; (b) an action by the state does not excuse or authorize violations of RCRA; and (c) Respondent has made no showing of affirmative misconduct on the part of EPA.[15]

In response to Complainant's motion for an accelerated decision, Respondent urges that it is entitled as a matter of law to prevail in this proceeding, whether by dismissal or accelerated decision. In summary, Respondent contends:

1. A careful reading of the affidavit of the president of Acme Brass clearly shows that the necessary determination was made pursuant to 40 C.F.R. § 262.11;

2. Mixing the baghouse dust with core sand cannot be deemed treatment;

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[14] Id. at 20-23.

[15] Id. at 23-25.

3. All of the requirements necessary for Acme Brass to qualify as an exempt small quantity generator have been met in that there is no stated requirement that there be a treatment permit for the actual mixing process.

IV. Discussion

A. Motion to Dismiss

Respondent's motion was denominated a motion to dismiss. Complainant points out that "although Respondent has captioned its pleading as a motion to dismiss, it seems to have incorporated in its motion part of the standard of review for an accelerated decision." In reply Respondent asserts, "[s]emantics aside, the essential point raised by Acme Brass in its Answer, Affirmative Defenses and Motion to Dismiss is that the applicable law and regulations provide no basis for relief against Acme Brass and that it is entitled as a matter of law to prevail in this proceeding, whether by dismissal or accelerated decision, as to all alleged violations."

Section 22.20(a) of the Consolidated Rules of Practice (CROP) provides that an accelerated decision may be rendered "in favor of the complainant or the respondent as to all or any part of the proceeding, . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." That section also provides that a motion to dismiss may be granted "on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant."

Respondent has not shown that Complainant has failed to establish a prima facie case or that there are other grounds which show no right to relief on the part of the Complainant. To the contrary, I find that Complainant has established a prima facie case. In other words, at this stage Complainant has produced evidence sufficient to render reasonable a conclusion in favor of the allegations Complainant asserts and hence, Complainant's case is sufficient to require Respondent to produce evidence to rebut it. In Respondent's second and third defenses, which are set forth in its Answer and motion to dismiss, Respondent contends that it is entitled to judgment as a matter of law on counts one and two in the complaint. Therefore, I will treat Respondent's motion to dismiss as a motion for accelerated decision. In a nutshell, I have before me cross motions for an accelerated decision on the issue of liability with respect to both count one and count two in the complaint.

B. Respondent's Estoppel Argument

In its motion Respondent also alleges that its facility, including its mixing practice, was annually inspected by State of Iowa officials from 1980 to 1985.[16] Iowa officials did not issue a notice of violation or take any other enforcement action as a result of these inspections. Respondent contends that it reasonably relied on the continuing review of its facility

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[16]Answer at 4.

practices by the State and that Complainant is equitably estopped from alleging any violation arising during this time period.[17]

From January 1981 to July 1985, the State of Iowa was authorized under Section 3006(b) of RCRA to administer its own RCRA program in lieu of the federal program.[18] According to Complainant, in July 1985, authority to administer the RCRA program in Iowa reverted to EPA.[19] In support of its motion, Respondent claims that Complainant is equitably estopped from alleging any violation of RCRA between 1980 and 1985 because the State of Iowa regularly inspected Respondent's facility during that period and never informed Respondent that it was in any violation of the statute.[20] In opposition, Complainant contends that it retains overlapping authority to enforce state RCRA rules in an authorized state program and, therefore, it cannot be estopped from asserting a violation where the state failed to bring an enforcement action.[21] In addition, Complainant argues that mere inaction or acquiescence by the state does not excuse violations of RCRA.[22] Assuming arguendo inaction by the state can estop the Federal government in a RCRA case, Complainant contends that estoppel may

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[17]Id.

[18]Complainant's Motion at 24.

[19]Id.

[20]Answer at 4.

[21]Complainant's Motion at 24.

[22]Id., U.S. v. Lacks Industries, Inc., 29 ERC 1035 (W.D. Mich. 1989).

not be asserted against a party acting to protect the public interest unless there is a showing of affirmative misconduct.[23]

In addressing the question of whether equitable estoppel may be invoked against the United States government, the Supreme Court has said:

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, interest of the citizenry as a whole in obedience to the rule is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant. Petitioner urges us to expand this principle into a flat rule that estoppel may not in any circumstances run against the Government. We have left the issue open in the past, and do so again today. Though the arguments the government advances for the rule are substantial, we are hesitating, when it is unnecessary to decide this case, to say that there are no cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government. But however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present.[24]

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[23]Complainant's Motion at 25.

[24]Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60-61 (1984) [Footnotes omitted]. Accord, Office of Personnel Management v. Richmond, 496 U.S. ___, 110 S. Ct. 2465, 110 L.Ed.2d 387, 397 (1990).

That doctrine, as applied here, would estop Complainant from enforcing Section 3005 of RCRA[25] presumably because of the failure of the State to allege a violation by Respondent during the years in which the State had an authorized RCRA program.

The traditional elements of estoppel are that the party claiming the defense "relied on its adversary's conduct 'in such a manner at to the change its position for the worse,' and 'that the reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading.'"[26] However, not only must Respondent meet these requirements, but it must also sustain the heavy burden associated with asserting estoppel against the government.

As a threshold issue, the wording of RCRA Section 3008(a)(2), 42 U.S.C. Section 6928(a)(2) makes clear beyond argument that EPA may enforce the Act in authorized states, provided only that notice be given to that state.[27] Nowhere does RCRA provide that a state

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[25]Section 3005(a) of RCRA prohibits the treatment, storage or disposal of hazardous waste except in accordance with a permit issued under that section.

[26]United States v. Allegan Metal Finishing Co., 696 F.2d 290, quoting Heckler, 467 U.S. at 62.

[27]RCRA Section 3008(a)(2), 42 U.S.C. Section 6928(a)(2) provides that:

> In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

can expressly or by conduct waive EPA's powers under RCRA Section 3008(a) to enforce the requirements of an authorized state program.[28] Furthermore, as the Chief Judicial Officer has stated, the Federal government is not estopped from taking enforcement actions against private individuals who rely on administrative advice.[29] Here, the reliance by Respondent on the State's inspection of its facility is analogous to receipt of administrative advice. While it may be reasonable for a member of the regulated community to believe that its practices were satisfactory where agencies of the government having responsibility to enforce those regulations found no violations on prior inspections, such belief is merely a factor to be taken into consideration in assessing any penalty in this matter and does not provide relief from a finding of liability.[30]

Based on the information contained in the record before me, the Respondent has not met the heavy burden imposed by the Supreme Court or the administrative decisions of this Agency regarding estoppel. Accordingly, I conclude that Complainant is not estopped from enforcing RCRA, and the regulations promulgated thereunder, against Respondent.

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[28] In re Landfill, Inc., RCRA (3008) Appeal No. 86-8 (Final Decision, November 30, 1990) at 11.

[29] Id. at 12.

[30] In re Ohio Waste Systems of Toledo, Ohio, V-W-83 R-066, (Initial Decision, July 2, 1984) at 12.

C. Cross Motions for Accelerated Decision as to Count Two

I will address first the issues concerning Count II of the complaint, in accord with the apparent logical order for disposition of the parties' respective motions. As noted, the standard for granting a motion for accelerated decision is set forth in 40 C.F.R. Section 22.20. To grant such a motion, the moving party must show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. The question presented by the second count of the complaint is whether Respondent performed a hazardous waste determination on its baghouse dust waste from November 1980 until April 1988. I find that with respect to this question, there exists a genuine issue of material fact and therefore, I will deny the cross motions for accelerated decision as to Count II.

The standard for determining whether a waste is hazardous is found in 40 C.F.R. Section 262.11.[31] In his affidavit, Mr. Swab

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[31]40 C.F.R. Section 262.11 states, in pertinent part,

> "A person who generates a solid waste, as defined in 40 C.F.R. 261.2, must determine if that waste is a hazardous waste using the following method: . . . .
> (c) For the purpose of compliance with 40 C.F.R. part 268, or if the waste is not listed in subpart D of this part, the generator must then determine whether the waste is identified in subpart C of 40 C.F.R. part 261 by either:
> (1) Testing the waste according to the methods set forth in Subpart C of 40 C.F.R. Part 261, or according to an equivalent method approved by the Administrator under 40 C.F.R. 260.21; or
> (2) Applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used.

asserted his familiarity with the materials, processes and products of the foundry and stated that it was acceptable to store baghouse dust on the premises and periodically combine it with discarded core sand. He further stated that it was an industry custom and accepted practice during the period in question to combine such mixed dust with discarded core sand.[32] Mr. Swab indicated that he was generally aware of the components and potential hazards of the materials used. In particular, he noted that the brass ingots contained only 5 percent lead. In paragraph 6, Mr. Swab stated that:

> . . . although I knew exposure to certain materials would be considered toxic or hazardous, I felt the dust and sand we generated would not be a problem in light of the percentages and proportion of the materials used and the processes we used in sandblasting and accumulating dust in the baghouse hopper, especially in light of the absence of objections by the state regulators.[33]

Complainant contends that the affidavit is defective on its face because Mr. Swab never stated that he actually determined that the baghouse dust waste was not hazardous. According to Complainant, his statements such as, "I had determined in practice that it was acceptable to store our baghouse dust on premise and periodically combine it with our discarded core sand," was vague and ambiguous.[34] Complainant concedes that Mr. Swab may have known

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[32]Id.

[33]Affidavit of J. Thomas Swab, Respondent's answer and motion to dismiss, Exhibit 1.

[34]Complainant's Motion at 6.

about the materials and process used but argues that such knowledge is not what is required by 40 C.F.R. 262.11(c)(2). The regulation requires that the generator apply his knowledge of the hazardous characteristic of the waste in light of the materials and processes used (emphasis added).[35] An affidavit of Kenneth Herstowski, Environmental Engineer, is presented by Complainant in support of its contention that there was no basis for Respondent to positively determine that its waste was not hazardous.[36]

Furthermore, Complainant contends that Swab's affidavit directly contradicts two prior statements made by Respondent, both of which indicate that Respondent failed to make a hazardous waste determination until the year 1988. On November 14, 1989, Ms. Cindy Wiemers, office manager for Respondent, replied to a request for information from Complainant stating that Respondent was not aware that the baghouse dust was a hazardous waste until April 4, 1988.[37] Then on January 2, 1990, in response to another request for information from Complainant, Ms. Weimers indicated that Respondent first conducted a hazardous waste determination on the baghouse dust on April 8, 1988.[38]

In its defense, Respondent alleges that the affidavit of J. Thomas Swab is sufficient to meet 40 C.F.R. 262.11(c)(2), and

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[35]Id. at 8.

[36]Id. at 8; Affidavit of Kenneth Herstowski, Complainant's Motion, Exhibit 10.

[37]Complainant's Motion, Exhibit 6.

[38]Complainant's Motion, Exhibit 7.

demonstrates an application of the requisite knowledge concerning the hazardous characteristic of the waste in light of the materials and processes used in generating that waste.[39] Respondent asserts that a careful reading of the affidavit as a whole, and in particular paragraph 6 of the affidavit, illustrates that such a determination was made.[40] Respondent contends that a scientific understanding of toxicity is not mandated by the standard in 40 C.F.R. 262.11(c)(2). According to Respondent, the standard does not require that the determination be absolutely accurate or correct if it was made in good faith on a reasonable basis.[41]

With respect to the statements made by Respondent's office manager, Respondent notes that it is a small foundry without a full-time environmental manager or engineer.[42] According to Respondent, Complainant's requests concerning any determinations made reference to actual testing done on the baghouse dust. Apparently, Respondent understood the request to refer to the date when Respondent contracted with Lester B. Knight Environmental Services Laboratory to perform a formal analysis.[43] Respondent, therefore, answered "by telling when they had done the testing of

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[39]Respondent's Response to Complainant's Motion for Accelerated Decision (Response) at 2.

[40]Id.

[41]Id.

[42]Id. at 3.

[43]Complainant's Motion, Exhibit 7.

the dust in 1988."[44] Respondent argues that it had no idea as to what the rest of the request referred to and did not know what it meant until it was explained fully by counsel retained at a later date. Respondent claims that the affidavit of Mr. Swab, which was made under oath after explanation of the regulations, more fully addresses the regulations than the statements of Respondent's office manager. Accordingly, Respondent alleges that any unreliability about the earlier information generated in response to Complainant's request stems from failure of the Complainant to explain to Respondent, an unsophisticated business, as to what they were asking for.[45]

In evaluating the cross motions for accelerated decision with respect to Count II, it is useful to consider principles articulated in the Federal Rules of Civil Procedure (FRCP). While not binding on administrative agencies, the FRCP can serve as useful guidance in interpreting Section 22.20 of the CROP. In deciding a motion for summary judgment under FRCP Rule 56, the function of the trial judge is not to weigh the evidence and determine truth, but to determine whether there are genuine issues of material fact for trial.[46] Material issues are those which might affect the outcome of the action. Summary judgment, therefore, is not appropriate where a reasonable factfinder could

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[44]Response at 4.

[45]Id.

[46]In re Adolph Coors Company, Docket No. RCRA-VIII-90-09, (Order Denying Motions for Accelerated Decision and to Dismiss, March 1, 1991) at 11.

find in favor of the nonmoving party. In deciding such motions, the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his favor.[47]

Applying those principles, I conclude that the cross motions for accelerated decision with respect to count two must be denied. Resolving the evidence and all the resulting justifiable inferences in favor of either party, a reasonable factfinder might find that Respondent had conducted a hazardous waste determination as required by 40 C.F.R. Section 262.11(c)(2) or then again, had not made such a determination. A hearing where witnesses are allowed to testify and be cross examined is necessary to ascertain whether Respondent conducted the requisite hazardous waste determination.[48] A hearing will provide the appropriate forum to shed light on any apparent inconsistencies between prior statements by Respondent's employees and Mr. Swab as well as any ambiguities in Mr. Swab's affidavit. As Senior Judge Harwood recently stated," . . . Summary judgement, and by analogy, accelerated decisions, should not be decided on affidavits where the issue is likely to be one of credibility."[49]

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[47] Id.

[48] 4 J. Weinstein & M. Berger, Weinstein's Evidence, Section 804(a)[01], p. 804-35 (1990).

[49] In re ICC Industries, Inc., TSCA-8(a)-90-0212 (Order Granting Motion for Accelerated Decision and Denying Discovery, July 2, 1991) at 5-6, citing 6-Pt. 2 J. Moore, W. Taggart, and J. Wicker, Moore's Federal Practice ¶ 56.15[4] at 56-287 - 56-289 (2d ed. 1981).

D. Cross Motions for Accelerated Decision as to Count I

Complainant alleges that Respondent's mixing of hazardous baghouse dust with non-hazardous core sand constituted treatment, which would require Respondent to obtain a permit or interim status under Section 3005 of RCRA, 42 U.S.C. Section 6925.[50] Complainant alleges that the definition of treatment contained at 40 C.F.R. Section 260.10 should be construed to include mixing[51] and cites, among other things, principles governing construction of regulatory language and prior Environmental Protection Agency interpretations of similar language in analogous circumstances to support its proposition.[52]

Respondent raises as its principal defense that it is exempt from obtaining the RCRA permit or interim status, because it met the requirements of 40 C.F.R. Section 261.5 for conditionally exempt small quantity generators.[53] Under 40 C.F.R. Section 261.5(a), a generator is conditionally exempt if he generates no more than 100 kilograms of hazardous waste in that month. It is undisputed that Respondent, who generated 33-45 kilograms of hazardous waste per month, was conditionally exempt during the

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[50]Complainant's Motion at 9.

[51]40 C.F.R. Section 260.10 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 . . . ."

[52]Complainant's Motion at 12-16.

[53]Answer at 5, Response at 8.

period in which the alleged violations occurred.[54] Respondent relies on 40 C.F.R. Section 260.5(h) to support its assertion that under the conditionally exempt small quantity generator provisions, it is allowed to mix hazardous waste with non-hazardous waste without obtaining any additional permits.[55]

Complainant contends that 40 C.F.R. Section 261.5(h) is inapplicable, arguing that the relevant governing provision is Section 261.5(g)(3).[56] In essence, this provision allows a conditionally exempt small generator to either treat or dispose of its hazardous waste provided the generator meets certain requirements. Mixing of the baghouse dust waste with the non-hazardous core sand constitutes treatment, Complainant alleges, and therefore Respondent's actions fall within the gambit of 40 C.F.R.

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[54]Complainant's Motion at 18.

[55]Answer at 3. 40 C.F.R. Section 262.5(h) states: "Hazardous waste subject to the reduced requirements of this section may be mixed with non-hazardous waste and remain subject to these reduced requirements even though the resultant mixture exceeds the quantity limitations identified in this section unless the mixture meets any of the characteristics of hazardous waste identified in Subpart C."

[56]40 C.F.R. 261.5(g)(3) provides that:

> A conditionally exempt small quantity generator may either treat or dispose of his hazardous waste in an on-site facility or ensure delivery to an off-site treatment, storage or disposal facility, either of which, if located in the U.S., is:
> (i) Permitted under Part 270 of this chapter;
> (ii) In interim status under Parts 270 and 265 of this chapter;
> (iii) Authorized to manage hazardous waste by a State with a hazardous waste management program approved by Part 271 of this chapter;
> . . . .

Section 261.5(g)(3).[57] By failing to meet the requirements of 40 C.F.R. Section 261.5(g)(3), by either (1) obtaining the requisite RCRA permit, (2) being in interim status, or (3) being authorized to manage hazardous waste by a state with a hazardous waste management program approved under Part 271, Respondent cannot avail itself of the safe harbor afforded by 40 C.F.R. Section 261.5(g)(3), Complainant argues.[58]

I agree with Complainant that mixing constitutes treatment of hazardous waste and that Respondent's activities are governed by 40 C.F.R. Section 261.5(g)(3).

Section 260.10 provides, in pertinent part:

> Treatment means 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, or less hazardous; safer to transport, store, or dispose of; or amenable for recovery, amenable for storage, or reduced in volume.

In this case, the mixing of the hazardous waste with the non-hazardous core sand constituted a method designed to change the composition of the hazardous waste so as to render such waste non-hazardous or less hazardous and hence the mixing constituted treatment within the meaning of that term in the regulations. The mixing altered the physical composition of the waste by reducing the proportional amount of the lead and thereby rendered the waste

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[57]Complainant's Motion at 20-22.

[58]Id. at 22, 23.

non-hazardous. Therefore, I conclude that the mixing process constituted "treatment" as defined by 40 C.F.R. § 260.10. The agency's interpretation of its own regulations promulgated to implement RCRA is entitled to considerable deference.[59] By so interpreting and applying the definition of "treatment" to the facts of this case I defer to the agency's interpretation which, in my view, accords the terms in the definition their plain and ordinary meaning and effectuates the purposes of the statute.

While I have declined at this juncture in these proceedings to decide whether Respondent performed a hazardous waste determination on its baghouse dust waste from November 1980 until April 1988 (supra, pp.16-17), for purposes of disposing of the cross motions for accelerated decision as to Count One, I will assume that Respondent made such a determination, thereby complying with 40 C.F.R. § 262.11 as incorporated into 40 C.F.R. § 261.5(g)(1).

However, the requirement that a conditionally exempt small quantity generator perform the hazardous waste determination required by Section 262.11 is not the only requirement which must be met. Under Section 261.5(b) a conditionally exempt small

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[59] In the Matter of Koppers Company, Inc., Docket No. RCRA-III-167, Initial Decision (October 14, 1988), Slip Op. at 28. See also, Hazardous Waste Treatment Council v. Reilly, No. 90-1443, slip op. at 8. (D.C. Cir. July 26, 1991): "A challenge to the EPA's interpretation of . . . its regulations is even more daunting. We must accept an agency's construction of its own regulations unless it is 'plainly wrong,' see Chemical Mfrs., 919 F.2d at 170 (internal quotes and citation omitted); that is,'"plainly erroneous or inconsistent with the regulation,"' Udall v. Tallman, 380 U.S. 1, 17 (1965) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). That interpretation, of course, must also meet the test of consistency with the underlying statute."

quantity generator's hazardous waste, except for wastes identified, inter alia, in paragraph (g), are not subject to regulation under Parts 262 through 266, 268 and Parts 270 and 124 of Chapter 40, and the notification requirements of Section 3010 of RCRA, provided the generator complies with the requirements, inter alia, of paragraph (g). In addition to the requirement to comply with Section 262.11, paragraph (g) requires that the conditionally exempt small quantity generator which elects to treat or dispose of its hazardous waste at an on-site facility be permitted under Part 270 or be in interim status under Parts 270 and 265. Respondent elected to treat its hazardous waste at its facility by mixing that waste with non-hazardous waste core sand without having met these requirements of Section 261.5(g)(3). The fact that disposal of the waste may eventually have occurred at an off-site disposal facility licensed by the state does not relieve Respondent of these requirements during the treatment of the hazardous waste. Furthermore, Respondent's reliance upon Section 261.5(h) in an attempt to relieve it of the responsibility to meet the requirements of Section 261.5(g) is misplaced. Section 261.5(h) permits the mixing of hazardous waste which is subject to the reduced requirements of Section 261, with non-hazardous waste, even though the resultant mixture exceeds the quantity limitations of the section, including the 100 kilogram limitation for conditionally exempt small quantity generators. However, Section 261.5(h) makes it clear that such waste would remain subject to the reduced requirements of Section 261.5 which would include the requirements of Section 261.5(g)(3).

Counsel for the respective parties should make every possible good faith effort to settle this matter in accordance with the Agency policy of encouraging settlement. (See 40 C.F.R. § 22.18.) Complainant is directed to submit a report on the status of settlement negotiations on October 31, 1991. Upon receipt of such report, I will reevaluate the status of the case and determine whether a hearing in the matter should be scheduled at that time.

So ORDERED.

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: SEP 24 1991
Washington, DC

IN THE MATTER OF ACME BRASS AND ALUMINUM FOUNDRY, INC.,
Respondent, [RCRA] Docket No. VII-90-H-0025

Certificate of Service

I hereby certify that this Order Granting in Part and Denying in Part Motions for an Accelerated Decision and to Dismiss, dated September 24, 1991, was mailed this day in the following manner to the below addressees:

Original by Regular Mail to:

Venessa R. Cobbs
Regional Hearing Clerk
U.S. EPA, Region 7
726 Minnesota Avenue
Kansas City, KS 66101

Copy by Certified Mail,
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Doris M. Thompson
Secretary

Dated: SEP 24 1991