5/2/86

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of | ) | |
| | ) | |
| Trailer Marine Transport Corp. | ) | Docket No. RCRA-II-85-0308 |
| | ) | |
| Respondent | ) | |

Resource Conservation and Recovery Act - Transporters - Discharges and Spills - Interim Status Standards - Exemption in 40 CFR 265.1(c)11 applied to transporter of hazardous materials upon whose facility trailer tanks of hydrochloric acid, which became hazardous waste when discharged, leaked so that transporter could not be charged with violation of Interim Status Standards (40 CFR Part 265), specifically, § 265.31, and equivalent regulations of the Commonwealth of Puerto Rico.

Appearance for Complainant:
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Office of Regional Counsel
Caribbean Field Office
U.S. EPA
Santurce, Puerto Rico

Appearance for Respondent:
Steven C. Lausell, Esq.
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San Juan, Puerto Rico

Opinion and Order Granting Motion
For An Accelerated Decision and Dismissing
Complaint

The instant proceeding under § 3008 of the Solid Waste Disposal Act, as amended, was commenced on September 24, 1985, by the issuance of a complaint charging Respondent, Trailer Marine Transport Corp. (TMT) with violations of the Act, applicable Federal regulations (40 CFR Parts 260 through 265 and 270) and equivalent regulations issued by the Environmental Quality Board (EQB) of the Commonwealth of Puerto Rico. Specifically, Complainant alleged that on two separate occasions, July 1 and July 5, 1984, releases of corrosive hydrochloric acid (33,900 pounds and 35,000 pounds, respectively) occurred at TMT's facility, and that these releases constituted the disposal of hazardous waste, thereby rendering Respondent a hazardous waste generator as defined in 40 CFR 260.10 and Regulations for the Control of Hazardous and Non-Hazardous Solid Waste (RCHNSW), Rule 102.1/ It was further alleged that the materials transfer area of the facility where the mentioned spills occurred was no more than ten feet from the adjacent bay area and that the grading and soil topography in the transfer area facilitates the drainage of storm waters to the bay shore, thus maximizing the possibility of fire, explosion, or unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents into the air. This was alleged to be a violation of 40 CFR 265.31

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1/ Although interim authorization for the Commonwealth of Puerto Rico to enforce its own hazardous waste program expired on January 31, 1986, the discharges here concerned occurred while such authorization was in effect.

and RCHNSW Rule 810 B. For these allged violations, it was proposed to assess a penalty totaling $35,000.

TMT through counsel filed an answer, admitting the alleged releases, but denying that the materials were hazardous waste and denying the applicability of the cited regulations. Respondent argued that the Clean Water Act was applicable and alleged that it had already been assessed a penalty for the discharges by the Coast Guard. TMT disputed the amount of the penalty and requested a hearing.

In a letter, dated January 17, 1986, forwarding the prehearing exchange directed by the ALJ, TMT pointed out that the regulation which it is alleged to have violated is by its terms applicable to hazardous solid waste treatment, storage and disposal facilities. TMT stated that it was merely a transporter of the materials and thus was not covered by the cited rule.[2/] TMT pointed out that Part 7 of RCHNSW covered generators and transporters of hazardous solid waste and that assuming the hydrochloric acid being transported in the instant case was such a waste,[3/] it as a transporter was only required to take immediate action to protect human health and environment (Rule 707 B(2)) and clean up any hazardous solid waste discharge that occurs during transportation (Rule 707E). It was alleged that TMT complied with the requirements of Part 7, which are analogous to 40 CFR §§ 263.30(a) and 263.31.

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2/ This letter is being treated as a motion for an acccelerated decision pursuant to Rule 22.20 (40 CFR Part 22).

3/ In 45 FR 76626-27, November 19, 1980, EPA made clear that spills of materials, which were hazardous when discarded, were considered to be discarded within the meaning of 40 CFR § 261.2(c) and (d), thus meeting the definition of a solid waste. Hydrochloric acid is obviously corrosive and, as a waste, is hazardous because of that characteristic, 40 CFR 261.22.

Responding to these arguments, Complainant points out that TMT filed a Notification of Hazardous Waste Activity on September 9, 1980, admitting that it was involved in the generation, transportation and treatment of hazardous waste (Brief, dated March 27, 1986, at 3). Complainant contends that TMT's repeated actions rendered it a generator of hazardous waste which disposed of such waste at the facility on more than one occasion (Id. at 6). Complainant points out that Rule 702 A.2 of RCHNSW (40 CFR § 262.10(f)) states that a generator of hazardous solid waste who treats, stores, or disposes of such waste on-site must comply with the applicable standards and permit requirements of Part VIII RCHNSW (40 CFR Part 265). One of these requirements is Rule 810 B (40 CFR § 265.31) which requires a facility to be maintained and operated to minimize the possibility of fire, explosion, or any unplanned sudden or non-sudden release of hazardous solid waste or hazardous solid waste constituents into air, soil or water, which could threaten human health or the environment.

Complainant points to RCHNSW Rule 102 (equivalent to 40 CFR 260.10) which defines a hazardous solid waste generator as "(a)ny 'person,' by site, whose act or process produces 'hazardous solid waste' identified or listed in this regulation" (Brief at 8). Complainant argues that because TMT is a person as defined in 40 CFR 260.10 and because the leaking or discharge of the hydrochloric acid rendered the acid a solid waste within the meaning of 40 CFR 261.2(c) and (d) (1984), which waste is hazardous by reason of corrosivity, the only question is whether the act of TMT produced the waste. Complainant says that this question must be answered in the affirmative because the discharge or leak on July 1, 1984, was discovered by a

representative of TMT while the tank was under TMT's control and TMT obtained a contractor to deal with the discharge.

Likewise, when the discharge of July 5, 1984, began on board a barge, TMT allowed the leaking tank to be brought onto its property, allegedly for the purpose of having the tank discharged onto the asphalt and into the underlying limestone for neutralization. Accordingly, it is argued that TMT exercised sufficient control over the leaking tanks and their discharges on its property so as to render TMT one whose act produced hazardous waste, thereby making it a hazardous waste generator. Because leaking, dumping or spilling constitutes disposal (RCHNSW Rule 102, 40 CFR 260.10), TMT, according to Complainant, was subject to applicable requirements of RCHNSW Part VIII, 40 CFR Part 265, specifically Rule 810 B and § 265.31 (Brief at 10, 11).

Complainant recognizes, however, that the responsibilities of persons who undertake hazardous waste treatment and storage activities in immediate response to a spill of such waste, or of a material which, when spilled, becomes a hazardous waste, have been addressed in amendments to the regulations, 48 FR 2508 (January 19, 1983). The codified regulation (40 CFR 265.1(c)(11)(i), RCHNSW Rule 801 B) makes it clear that Part 265 (Interim Status Standards) are not applicable to a person engaged in treatment or containment activities during immediate response to any of the following situations: "(A) a discharge of hazardous waste; * * * (C) a discharge of a material which, when discharged, becomes a hazardous waste; * * *." It is further made clear (§ 265.1(c)(11)(iii)) that a person covered by paragraph (c)(11)(i) of this section who continues or initiates hazardous

waste treatment or containment activities after the immediate response is over is subject to all applicable requirements of this part and Parts 122-124 for those activities. Complainant points out, however, that the exemption does not extend to disposal[4/] and asserts that what actually happened at the TMT facility on July 1 and July 5, 1984, were intentional disposals of hazardous waste into the environment (Brief at 14, 15).

Complainant argues that the logical extension of TMT's contentions would be that any transporter could relieve itself of the burden of addressing a discharge by merely moving the discharging unit, allowing it to be disposed of on-site and claiming, as in the instant case, that the move from one location to another was an immediate response and thus be exempted from otherwise applicable requirements of 40 CFR Part 265 (Brief at 16, 17). Under TMT's interpretation, further discharges from the tanks would be exempted from any requirements of Part 265. It is contended that such a result is clearly contrary to the exemptions provided by 40 CFR 265.1(c)(11), which assertedly are not meant to exempt those who systematically establish contingency procedures which are viewed as inadequate by the Agency.

Replying to the mentioned arguments, TMT asserts that the fact that it may have mistakenly considered itself to be a hazardous waste generator in 1980 or filed a Notification of Hazardous Waste Activity as a protective measure is totally irrelevant (Brief, dated March 24, 1986, at 3). TMT points out that the regulations clearly envisage different requirements for (1) generators (40 CFR Part 262), (2) transporters (40 CFR Part 263) and (3) owners

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4/ Quoting 48 FR 2509, January 19, 1983: "The exemption concerns only treatment and storage activities, it does not relieve anyone of complying with any requirements for the disposal of hazardous waste."

and operators of storage, treatment and disposal facilities (40 CFR Parts 264 or 265) (Id. at 4, 5). TMT states that it is a transporter of hazardous materials, subject to regulations promulgated by the Department of Transportation (49 CFR Subchapter C, Parts 171-177) and that before the spill, RCRA regulations were not applicable. This is, of course, because before the spill the hydrochloric acid being transported was not a waste.

TMT argues that Complainant's interpretation of the definitions in 40 CFR Part 260 is erroneous and disregards amendments and comments to the regulation subsequent to its original promulgation. In support of this contention, TMT quotes extensively from the Interim Final Rule and request for comments (45 FR 76626, November 19, 1980), which provides, inter alia, that requirements for treatment and storage are not applicable to actions taken to immediately contain and treat spills of hazardous wastes and materials which, when spilled, become hazardous wastes. Spills are described as sudden, unplanned events. The preamble further states that the amendments do not affect in any way the application of the generator and transporter requirements, which will be governed by Parts 262 and 263.5/

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5/ At 45 FR 76629, an example is given of a spill of hazardous waste material listed in § 261.33(e) occurring in transportation. The question as to what the transporter must do is answered as follows:

> Under § 263.30(a), the transporter must take appropriate immediate action to protect human health and the environment. The spill containment or treatment action taken in immediate response is exempt from the treatment and storage requirements of Parts 264 and 265 and the transporter is not required to have a RCRA permit or interim status for such action. If he has generated hazardous waste, he must comply with Part 262 when the immediate actions are over. If he transports the spill residue from the spill site, he must comply with the transporter requirements of Part 263 and transport the residue to a facility with a RCRA permit or interim status.

TMT also points out that in accordance with the cited amendments (40 CFR 265.1(c)(12)) a transporter may store a manifested shipment of hazardous waste in containers meeting the requirements of § 262.30 at a transfer facility for a period of ten days or less without a RCRA permit and without complying with standards applicable to hazardous waste storage facilities. The final rule (48 FR 2508, January 19, 1983) made but two changes in the interim rule, replacing the term "spill" with the term "discharge" and extending the applicability of the exemption to include immediate response to imminent and substantial threats of discharges of hazardous waste.

TMT asserts that it is not a hazardous solid waste generator, because the dictionary definitions of "act" or "process" in 40 CFR 260.10, defining such a generator, require a measure of intention and purpose (Brief at 10, 11). TMT argues that the leak of hazardous material, which when spilled becomes a hazardous waste, is not an act of TMT, and thus TMT is not a generator. Pointing to the definition of a "disposal facility" (40 CFR 260.10) as a "facility or a part of a facility at which hazardous waste is intentionally placed into or on any land or water, and at which waste will remain after closure," TMT says that it does not come within that definition, because the disposal was not intentional and no material meeting that definition remains at its facility. TMT states that the fallacy in Complainant's position is evidenced by the fact that once it determined TMT was a generator of hazardous waste or owns or operates a hazardous waste disposal facility, Complainant did not seek to enforce compliance with all regulations applicable to generators or disposal facilities, but rather selectively chooses those requirements which would modify regulations applicable

to transporters in the manner deemed necessary by counsel for Complainant (Brief at 12).

## Discussion

Although TMT objects to several statements of alleged fact in Complainant's brief,[6/] the facts are essentially undisputed (attachment). This being so, there is not much to be said for Complainant's position. The discussion in the preamble to the Interim Final Rule and request for comments 45 FR 76626 et seq. (November 19, 1980) clearly provides that the requirements for treatment and storage in Parts 265 are not applicable to actions taken to immediately contain and treat spills of hazardous waste or materials, which, when spilled, become hazardous waste. The Final Rule (48 FR 2508, January 19, 1983) replaced the term "spill" with discharge" and broadened the exemption to include immediate responses to imminent and substantial threats of discharges of hazardous waste. This discussion also makes it clear that the exemption applies even to intentional discharges. The reason is, of course, obvious, that is, to encourage immediate responses to hazardous waste discharges or of materials, which when discharged, become hazardous waste, so as to minimize damage or risks thereof to human health and the environment.

The exception advocated by Complainant, i.e., that the exemption does not cover those who systematically establish contingency procedures which are viewed as inadequate by the Agency, would swallow the exemption and produce

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6/ TMT, inter alia, disputes as totally unsupported the assertion that it "designated a holding area for leaking tanks" and characterizes as a "malicious misrepresentation" the allegation that the incidents herein concerned were deliberate disposals of hazardous waste.

the very uncertainty the rule is designed to prevent. While Complainant is correct that the exemption does not cover disposal, this exception to the exemption applies only where the response activities produce hazardous waste or where an accumulation of hazardous waste remains after completion of immediate response activities, which is not the case here. Moreover, the materials here concerned were not hazardous wastes until discharged and to regard any such discharge as a disposal would negate the exemption from Interim Status Standards provided by 40 CFR 265.1(c)(11)(i)(C) as to a discharge of a material, which when discharged, becomes a hazardous waste.7/

Complainant has not disputed TMT's assertion that it complied with 40 CFR §§ 263.30 and 263.31 by taking immediate action to protect human health and the environment, notifying local authorities and taking such action as may be required by Federal, State or local officials so that the discharge no longer presents a hazard. Moreover, Complainant has not pointed or alluded to any evidence it contemplates introducing to support its apparent position that TMT's action (July 5, 1984, leak) in removing the leaking trailer tank from the barge to its facility was unreasonable and that the discovery of two leaking trailer tanks of hydrochloric acid within one week represented a pattern and practice, rather than defects in fairly new tanks as alleged by TMT.

It is concluded that TMT's position that it is not subject to Interim Status Standards in 40 CFR Part 265 and equivalent regulations of the Commonwealth of Puerto Rico must be sustained and the complaint dismissed.

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7/ An example of a commercial manufacturer spilling a listed commercial chemical product on the floor of it's plant set forth at 45 FR 76629, November 19, 1980, appears to establish that TMT is a generator of hazardous waste. This conclusion, if true, does not alter the result herein.

## O R D E R[8/]

The complaint is dismissed.

Dated this 8th day of May 1986.

Spencer T. Nissen
Administrative Law Judge

ATTACHMENT

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8/ Pursuant to Rule 22.20 (40 CFR Part 22) this accelerated decision constitutes an initial decision, which, unless appealed in accordance with Rule 22.30, or unless the Administrator elects, sua sponte, to review the same as therein provided, will become the final order of the Administrator in accordance with Rule 22.27(c)

ATTACHMENT

FACTS

Trailer Marine Transport Corp. (TMT) is a common carrier, providing marine transportation services between San Juan, Puerto Rico and ports in the continental United States and other countries.

Tank Trailer No. 10905, containing hydrochloric acid and having 10,000-gallon capacity, owned by and consigned to NCIDEL Caribe, Inc., San Juan, Puerto Rico, was unloaded from a barge and parked in the transfer area of TMT's facility on June 28, 1984.* At approximately 5:00 a.m. on July 1, 1984, a security guard observed that this tank was leaking. At 7:00 a.m., the area was isolated and water sprayed to prevent fumes from developing. Representatives of an environmental firm, Crowley Environmental Services, and the San Juan Fire Department were called to the facility. A representative of the Coast Guard arrived on the scene at 10:45 a.m. It was determined that the leak was from a flange on the underside of the tank and that the material would have to drain off to a level below the flange before any attempt to pump the product could be made. Once this occurred, the remainder of the product was transferred to another tank.

Due to the nature of the product, no clean up actions were possible. The acid drained into limestone deposits beneath the asphalt and was apparently neutralized as no evidence of fish kills, discoloration, or other environmental damage was observed. Approximately 3,500 gallons (33,900 lbs.) of acid were discharged.

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* These facts are gleaned from Department of Transportation Hazardous Materials Incident Reports and U.S. Coast Guard Water Pollution Violation Reports contained in Complainant's prehearing exchange.

The discharge of July 5, 1984, occurred when Trailer Tank No. 10903, consigned to and apparently owned by NCI del Caribe, Inc., arrived on a barge at the TMT facility with a slow leak from the bottom forward of the first axle. The trailer tank was unloaded and placed in the transfer area of TMT's facility. A representative of the U.S. Coast Guard was present and because the leak was considered minor, the only action taken was to spread soda ash under the leak. At 7:00 a.m. on July 6, 1984, the leak increased in severity and efforts to patch it failed. Assistance was requested from the Coast Guard and Crowley Environmental Services. A patch was secured and the leak was stopped. Approximately 24,200 lbs. of acid were discharged. Product was neutralized by soda ash and flow through limestome and no evidence of fish kills or other environmental damage was observed.