UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Babcock & Wilcox,
Naval Nuclear Fuel Division

Dkt. No. RCRA-III-162
JUDGE GREENE

Respondent

Amended

ORDER DENYING MOTION TO DISMISS
and
GRANTING MOTION FOR "ACCELERATED DECISION"

The complaint in this matter charges Respondent with seventeen violations of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§690 et seq., and the Virginia Hazardous Waste Management Regulations (VHWMR) including treatment, storage or disposal of hazardous waste without obtaining either a permit or interim status, generating hazardous waste and owning or operating a hazardous waste storage facility without having filed a notification of hazardous waste activity, failure to identify a surface impoundment in the permit application, failure to develop and follow a waste analysis plan, and failure to implement a groundwater monitoring program. After months of negotiations between the parties and with State of Virginia officials, following which it appeared that settlement would be effected, Respondent raised a new defense -- lack of jurisdiction in the U. S. Environmental Protection Agency (EPA) and the State of Virginia to prosecute this matter on the ground that sole jurisdiction lies in the Nuclear Regulatory Commission (NRC) . Respondent was permitted to amend its answer to the complaint in order to assert this defense. Subsequently Respondent moved to dismiss. Complainant then cross-moved for "accelerated decision" as to liability.

The sole legal issue presented by the motion to dismiss is whether Respondent, which admits that it stored an acidic, corrosive hazardous waste in a surface impoundment ("cold pond") from 1980 until September, 1983, is nevertheless not subject to federal or state hazardous waste management regulations because the

facility was allegedly "contaminated" by uranium enriched in the U-235 isotope ("enriched uranium") . The presence of enriched uranium would bring the facility within the exclusive jurisdiction of the NRC or the U. S. Department of Energy pursuant to 42 USC §§2011-2013 and regulations issued pursuant to authority thereunder. In order to prevail, Respondent must show (1) that the cold pond contained a "radioactive mixed waste" as defined by the regulations, [1] and (2) that the impoundment area did in fact contain such radioactive mixed waste for the entire period from November 19, 1980, when the RCRA regulations became effective, until September, 1983.

In 1990, Respondent discovered that roof run-off from a building contained minute quantities of enriched uranium, that this water was recycled and mixed with water from a cleaning process performed at the facility, and that the runoff water contaminated the hazardous waste pond with a small amount of radioactive material. As discussed below, Respondent cannot prevail on the facts in showing contamination with enriched uranium prior to the actual discovery in 1990, and, even if it could, cannot prevail at law inasmuch as the belatedly discovered enriched uranium in the sludge from Respondent's landfill and wastewater treatment system hardly rises to the level of contamination contemplated by the regulations.

The facts here are clear: (1) Respondent operated a hazardous waste impoundment from 1972 until at least September, 1983; (2) this pond came under RCRA regulation at the end of 1980; (3) the pond was noted by State of Virginia authorities in 1986; (4) a complaint was filed by EPA in 1987; and (5) Respondent discovered that sludge from its landfill and wastewater treatment system contained some enriched uranium in 1990, which enriched uranium is ascribed to run-off from the roof of a building at the facility. The level of radioactive waste and its nature, even assuming it was there for the entire period, is so small as to be no greater than that contained in the water drawn by the plant from the James River.

Respondent admits that it has "limited data" from the period 1980-1983 (motion to dismiss, at 5). In fact, it has no "data," but seeks to create facts by inference. No tests of the sludge in the landfill or wastewater treatment system were conducted during the nearly three-year period in question. The tests that were performed on the recycle water system at the time do not show radioactivity in excess of river water intake levels. Respondent does not contest this fact, and argues only that the nature of the radioactivity in the sludge and the recycle water system shows that it was derived from the plant, rather than from the James River (Respondent's motion to dismiss, at 5). Thus,

there is no valid basis from which to infer that merely because sludge from Respondent's landfill or wastewater treatment system may show contamination with enriched uranium in 1989, that the pond was similarly contaminated in 1980, in 1983, or at any time in between. [2] In an affidavit supporting Complainant's response to the motion to dismiss, not only are Respondent's inferences refuted, but strong inferences to the contrary are drawn by Complainant that the pond had no radioactive roof run-off from 1980 - 1983, or, that, if it did, the pond was not contaminated for this period (see Complainant's response to Respondent's motion to dismiss, and Ellison affidavit, at 3-16). Moreover, since the inference proposed by Respondent would lead to a result contrary to the intent of a remedial statute, such inference ought not to be drawn. Consequently, it is found that Respondent has failed to meet its burden of showing that the pond was contaminated with enriched uranium thoughout the entire period.

Second, the "contamination" here is such that, even if it did exist, it was not intended to be governed by the regulation, and so finding would not reach a rational result. The "contamination" here is basically non-existent [see Zeff affidavit (Exhibit 4) in support of motion to dismiss], since the radioactivity in the recycle water system is on the whole less than the radioactivity of the intake water from the James River and most surface water. The isotopic data on the sample of recycle water which Respondent submitted may not be conclusive (see Ross affidavit in support of Complainant's response; and see May 21, 1991, letter from NRC to EPA). [3] It is questionable also whether the enriched uranium in the analysis of sludge from the filter press relied upon by Respondent for its 1990 istopic examination is from roof contamination at all (Ellison affidavit, attached to Complainant's response to Respondent's motion to dismiss, at 17 ff) It must also be noted that in 1981 there was a spill which may have contaminated the recycle water independent from roof runoff or the pond (Ross affidavit at 3). It cannot seriously be contended that a hazardous corrosive waste pond has been "contaminated" by recycle water that is no more hazardous most if not all the time than typical river water. Remedial statutes such as RCRA, together with its implementing regulations, are designed to protect public health and the environment. They cannot be set aside lightly or found inapplicable on the basis of speculative inference alone. A preponderance of evidence does not exist when the only evidence consists of opposing inferences. The beginning and the end of the inquiry is that there is no specific evidence in Respondent's rebuttal of Complainant's *prima facie* case.

For the reasons set out above, Respondent has failed to show that it is not subject to federal or state hazardous waste management regulations, and, consequently, the motion to dismiss must be denied.

Turning to Complainant's cross motion for "accelerated decision", no material facts relating to whether the pond was a hazardous waste facility subject to federal and state hazardous, waste regulation are at issue. In the motion to dismiss, Respondent admits that between 1973 and 1980 a surface impoundment "...used for the storage prior to treatment and discharge, of pickle acid waste...." was operated. It is further admitted that "... while it was in use, B & W assumed that the wastewater stored in the pond was non- radioactive . . . . "

The dispute between Complainant and Respondent through their witnesses is the level of reliability which can be placed upon Respondent's inference of contamination during the period in question. But as noted above, since there is no showing that the holding pond was "contaminated," Respondent's defense could not prevail and the issue in controversy is not material; even if resolved in Respondent's favor, these inferences would not overcome Complainant's *prima facie* case.

Consequently, there are no material facts at issue and, even if they were found in Respondent's favor as inferences, would not defeat a motion for accelerated decision. Complainant is entitled to judgment as a matter of law as a consequence of there being no material facts at issue. Respondent has not only failed to show, but has demonstrated that it cannot show, that EPA lacks jurisdiction over this matter.

Accordingly, Complainant's cross motion for "accelerated decision" as to liability must be granted. It is held that there are no material facts at issue, that Respondent has not overcome Complainant's *prima facie* case, and that Complainant is entitled to judgment as a matter of law.

Last, Respondent has made several assertions which might well form the basis for a reduction of the penalty proposed in the complaint. It is noted that NRC relegated the violation of burying sludge containing U-235 in a landfill to one of its lowest penalty levels; any settlement discussions should take various circumstances into account.

The following findings are adopted in part from Complainant's Response to Motion to Dismiss and Motion for Accelerated Decision on Liability:

FINDING OF FACTS AND CONCLUSIONS OF LAW

Respondent is subject to RCRA and regulations issued pursuant to authority, and to VHWMR. Respondent is a "person" as defined in VHWMR §2.134 (1984).

Respondent "pickles" (i.e., cleans) zirconium parts with a solution of nitric and hydrofluoric acids at its Lynchburg, Virginia, facility. From November 19, 1980, when the RCRA regulations became effective, until September 1983, Respondent stored the spent acid solution ("pickle acid waste") in a surface impoundment. The pickle acid waste was a corrosive hazardous waste (D002), as defined in VHWMR §3.00 (1984), 40 C.F.R. Part 261, (1984), VHWMR Part III (1986).

Respondent did not obtain a RCPA permit or interim status for the impoundment. The impoundment was discovered by the Virginia Department of Waste Management ("VDWM") during an inspection in 1986. By agreement with VDWM, EPA filed the complaint in this action and seeks, *inter alia*, closure of the impoundment in accordance with RCRA regulations.

It is found and concluded that Respondent cannot show that enriched uranium was present in the surface impoundment during the period 1980 to September, 1983; and that such material, even if present, was *de minimus* and did not rise to the level contemplated by RCRA and regulations promulgated pursuant thereto. Accordingly, it is found that the surface impoundment contained hazardous waste as charged, and is subject to regulation under RCRA.

It is concluded that, as charged in the complaint, Respondent violated §§ 3005(a) and 3010(a) of RCRA, 42 U.S.C.§§6925(a) and 6930(a); and §§11.01 (1984), 11.1 (1986), 4.02 (1984), 4.1.B (1986), 11.02.05 (1984) [11.2.0 (1986)], 10.02. 04 (b) (2) (1984) [10.1.D (2)(b)(1986)], 10.06.01 (a) (1984) [10. 5.A (1986) , 10.11.02(c) (1984) [10 . 10 . B. 3 (1986)]f 10.05.02 (1984) [10.4.B (1986)], 10.02.06(b) (1984) [10 . 1. F. 2. (1986) 1 1 10. 02 . 06 (d) (1984), [10. 1. F. 4 (1986) 1 , 10.02.07(d) (1984) [10.1.G.4 (1986)], 10.04.01 (1984) [10.3.A (1986)], 10.05.04 (1984) [10. 4 . D (1986) 1 , 10 .07. 03 (1984) [10. 6 . C (1986) 1 , 10 .07. 09 (1984) [10 .6. I (1986)] , 10. 08 .02 and 10.0.03 (1984) (10.7.B and 10.7.C (1986)], 10.08.04 and 10 . 08. 05 (1984) , [10. 07.D and E (1986)] , 9. 08. 07 (1984) [9. 7.G (1986)] of VHWMR.

ORDER

It is ORDERED that Respondent's motion to dismiss be, and it is hereby, denied; and that Complainant's motion for "accelerated" decision as to liability be, and it is hereby, granted.

And it is FURTHER ORDERED that the parties shall confer for the purpose of attempting to conclude the settlement which once seemed at hand. They shall meet, confer, and report upon the status of this matter no later than January 30, 1992. Failure to observe the terms of this order will, in the absence of extraordinary circumstances--which do not include the possibly busy schedules of counsel--result in the matter being set for trial.

J.F. Greene

Administrative Law Judge

Dated :June 11. 1997

Washington, D.C.

[1] "Radioactive mixed waste" is defined as any "matrix containing a RCRA waste . . . and a radioactive waste subject to the Atomic Energy Act is a radioactive mixed waste." 53 Fed. Reg. 37,046, September 23, 1988.

[2] If the impoundment were not contaminated with enriched uranium at any time between November, 1980, until September, 1983, federal or state hazardous waste regulations would apply.

[3] Complainant's argument that the Federal Register notice is prospective and did not apply to pre-1988 hazardous waste ponds need not be reached for purposes of deciding these motions.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order, was filed with the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on June 12, 1997.

Shirley Smith

Legal Staff Assistant

For Judge J. F. Greene

NAME OF RESPONDENT: Babcock & Wilcox Company

DOCKET NUMBER: RCRA-III-162

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