12-31-91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
WESTINGHOUSE MATERIALS COMPANY OF OHIO,	)	Docket No. RCRA-V-W-89-R-11
	)	
	)	
Respondent	)	

RULING ON RESPONDENT'S MOTION

FOR PARTIAL ACCELERATED DECISION

This Ruling addresses a motion for partial accelerated decision filed by Respondent--Westinghouse Materials Company of Ohio, Incorporated--against Complainant--the Director, Waste Management Division, Region V, U.S. Environmental Protection Agency. Complainant initiated this case on February 9, 1989 by issuing a complaint under the authority of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq., as amended ("RCRA").

The complaint charged violations of RCRA, and of regulations issued thereunder, at the Feed Materials Production Center, a uranium processing facility that is located in Fernald, Ohio and owned by the U.S. Department of Energy ("DoE"). Since 1986 Respondent has had important management responsibilities at this Fernald facility pursuant to a contract with DoE. It is in Respondent's discharge of these responsibilities that the complaint alleged that Respondent violated RCRA and its regulations for handling hazardous waste.

Respondent filed an answer denying the alleged violations. Both parties filed motions for partial accelerated decision that raised the following issues: whether, at the Fernald facility, Respondent was the "operator" of the facility and the "generator" of hazardous waste, as those terms are defined in RCRA; and whether the radioactive mixed waste produced at the Fernald facility was subject to RCRA. The last issue--the disputed subjection to RCRA of the radioactive mixed waste--was raised principally by Respondent's motion; and it is this motion that is addressed by this Ruling.

Respondent's motion advanced two arguments as to why the radioactive mixed waste produced at the Fernald facility was not subject to RCRA. First, Respondent claimed that the language of RCRA exempts from RCRA's coverage any materials containing uranium, and that uranium was present in all of the mixed waste produced at Fernald. Second, Respondent contended that, even if waste containing uranium could be subject to RCRA, a Clarification Notice published by the U.S. Environmental Protection Agency ("EPA") in the Federal Register in September 1988 deferred enforcement for such subjection until March 1989, which was after the complaint was filed in February 1989. These two arguments by Respondent are reviewed in order below.

RCRA's Exemption

Respondent's Argument

Respondent, citing the appropriate statutes and regulations, argued that all of the mixed waste produced at the Fernald facility

was exempted from RCRA's regulation of hazardous waste because the waste contained uranium. Thus Respondent stated that: "hazardous waste" is a subset of "solid waste;" "solid waste" excludes "source material;" "source material" includes materials containing uranium; and all of the waste at issue in this case contained uranium.

In detail, a waste that is regulated under RCRA as "hazardous" must be a "solid waste" (42 U.S.C. § 6903(5)). The definition of "solid waste" in RCRA "does not include ... source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended" (42 U.S.C. § 6903(27)).

The Atomic Energy Act, as amended, defines "source material" as follows (42 U.S.C. § 2014(z)).

> ... (1) uranium, thorium, or any other material which is determined by the [Nuclear Regulatory] Commission ... to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

"Source material," as defined by the Nuclear Regulatory Commission ("NRC"), is as follows (10 C.F.R. § 40.4).

> ... (1) Uranium or thorium, or any combination thereof, in any physical or chemical form or (2) ores which contain by weight one-twentieth of one-percent (0.05%) or more of: (i) Uranium, (ii) thorium or (iii) any combination thereof....

To complete its argument, Respondent asserted that all of the waste involved in this case from the Fernald facility--described by Respondent as "essentially a foundry engaged in the manufacture of uranium metal from certain uranium compounds"[1]--contained uranium.

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[1] Memorandum in Support of Respondent Westinghouse's Motion for Partial Accelerated Decision (Dec. 15, 1989) at 6.

Therefore, Respondent concluded, this waste was exempted from coverage by RCRA.

Respondent stated this conclusion in the following terms.

> The definition of a "source material" includes uranium "in any physical or chemical form", without respect to concentration. Obviously, that definition necessarily includes uranium contained in compounds, mixtures, or solutions, with other materials.... Thus, the "mixed wastes" at issue in this proceeding are themselves source materials and exempt from RCRA.[2]

Respondent later repeated this conclusion as follows.

> [S]ince classification of a uranium-bearing material as 'source material' does not hinge on the concentration of uranium, all waste materials that contain uranium ... [are] 'source material,' specifically exempt from RCRA.[3]

Respondent additionally offered a justification "based on sound public policy" for its conclusion.[4] Allocating the regulation of radioactive mixed waste to the jurisdiction of DoE and the NRC accords with such policy because "[t]hese two agencies have the specialized expertise to address radiation hazards [that] ... U.S. EPA does not."[5]

Complainant's Response

In response, Complainant contended that the RCRA exemption for source materials applies only to the radioactive component of radioactive mixed waste, and that the hazardous waste component

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[2] Memorandum of Respondent, supra note 1, at 8 (emphasis in original).

[3] Respondent's Reply to Complainant's Response to Respondent's Motion for Partial Accelerated Decision (April 9, 1990) at 9.

[4] Memorandum of Respondent, supra note 1, at 10.

[5] Id. 11.

remains subject to RCRA. Complainant cited documents to show that such a dual regulatory scheme has been adopted by EPA, the NRC, and DoE.

Complainant noted further, with a citation to legislative history and judicial cases,[6] that RCRA was enacted for a "remedial purpose" and to establish a "comprehensive ... regulation."[7] Both of these points, suggested Complainant, justify construing RCRA liberally in establishing its jurisdictional reach, such as in according RCRA its role in the dual regulation of radioactive mixed waste. Complainant argued additionally, quoting another section of RCRA, that RCRA may apply to materials regulated by the Atomic Energy Act and certain other named Acts "to the extent that such application ... is not inconsistent with the requirements of such Acts."[8]

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[6] Complainant's Response in Opposition to Respondent's Motion for Partial Accelerated Decision (Feb. 28, 1990) at 8-15.

[7] Id. 9.

[8] Id. 4, quoting 42 U.S.C. § 6905(a). The full text of that statutory section, set forth in full also by Complainant, is as follows.

(a) Application of chapter

> Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to the Federal Water Pollution Control Act (33 U.S.C. § 1251 and following), the Safe Drinking Water Act (42 U.S.C. § 300f and following), the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. § 1401 and following), or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 and following) except to the extent that such application (or regulation) is not inconsistent with the requirements of such Acts.

To document EPA's assertion of authority over the hazardous waste component of radioactive mixed waste, Complainant cited a 1986 EPA notice in the Federal Register (51 Fed. Reg. 24,504 (July 3, 1986)). That publication notified States that, in order to have an authorization under RCRA subtitle C for a hazardous waste program, a State would need the authority to regulate the hazardous waste component of radioactive mixed waste. The notice stated that the radioactive waste component of such waste is subject to the Atomic Energy Act, and that the hazardous waste component is subject to RCRA. This statement was repeated in EPA's September 1988 Clarification Notice (53 Fed. Reg. 37,045 (Sept. 23, 1988)) that is the focus of the following section of this Ruling.

To show the NRC's adoption of this dual regulation scheme, Complainant cited a 1989 Guidance to NRC licensees, developed jointly by EPA and the NRC, on the definition and identification of commercial mixed low-level radioactive and hazardous waste.[9] A similar jointly developed Guidance to NRC licensees had been issued in 1987.[10] According to these Guidances, this waste contains source, byproduct, or special nuclear materials, which are regulated by the NRC under the Atomic Energy Act, and this waste contains also hazardous waste, which is regulated by EPA under RCRA.

To document the adherence to the dual regulatory scheme by

(emphasis in original)

[9] Id. 2, Attachment C.

[10] Id.

DoE, the owner of the Fernald facility, Complainant cited chiefly a 1987 publication by DoE in the Federal Register (52 Fed. Reg. 15,937 (May 1, 1987)). This publication was a final interpretive rule to clarify DoE's obligations under RCRA for radioactive waste that contains both byproduct material as defined by the Atomic Energy Act and also hazardous waste as defined by RCRA.

This DoE rule focused only on "byproduct material," and not also on "source material" and "special nuclear material." The apparent reason, as stated in the preamble to the rule, was that, "in contrast" to "[t]he AEA's [Atomic Energy Act's] definition of 'byproduct material,'" "[t]he AEA's definitions of the [other two] terms ... are specific in nature, and present no particular difficulty of interpretation" (52 Fed. Reg. 15,938, col. 1).

Nonetheless, the preamble to DoE's rule sometimes discussed source material and special nuclear material together with byproduct material, as in the following selection (52 Fed. Reg. 15, 938, col. 2).

> [T]he legislative history of RCRA is silent on the intended effect of RCRA's exclusion from its coverage of source, special nuclear, and byproduct material. Nevertheless, DoE assumed that the exclusion was intended by the Congress to be applied to radioactive wastes in their real-world configuration. Virtually all radioactive waste substances are contained, dissolved or suspended in a nonradioactive medium from which their physical separation is impracticable.

The preamble to DoE's rule also discussed source material and special nuclear material together with byproduct material as the preamble moved to its conclusion (52 Fed. Reg. 15,940, col. 2).

> RCRA's definitional exclusion of source, special nuclear and byproduct material ... appears directed only to the

> radioactive component of a nuclear waste.... [T]he definitional exclusion ... provide[s] for the regulation under RCRA of all hazardous waste, including waste that is also radioactive. RCRA does not apply to the radioactive component of such a waste, however, if it is source, special nuclear or byproduct material. Instead, the AEA [Atomic Energy Act] applies to that radioactive component.

As support for interpreting RCRA so as to authorize its application to the hazardous waste component of radioactive mixed waste, the preamble to the DoE rule cited the remedial purpose and comprehensiveness of regulation for which RCRA was enacted. As "[a] final consideration" for its rule, the preamble cited the "rule's consistency" with the 1987 Guidance referenced above that was developed jointly by EPA and the NRC (52 Fed. Reg. 15,940, col. 2).

> [Those] two agencies stated that for commercial low-level radioactive waste containing a hazardous component, they will regard only the actual radionuclides in the waste as being exempt from RCRA. Today's final rule adopts the same approach for all DOE radioactive and chemically hazardous waste.

The subject of DoE's final rule, however, was only byproduct material, and the rule applied only to it, as follows (52 Fed. Reg. 15,940, col. 3).

> [F]or purposes of RCRA, DOE interprets the term byproduct material to refer only to the radioactive component of a nuclear waste. The nonradioactive chemically hazardous component will be subject to regulation under RCRA.

Respondent's Reply

Respondent's basic reply was to repeat that Congress had exempted from RCRA's coverage any source material as defined by the NRC, and thus all of the EPA, NRC, and DoE interpretations cited by Complainant simply lacked the authority to undo this exemption. In

Respondent's view, the exemption could be changed only by appropriate Congressional action or by NRC alteration of the pertinent definition.

In addition to this basic response, Respondent also attacked the relevance of some of the documents cited by Complainant. None of them, Respondent claimed, addressed the pivotal issue here of whether waste material containing uranium could be regulated under RCRA. Respondent stated that EPA's 1986 notice in the Federal Register, for example, just assumed that radioactive mixed waste could be regulated by the States.

As for the jointly developed EPA and NRC Guidance to NRC licensees, Respondent dismissed it on two grounds. First, it "is not a rule-making;" and, second, it "is directed to NRC licensees that handle commercial radioactive materials not uranium source materials," and the Fernald facility was not such a licensee.[11]

Respondent similarly distinguished from this case DoE's 1986 Federal Register publication. "This DOE rule-making is irrelevant because it related only to 'byproduct material,' not 'source material'.... This case involves 'source material,' not 'byproduct material.'"[12]

Other Issues

Other issues regarding RCRA's possible coverage of radioactive mixed waste that were debated by the parties included the deference due agency interpretations and 1989 proposed Congressional

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[11] Respondent's Reply, supra note 3, at 10.

[12] Id.

legislation. As for the former, Complainant asserted strongly that EPA's construction of its responsibilities under RCRA was entitled to the deference traditionally accorded an agency's interpretation of its own promulgations. Respondent's reply was that waste containing uranium was exempted from RCRA by Congressional statute and NRC definition, and no amount of EPA interpreting could alter either of these.

As to the proposed Congressional action, both parties cited draft legislation introduced in 1989 that would clearly establish RCRA's regulation of at least the hazardous waste component of mixed waste containing source, special nuclear, or byproduct materials. Respondent argued that such Congressional proposals show a recognition that, absent such Congressional action, such radioactive mixed waste remains exempted from RCRA's coverage. Complainant countered that the intent of these legislative proposals was just to codify what is understood to be the present state of the law.

Ruling

Certainly Respondent is right in arguing that a RCRA exemption established by Congressional statute and NRC definition cannot be simply interpreted away by EPA, DoE, and the NRC. But the important question that needs answer is what constitutes this exemption from RCRA coverage that is created by statute and NRC definition.

The pertinent exemption applies to "source material" as defined by the NRC, and that definition reads as follows (10 C.F.R.

§ 40.4).

> ... (1) Uranium or thorium, or any combination thereof, in any physical or chemical form or (2) ores which contain by weight one-twentieth of one-percent (0.05%) or more of: (i) Uranium, (ii) thorium or (iii) any combination thereof....

The factual context in which the question of what constitutes the exemption arises was described by DoE in its 1987 interpretive rule as follows (52 Fed. Reg. 15,938, col. 2).

> Virtually all radioactive waste substances are contained, dissolved or suspended in a nonradioactive medium from which their physical separation is impracticable.

The precise question therefore becomes whether any hazardous waste in that "nonradioactive medium" is part of the "source material" that is exempted from RCRA coverage. A similar statement of the question may be derived from Respondent's formulation of the issue, quoted above,[13] which provides as well Respondent's answer to the question.

> The definition of a "source material" includes uranium "in any physical or chemical form", without respect to concentration. Obviously, that definition necessarily includes uranium contained in compounds, mixtures, or solutions, with other materials.... Thus, the "mixed wastes" at issue in this proceeding are themselves source materials and exempt from RCRA.[14]

Accordingly the question, as derived from Respondent's statement, is whether any hazardous waste in the "other materials" with which the uranium is "contained in compounds, mixtures, or solutions" constitutes part of the "source material" that is exempted from

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[13] See text accompanying note 2 supra.

[14] Memorandum of Respondent, supra note 1, at 8 (emphasis in original).

RCRA.

Respondent of course answered that question in the affirmative. The language of the definition itself, however, is perfectly consistent also with Complainant's answer: that source material includes only the radioactive component of such mixed wastes.

Respondent did accurately state that "[o]bviously, that definition necessarily includes uranium contained in compounds, mixtures, or solutions." But that obviousness applies only to the uranium itself. Nothing in the definition requires that "source material" include the "other materials" themselves with which the uranium is so contained; and accordingly nothing requires that "source material" include all of the radioactive mixed waste at issue here.

Respondent advanced a couple reasons to support its answer. Respondent noted that subsection (1), the relevant part of the definition, is "without respect to concentration." Presumably Respondent's point was partly the contrast with subsection (2) of the definition for ores, which does specify a minimum concentration. Or, as Respondent stated its position: "[S]ince classification of a uranium-bearing material as 'source material' does not hinge on the concentration of uranium, all waste materials that contain uranium ... [are] 'source material,' specifically exempt from RCRA."[15]

But the absence of a minimum concentration in subsection (1)

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[15] Respondent's Reply, supra note 3, at 9.

of the definition need not mean that all such waste materials are source material, regardless of the amount of uranium therein. As stated above, the language of subsection (1) is entirely consistent with Complainant's reading: that source material includes, in terms of Respondent's quotation, only the uranium, and not the waste materials in which the uranium is contained. That reading is perfectly reasonable; the absence of any specification of a minimum concentration in subsection (1) need not necessarily have any significance related to the presence of such a specification in subsection (2).

Public Policy. Another reason advanced by Respondent to support its answer was "sound public policy."[16] Respondent's answer would allocate regulation of radioactive mixed waste to the jurisdiction of DoE and the NRC, which, in Respondent's words, "have the specialized expertise to address radiation hazards [that] ... U.S. EPA does not."[17]

But the public policy concern suggested by Respondent would actually seem to favor the dual regulation urged by Complainant. Respondent's answer would require that any amount of uranium present in a mixed waste, no matter how minuscule or unevenly dispersed, would classify the whole waste as source material and beyond the regulation of RCRA. Under such an approach, conceivably a spill of uranium into a lake or a river would, for example, stamp the whole body of water as source material, regardless of the

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[16] Memorandum of Respondent, supra note 1, at 10.

[17] Id. 11.

amount or distribution of the spill.[18]

Even aside from such possibly extreme situations, Respondent's answer would free the nonradioactive portion of any mixed waste from the jurisdiction of EPA. But EPA is the particular agency with the specialized knowledge for controlling the wide variety of dangers involved in the treatment, storage, and disposal of nonradioactive hazardous waste.

From the standpoint of the public policy consideration suggested by Respondent--matching each type of waste with the specialized agency expertise best qualified to deal with that type--it is Complainant's proposed dual regulation that makes the most sense. This dual regulation allocates jurisdiction over the radioactive component of radioactive mixed waste to DoE and the NRC, and jurisdiction over the nonradioactive hazardous component to EPA. Such an arrangement seems to assign the control over each type of waste to exactly the agency or agencies with the knowhow to administer that control effectively.

By contrast, as noted, Respondent's answer would withdraw from governance by RCRA and EPA potentially large and dangerous quantities of hazardous waste just because of their mixture with radioactive waste. Such an outcome would appear to run counter to sound public policy.

This conflict with sound public policy would be exacerbated because RCRA's requirements for hazardous nonradioactive waste are in important respects more stringent than those of the Atomic

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[18] See, e.g., Respondent's Reply, supra note 3, at 6 n.2.

Energy Act. Thus companies, under Respondent's reading of the definition, could have an economic incentive to mix such waste with radioactive waste in order to avoid application of RCRA's more stringent requirements to the nonradioactive portion. Moreover, the narrowing of RCRA's coverage inherent in Respondent's approach would also seem inconsistent with the remedial purpose and comprehensiveness of regulation for which RCRA was enacted, statutory objectives that encourage an expansive rather than a narrow interpretation of RCRA's coverage.

Legal Authority. As for legal authority to support either Respondent's or Complainant's position, neither party cited any meaningful legislative history. Complainant did claim, however, that the three agencies that are potentially responsible for regulating radioactive mixed waste--EPA, DoE, and the NRC--all support Complainant's position.

It is true, as argued by Respondent, that none of the documents cited by Complainant to show this support focused specifically on whether the presence of uranium in mixed waste means that the whole waste is source material. But the documentation cited by Complainant does establish that these three agencies endorse dual regulation of radioactive mixed waste--that is, regulation under the Atomic Energy Act of the radioactive waste component, and regulation under RCRA of the hazardous waste component. This principle of dual regulation would seem to apply directly to the radioactive mixed waste at the Fernald facility, and Respondent offered no significant reason why it should not.

As to EPA, Respondent objected that the 1986 Federal Register publication cited by Complainant (51 Fed. Reg. 24,504 (July 3, 1986)) assumed that radioactive mixed waste was subject to regulation by States, rather than addressing whether the hazardous waste component was regulated under RCRA. Any merit to that objection by Respondent is, however, undercut by EPA's 1988 Clarification Notice (53 Fed. Reg. 37,045 (Sept. 23, 1988)). This Clarification Notice did directly address the issue of RCRA's jurisdiction, asserting RCRA's regulation of the hazardous waste component of radioactive mixed waste.

For the NRC, Complainant cited the Guidances that the NRC developed jointly with EPA.[19] These Guidances were not, as Respondent observed, rulemaking, nor is the Fernald facility an NRC licensee. But these Guidances did adopt the approach of dual regulation urged by Complainant for application to this case. Moreover, these Guidances assume additional significance here because the NRC, as mandated by Congress in the Atomic Energy Act, is the author of the definition of source material in the RCRA exemption that underlies Respondent's whole argument. The NRC's application of its own definition merits some deference.

For DoE, Respondent noted that the 1987 interpretive rule cited by Complainant applied only to byproduct material, not to source material. But, as shown in the quotations above from the

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[19] Complainant's Response, supra note 6, Attachment C, discussed in the text paragraph accompanying notes 9-10 supra.

preamble to the DoE rule,[20] DoE discussed byproduct material together with source material and special nuclear material, and the rationale advanced by DoE for applying dual regulation to byproduct material would seem fully applicable to source and special nuclear material.

The question of subjecting the hazardous waste component of radioactive mixed waste to RCRA arose also in two cases involving a DoE nuclear weapons facility in Rocky Flats, Colorado.[21] In these cases, DoE conceded, and the U.S. District Court approved, the proposition that the hazardous waste component of the radioactive mixed waste there fell within the jurisdiction of RCRA and EPA. Thus DoE has accepted the principle of the dual regulation that is urged here by Complainant.

In Sum. As for two other issues raised by the parties--the deference to be accorded an agency's interpretation of its own administrative program, and the significance of the 1989 proposed legislation--this Ruling will be based on neither. The reading of the RCRA exemption advanced by Complainant, as reviewed above, is persuasive on its merits, independently of any deference that might be due it as the interpretation of the agency involved. As to the 1989 proposed legislation, it could equally plausibly be explained as intended to change the existing state of the law or as intended

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[20] See six text paragraphs following text paragraph containing note 10 supra.

[21] Sierra Club v. U.S. Dept of Energy, 770 F.Supp. 578 (D.Colo. 1991); Sierra Club v. U.S. Dept of Energy, 734 F.Supp. 946 (D.Colo. 1990).

to codify it, so that these proposals provide no useful guidance for this Ruling.

In sum, in terms of the two issues that do provide guidance--public policy and the available legal authority--Respondent's reading of the RCRA exemption is less reasonable than Complainant's. Accordingly, Respondent's motion will be denied insofar as it requested a ruling that the radioactive mixed waste at the Fernald facility was totally exempt from RCRA.

Federal Register Clarification Notice

Respondent's second argument was that EPA, in a September 23, 1988 Federal Register publication titled "Clarification Notice" (53 Fed. Reg. 37,045) had extended to March 23, 1989 the effective date for RCRA regulation of radioactive mixed wastes. Therefore Complainant "is estopped" from prosecuting this complaint, claimed Respondent,[22] because the complaint was filed February 9, 1989, prior to March 23, 1989, and all of its alleged violations were prior to that March date.

Complainant challenged this argument with three points. First, Complainant contended that the extension to March 23, 1989 was limited to those who were in fact substantially confused about their status, had not filed a Part A permit application, and would have to close down but for the extension. Second, Complainant declared that Respondent could not have been thus confused, because DoE had filed permit applications for Parts A and B in 1985 for the Fernald facility. Third, Complainant moved to amend the complaint

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[22] Memorandum of Respondent, supra note 1, at 11.

to add violations alleged to have occurred after March 23, 1989.

Respondent's argument based on the Clarification Notice, together with Respondent's three points in opposition, is reviewed below. A final decision on Complainant's third point--its motion to amend the complaint--is deferred, as discussed in the following section of this Ruling titled "Further Procedure."

Respondent's Argument

In its argument, Respondent quoted the following statement in EPA's September 23, 1988 Clarification Notice (53 Fed. Reg. 37,045, col. 1).

> Owners and operators of facilities treating, storing, or disposing of radioactive mixed waste in States not authorized by September 23, 1988 to administer the Federal hazardous waste program in lieu of EPA must submit a RCRA Part A permit application to EPA by March 23, 1989 to qualify for interim status.[23]

Ohio was identified in the Clarification Notice as one of the States not so authorized (53 Fed. Reg. 37,045, col. 3). Consequently, Respondent concluded, Respondent was "not subject to the RCRA regulations until March 23, 1989,"[24] and accordingly Complainant "is estopped" from pursuing the complaint.[25]

The significance of the "interim status" referenced in the above quotation was stated in the Clarification Notice as follows (53 Fed. Reg. 37,046, col. 3).

> Interim status provides temporary authorization to continue hazardous waste management activities at

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[23] Id.

[24] Id. 12.

[25] Id. 11.

> facilities engaging in such activities at the time that they first become subject to RCRA regulation. Without interim status, the activities would have to cease until a permit application was filed and reviewed and final permit issued.

The need for issuance of the Clarification Notice was described therein in the following manner (53 Fed. Reg. 37,046, col. 2).

> EPA has become aware that many ... [facilities] handling radioactive mixed waste ... have been substantially confused about the regulatory status of their particular mix of hazardous waste ... [and] are uncertain about how to qualify for interim status if they are handling radioactive mixed waste.

Further (id. 37,047, col. 2),

> owners and operators [of such facilities] in unauthorized States could legitimately have been confused as to whether (and when) they were required to submit a Part A permit application.

The conclusion in the Clarification Notice was set forth as follows (id.).

> EPA, therefore, is exercising its authority today ... to extend the Part A permit application filing dates for owners and operators of facilities handling radioactive mixed waste in unauthorized States. Owners and operators ... must submit RCRA Part A permit applications or modifications within six months of the date of publication of today's notice to qualify for interim status.

The Clarification Notice further indicated that proper filing of the Part A permit application by a facility owner or operator such as Respondent would qualify the facility for interim status.

Complainant's Points; Respondent's Replies

Complainant's first point of challenge was that the extension for Part A permit applications provided by the Clarification Notice was limited in its availability. Complainant stated this position

as follows.

> U.S. EPA's September 1988 notice provided an extension to file for Part A interim status, only to those facilities which were substantially confused about interim status filing, had not filed for their Part A application, and would be required to close their facilities without the extension.[26]

To document this interpretation of the Clarification Notice, Complainant offered two citations. Complainant began[27] by presenting the first quoted statement above from the Clarification Notice regarding the need for its issuance, in which EPA stated that "many [facilities] ... have been substantially confused ... and are uncertain."

Complainant's second citation was to a July 30, 1987 memorandum from a division director in EPA's Office of Solid Waste that was addressed to the RCRA branch chiefs of EPA Regions I - X. Complainant presented this memorandum as follows.

> Supporting Complainant's view on the applicability of this notice is a U.S. EPA contemporaneous memorandum stating the limited application intended by the clarification:
>
> > With respect to facilities treating, storing, or disposing of mixed waste in unauthorized States, Headquarters is currently developing a Federal Register notice that will clarify interim status qualification requirements under Section 3005(e) as they apply to affected facilities that have not notified in accordance with Section 3005(a) or submitted

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[26] Complainant's Response, supra note 6, at 16 (emphasis in original).

[27] Id.

Part A and/or B permit applications.[28]

In reply, Respondent denied that the applicability of the Clarification Notice was limited as claimed by Complainant: "One would search in vain for any indication of such a limitation on this notice."[29] Respondent's reply likewise denied that the EPA memorandum cited by Complainant was evidence of any such limitation.

> Furthermore, Complainant's contention that an internal, unpublished EPA memorandum issued more than one year prior to the Federal Register clarification notice, and not even referenced in the Federal Register, can somehow create a sort of undisclosed limitation on the "clarification notice" is patently absurd.[30]

Complainant's second point was that the Clarification Notice's extension, per Complainant's reading of the Notice, was unavailable to Respondent because DoE had filed Part A and Part B permit applications for the Fernald facility in 1985. Respondent replied that this contention conflicted with the complaint's alleged violation by Respondent for failure to file required Part A and B permit applications, and that DoE's applications should not be imputed to Respondent for some purposes but not for others.

Ruling

Respondent's basic reading of the Clarification Notice--that Respondent could not be held in violation of the RCRA requirements

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[28] Id. 16-17 (footnote omitted from Complainant's Response; emphasis in the quotation from the 1987 memorandum supplied by Complainant).

[29] Respondent's Reply, supra note 3, at 13.

[30] Id. (emphasis in original).

applicable to radioactive mixed waste until after March 23, 1989--is sustained. None of Complainant's three points in opposition successfully disputes that essential reading.

The Clarification Notice failed to contain the limitation suggested by Complainant on the applicability of the extension to March 23, 1989. Although the Notice, in one of the portions quoted above, spoke of "many" facilities as being confused and uncertain, nothing in the language of the extension itself limited it to those who were confused or uncertain or who had not filed Part A permit applications. The extension, as quoted above, was provided generally for "owners and operators" of facilities that handled radioactive mixed waste in States that were then unauthorized.

As for the 1987 EPA memorandum cited by Complainant, obviously such an unpublished EPA document that is undisclosed to the public lacks the status to override any contrary language in a Federal Register issuance. The language in the Clarification Notice is sufficiently clear on the question at hand that there is no occasion to refer to the 1987 memorandum to resolve any ambiguity.

As to DoE's submission of a Part A permit application, Complainant supplied no reason why that submission should bind Respondent on the present question. Respondent and DoE are separate entities; DoE's 1985 submission had occurred before Respondent assumed its management responsibilities at the Fernald facility in 1986; Complainant in its complaint charged Respondent with a violation for not submitting a Part A permit application; and the Clarification Notice addressed basically the "owners and

operators" of the relevant facilities, rather than the facilities themselves.

Complainant's third point--its motion to amend the complaint--of course does not controvert Respondent's reading of the Clarification Notice, but rather seeks to circumvent the force of that reading by charging violations allegedly occurring after March 23, 1989. As noted, in the following section a final decision on that motion is deferred.

In sum, Complainant has failed to rebut Respondent's claim that the Clarification Notice effectively deferred until after March 23, 1989 any enforceable violation by Respondent of RCRA's requirements applicable to radioactive mixed waste.[31] Complainant's complaint that charges only violations said to have been committed before March 23, 1989 is therefore, as urged by Respondent, without merit.

Further Procedure

The resolution above of Respondent's reading of the Clarification Notice in Respondent's favor leaves unresolved two additional questions related to Respondent's motion: whether all of the Fernald facility's waste is radioactive mixed waste, and whether Complainant's motion to amend the complaint should be

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[31] Complainant did not dispute Respondent's assertion that, if the Clarification Notice applied to Respondent, any enforceable violations were deferred until after March 23, 1989. It is apparent from the Clarification Notice, for example, that Respondent could have obtained interim status by filing the part A permit application by March 23, 1989. Pursuant to 40 C.F.R. § 265.1(b), the interim status standards would not have applied to Respondent until it had either filed that part A permit application or had failed so to file by March 23, 1989.

granted. Before either of these questions is pursued, however, the parties will be directed to try again to settle this case.

Settlement is encouraged by Section 22.18 of EPA's Consolidated Rules of Practice (40 C.F.R. § 22.18). With the instant Ruling on Respondent's motion for partial accelerated decision, the parties have an additional framework within which to try to negotiate a settlement. Accordingly, the parties will be directed to resume their settlement negotiations, and to report by February 15, 1992 on the status of the negotiations.

If a negotiated settlement proves unattainable, the two remaining questions cited above will have to be addressed. As to the first, the parties' filings raise the possibility that some of the waste at the Fernald facility may not be radioactive mixed waste.[32] To the extent that such waste was other than radioactive mixed waste, of course, the complaint may still have merit.

As for Complainant's motion to amend the complaint, such amendment would create charges that are not obviated by the above reading of the September 23, 1988 Clarification Notice. Although both parties have briefed this motion, before any ruling is issued, the parties will be given the opportunity to make another filing regarding it.

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[32] See, e.g., Complainant's Prehearing Statement (June 2, 1989) at 12; Complainant's Motion for Partial Accelerated Decision (Oct. 2, 1989) at 30-31; Respondent's Motion for Partial Accelerated Decision (Dec. 15, 1989) at 1-2; Memorandum of Respondent, supra note 1, at 4 n.3; Complainant's Response, supra note 6, at 4 n.3, 6 n.7; Respondent's Reply, supra note 3, at 5-6 & 6 n.2.

Order

Respondent's motion for partial accelerated decision is denied insofar as it requested a ruling that the radioactive mixed waste at the Fernald facility was exempted from RCRA because it was all source material. Respondent's motion is granted insofar as it requested a ruling that, pursuant to EPA's September 23, 1988 Clarification Notice, the complaint failed to charge an enforceable violation by Respondent at the Fernald facility of RCRA's requirements applicable to radioactive mixed waste. It is hereby so ruled.

Both parties are directed to try to negotiate a settlement of this case, and to report by February 15, 1992 on the status of these negotiations. Such reporting may be done individually or jointly, at the parties' discretion.

T. Thomas W. Hoya

Thomas W. Hoya
Administrative Law Judge

Dated: December 31, 1991

In the Matter of Westinghouse Materials Company of Ohio, Respondent,
Docket No. RCRA-V-W-89-R-11

Certificate of Service

I certify that the foregoing **Ruling On Respondent's Motion for Partial Accelerated Decision,** dated December 31, 1991, were sent this day in the following manner to the addressees listed below.

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Secretary

Dated: December 31, 1991