7/23/86

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	RCRA-85-69-R
JOHN BOYLE & COMPANY, INC.	)	
	)	
Respondent	)	

1. Resource Conservation and Recovery Act - Where the Agency, in charging respondent with installing an inadequate groundwater monitoring system, is only able to demonstrate that the data associated therewith is capable of more than one interpretation and suggests that the downgradient wells may, in fact, be properly located has not described a violation of the Act or the regulations promulgated pursuant thereto. The complaint must be dismissed.

2. Resource Conservation and Recovery Act - Exclusions under 40 C.F.R. § 261.4 - Where the Respondent has presented clear and undisputed testimony and data which satisfies the requirements of the regulations and the Agency's rationale for denying the exclusion is repudiated by both the respondent's expert witnesses and the Agency's own expert witness, the exclusion should be granted, if EPA retains the authority to do so. If the State of North Carolina has been delegated such authority, it is urged to grant the exclusion.

Appearances:

Reuben Bussey, Esquire
U.S. Environmental Protection Agency
Atlanta, Georgia
(For Complainant)

Joseph A. Rhodes Jr., Esquire
Haynsworth, Baldwin, Miles, Johnson, Greaves and Edwards
Greenville, South Carolina
(For Respondent)

INITIAL DECISION

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation Recovery Act of 1976, as amended, (hereinafter "RCRA"), Section 3008, 42 U.S.C 6928 (Supp. IV 1980), for assessment of a civil penalty for alleged violations of the requirements of the Act, and for an order directing compliance with those requirements[1].

The proceeding was instituted by a Complaint and Compliance Order against John Boyle and Company issued by the United States Environmental Protection Agency on October 11, 1985. The Complaint alleged that John Boyle and Company at its facility located at Statesville, North Carolina conducts hazardous waste activities and had violated the standards for hazardous treatment, storage and disposal facilities. The specific violations charged were of 40 C.F.R. 265.90(a) for failure to develop sufficient hydrogeologic information to detect the impact of waste stored in a waste lagoon and for failure to develop sufficient information to prepare an adequate groundwater quality assessment plan pursuant to 40 C.F.R. 265.93(d)(4). A penalty of $7,000 was proposed in the Complaint.

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[1] Pertinent provisions of Section 3008 are:

Section 3008(a)(1): "Compliance orders - ...whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirements of this subchapter the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period or both..."

Section 3008(g): "Civil penalty - Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation."

In its Answer, the Respondent, John Boyle and Company, Inc., denied the violations stating that the groundwater monitoring system it had in place was developed and designed in cooperation with and at the direction of the North Carolina agency, which has jurisdication to operate the RCRA program in lieu of the Federal Government. A Hearing was held in Atlanta, Georgia on April 23-24, 1986. Following the Hearing, each party submitted proposed findings of fact and conclusions of law. All proposed findings of fact inconsistent with this Decision are rejected.

Factual Background

The Respondent operates a manufacturing facility in Statesville, North Carolina. Although the facility is involved in several activities related to the textile industry, the activity at the facility which is relevant to this proceeding has to do with their dyeing operation. The Respondent manufactures cotton cloth and dyes this material for use primarily in the marine and recreation industry. Their products are used for boat covers and recreational tents. Pursuant to the provisions of the Clean Water Act, the facility installed a treatment system which involves the neutralization of the chromium containing wastewater from the dyeing process and the addition of flocculants which cause the chromium containing waste to precipitate out in a lagoon. The dyeing operation provides the only source of wastewater from the facility. The surface water of the lagoon is pumped ultimately to a nearby stream and discharged therein pursuant to the provisions of a NPDES permit issued to the facility some time in the past.

The record reveals that in 1983 the facility was approached by the North Carolina Hazardous Waste Office and advised that the material contained in their treatment lagoon is likely to be a hazardous waste and that, therefore,

the Company must design, install and implement a groundwater monitoring system. Pursuant to that direction, the Respondent hired several consultants who, in conjunction with the State of North Carolina and their geologists, following a review of the available geologic information, determined the appropriate locations for one up-gradient and three down-gradient wells adjacent to the treatment lagoons. Based upon the data derived from the required sampling activities relating to these wells, it was determined that there was, in fact, some migration of the wastewater from the lagoons and pursuant to the direction of the State of North Carolina a groundwater quality assessment plan was developed.

At some point in time following their notification by the State of North Carolina that the waste lagoons were possibly hazardous waste facilities subject to the requirements of RCRA, they were advised by counsel that, given the nature of the wastewater they deal with, it is very likely that they could qualify for an exclusion under the RCRA regulations inasmuch as the materials used in their process are exclusively trivalent chromium and do not contain hexavalent chromium. Following up on that advice, the Company put together a proposal which they informally submitted to the State of North Carolina for an opinion as to whether or not there was some likelihood that their waste would be excluded under of the RCRA regulations and that they could be relieved of the necessity for treating their lagoons as hazardous waste managing facilities. The State of North Carolina sought the advice of Region IV EPA on this issue and were advised that the Agency did not feel that the exclusion could be granted. EPA reasoned that since hazardous waste constituents had been found in the groundwater and detected by the monitoring wells, that fact was conclusive that there was hexavalent chromium in their wastewater. The State of North Carolina suggested to the Respondent that they

make a formal application for the exclusion to them, despite the advice from EPA, and the Company has done that. The record is unclear as to which agency, vis-a-vis the State of North Carolina or the Federal EPA, has the ultimate authority to grant the exclusion but the preponderance of the evidence in the record suggests that the State of North Carolina has this authority. Despite that conclusion, the record reveals that for some reason the State of North Carolina forwarded this formal petition to EPA Region IV and the request now reposes in EPA Headquarters in Washington, D.C.

Although this defense was not raised in the Answer, it was made an issue in the case by the prehearing filings of the Respondent and, therefore, will be addressed in this Decision, despite the fact that EPA takes the position that this Court has no authority or jurisdiction relative to that issue.

Discussion

As described above, the Complaint charges the Respondent with failure to develop and maintain an adequate groundwater monitoring system. The testimony of the EPA witness in this regard suggests that although the Complaint cites the Respondent for failing to develop an adequate groundwater monitoring system and also that the failure to develop such a system prevents them from developing an adequate groundwater assessment program, the witness for the Agency who testified on this issue and who also calculated the proposed penalty did not appear to separate out these two violations and assign a separate monetary value to each of them.

The primary witness appearing for the Agency on the question of the violation and the calculation of the penalty associated therewith testified that his concern with the groundwater monitoring system installed by the Respondent was the geologic data appearing in the Agency's files suggests

that the data presented is "technologically ambiguous". Since the Court was unaware that mere ambiguity constituted a violation of RCRA, further exploration on this issue was had with the witness.

In explanation of his position, the witness states on Page 20 of the Transcript that: "Because the system as I viewed it was technically ambiguous in that it addressed a possibility for which -- a possibility for groundwater flow, but did not exclude other plausible options of groundwater flow." Upon further examination by the Court, the witness indicated that his concern with the wells was that the Respondent chose to interpret the data available in such a way that would justify the location of the wells they had already had in place. When asked how the witness thought that the Respondent determined the location for the wells he stated that: "I am told they chose the location of wells by visual observation of the surface." The Court asked: "In other words, the ground sloped that way, they figured that's the way the water went. Was it that crude?" The witness replied: "That's my only indication." The Court then asked the witness: "You have nothing in your file to indicate that the Company's choice of the locations of those wells was based on anything other than just eyeballing the surface?" The witness responded: "I have no information other than that." The Court then asked: "Okay. You don't know for a fact, I gather, exactly where the water flow is. It may, in fact, be that these wells are okay, but you're merely saying that the data is subject to more than one interpretation." The witness answered: "That's correct." The Court then said: "And the fact that they chose to interpret in a way that supports the location of wells makes you uneasy." The witness: "That's correct." That colloquy between the Court and the witness appears to form the basis for the Agency's issuance of the Complaint and the assessment of the proposed penalty.

At first blush, the Court found the witness' rationale to be incredible and nothing produced at the Hearing thereafter causes the undersigned to change his opinion thereof.

The Agency's concern apparently is that, since the data provided is subject to more than one interpretation, the groundwater monitoring system as installed by the Respondent violates the provisions of the Act and the regulations promulgated thereto. This despite the fact that the witness testified that the location of the wells as installed by the Respondent may, in fact, be perfectly adequate. It is just that the data which he reviewed is in his judgement subject to more than one interpretation. The witness' professed opinion about how the location of the wells was actually chosen is diametrically opposed to not only to the testimony of the Respondent's witnesses, but the information in the Agency's possession prior to the institution of this action. The Court and counsel for the Respondent examined this witness as to how he would have chosen the well locations had it been his responsibility to do so. The witness then went on to describe, at some length, the various steps he would have pursued had it been his responsibility to determine a proper location for the wells. Both the testimony of the Respondent's witnesses and the record available to the Agency in the form of exhibits, which it had entered into the record suggests, that the methodology proposed by the Agency's witness was precisely that employed by the Respondent in locating its wells.

The record is clear that the Respondent, in locating its wells, did substantially more than merely "eyeball" the surface of the ground. The record reveals that they employed a competent and experienced consulting firm who has a long history of designing groundwater monitoring systems under RCRA and that consultant, in cooperation with the geologists employed for that purpose

by the State of North Carolina, actually located the wells. The record reveals that following some discussion between the Respondent, its consultant and the State of North Carolina, which under the law has authority to administer the RCRA program, approved the ultimate location of the monitoring wells prior to their drilling and installation.

Not only was the Agency's witness absolutely wrong in his assumption as to how the Respondent determined the ultimate location of the wells, but the record further reveals that the wells, in fact, performed admirably their anticipated function by immediately detecting the migration of some waste containing flow in the groundwater.

40 C.F.R. § 265.90(a), which the Agency alleges was violated by the Respondent, states as follows:

> "Within one year after the effective year of these regulations, the owner or operator of a surface impoundment, landfill, or land treatment facility which is used to manage hazardous waste must implement a groundwater monitoring program capable of determining the facilities impact on the quality of groundwater in the uppermost aquifer underlying the facility, except as § 265.1 and Paragraph C of this section provide otherwise."

Clearly the groundwater monitoring system installed by the Respondent met this requirement inasmuch as it did detect migration of certain of the waste constituents of concern from the waste treatment lagoons, and are therefore clearly downgradient of the lagoons.

40 C.F.R. § 265.91(a)(2) states, in part, that as to these wells:

> "Their number, locations, and depths must insure that they immediately detect any statistically significant amounts of hazardous waste or hazardous constituents that migrate from the waste management area to the uppermost aquifer."

The record reveals that the wells, as installed by the Respondent, satisfied this requirement as well. When faced with this apparent inconsistency in the Agency's position, the witness responded that, although it is

true that the wells did determine that some leakage from the lagoons had occurred, the fact that the wells detected such leakage may well be "accidental". On Page 123 of the Transcript the witness went on to explain this rather unusual interpretation stating: "Our stance is that without a definitive explanation of the hydrogeology, the detection monitoring is meaningless and in some cases, it would actually be gratuitous that you caught contaminations in the groundwater if you hadn't adequately defined the hydrogeology."

The witness went on to state that his concern was that, although the groundwater monitoring system had performed its primary function, in that it detected migration of the waste materials from the lagoons, the system was inadequate since it was unable to determine the actual specific direction and quantity of the flow involved. When asked to provide the record with some basis in the regulations for that proposition, the witness was unable to do so. During the course of the examination of this witness, some discussion of the purpose of a groundwater quality assessment program was had. The witness agreed that when there has been a detection by the existing groundwater monitoring system of migration of hazardous waste or waste constituents in the groundwater, a groundwater quality assessment plan must be prepared and ultimately implemented. Upon examination, the witness admitted that the concerns he had with the purported inadequacy of the existing groundwater monitoring system would, in all likelihood, be addressed in the second phase of a facility owner's responsibility in that a more intensive hydrogeologic examination would be made and additional wells would have to be drilled, monitored and sampled. The fact that this second phase requires a more intensive examination of the hydrogeologic factors surrounding a particular facility is borne out by the language of 40 C.F.R. § 265.93(a) which states that:

> "Within one year after the effective date of these regulations, the owner or operator must prepare an outline of a ground water quality assessment program. The outline must describe a more comprehensive groundwater monitoring program then that described in § 265.91 and § 269.92 capable of determining: (1) whether hazardous waste or hazardous waste constituents have entered the groundwater; (2) the rate and extent of migration of hazardous wastes or hazardous waste constituents in the groundwater; and (3) the concentrations of hazardous wastes or hazardous waste constituents in the groundwater." (Emphasis supplied.)

It is apparent to the undersigned that the witness seemed to feel that the groundwater monitoring system as initially designed and installed must accomplish more than the regulations say it must and that the specific parameters, which are apparently of some concern to the Agency, would be answered and described in more detail through the implementation of the required groundwater quality assessment plan and program.

This witness as well as another EPA witness took the position that inasmuch as the existing groundwater monitoring system is somehow technically ambiguous, it can not possibly form the basis for the development of a groundwater assessment plan. The logic of this assertion was never adequately explained in the record by either of these witnesses.

Consequently, I am of the opinion, from consideration of this entire record and the exhibits associated therewith, that the Agency has failed to demonstrate by logic, common sense or law that the groundwater monitoring system as installed by the Respondent was inadequate when examined in the light of the requirements of the regulations. This is particularly true when the Agency's primary witness on this subject testified that it is likely that the system as installed is, in fact, appropriate and adequate under the regulations but that since the data presented is capable of more than one interpretation that factor alone must somehow result in a violation of the regulations. This rather bizarre and twisted logic escapes the undersigned.

The next issue to be discussed involves whether or not the Respondent is entitled to an exclusion from the operation of RCRA to its particular waste. 40 C.F.R. § 261.4(b)(6)(i) states as follows:

> "Exclusions. ...(b) The following solid wastes are not hazardous wastes:
> (6)(i) Wastes which fail the test for the characteristic of EP toxicity because chromium is present or are isted in Subpart D due to the presence of chromium, which do not fail the test for the characteristic of EP toxicity for any other constituent or are not listed due to the presence of any other constituent, and which do not fail the text for any other characteristic, if it is shown by a waste generator or by waste generators that:
> (A) The chromium in the waste is exclusively (or nearly exclusively trivalent chromium; and
> (B) The waste is generated from an industrial process which uses trivalent chromium exclusively (or nearly exclusively) and the process does not generate hexavalent chromium; and
> (C) The waste is typically and frequently managed in non-oxidizing environments."

The circumstances giving rise to this particular exclusion, which is one of several presented in the above-cited Section, are explained in the original promulgation of this exclusion which appears in the Federal Register, Volume 45, No. 212, at pages 72035 through 72037, dated Oct. 1980. The Preamble to this regulation which appears on page 72035 of the above-cited Federal Register publication states:

> "We are concerned that the characteristic identifies as hazardous certain trivalent chromium-bearing wastes which are unlikely to create a substantial present or potential hazard to human health or the environment when mismanaged, imposing significant regulatory burden without achieving any statutory purpose. A temporary exclusion of this limited class of waste is needed to prevent this result.
>
> "We consequently will exclude temporarily from hazardous waste status certain chromium-bearing wastes."

The above-quoted regulation describes in some detail just exactly what a facility owner must prove in order to gain this exclusion for his facility.

The record is absolutely clear that at no point in its manufacturing and dyeing process does the Respondent employ any materials which contain hexavalent chromium. The record is equally clear that at no point in the entire wastewater treatment process does the Respondent add anything to its waste stream which would tend to convert the trivalent chromium, which it exclusively employs, to hexavalent chromium. Given the undisputed facts that the waste contains trivalent chromium exclusively (or nearly exclusively); that the waste is generated from an industrial process which uses trivalent chromium exclusively (or nearly exclusively) which process does not generate hexavalent chromium; and that the waste is typically and frequently managed in an non-oxidizing environments, one is initially at a loss to understand why the Agency determined that this Respondent was not entitled to the exclusion described in the regulations.

The answer to this question is found in Complainant's Exhibit No. 3, which is a letter from James H. Scarbrough, Chief of the Residuals Management Branch, EPA Region IV, to Mr. O. W. Strickland, Head of the Solid Waste Management Branch of the North Carolina Department of Human Resources, dated November 1, 1984. The Agency's position on this issue is found in Paragraphs 4 and 5 of that letter as follows:

> "The fact that there is chromium in the groundwater at the site above background and above drinking water standards is evidence that the chromium is in the mobile hexavalent form. This indicated there is more than a minimal of hexavalent chromium in the process and/or the waste is managed in an oxidizing environment.
>
> "The data submitted by the Company is not adequate to demonstrate the chromium is exclusively trivalent. But, that fact is irrelevant due to the groundwater contamination. The basis for the exclusion is primarily that trivalent chromium is immobile and will not leach into the environment. The groundwater contamination at the site indicates that chromium is leaching. Therefore, John Boyle and Company, Inc., does not qualify for the exemption at 40 C.F.R. 261.4(B)(6)(i)."

The scientific validity of this rather astounding conclusion was the subject of considerable testimony and evidence at the Hearing. The Agency's notion that the mere presence of chromium-bearing waste in the groundwater must lead inevitably to the conclusion that the waste is primarily in the hexavalent state was refuted by the two expert witnesses who testified on behalf of the Respondent at the Hearing. Although the presence of opposing expert scientific testimony is not usually, in of itself, a sufficient justification for discarding a scientific proposition, apparently strongly held by the other side,in this instance the Agency's scientific theory was also refuted by its primary expert witness on this very subject.

Dr. David Brown, an employee of the EPA at its Athens Laboratory since 1971, was offered by the Agency as a rebuttal witness to those scientific experts offered by the Respondent on the issue of whether or not the Respondent should be entitled to an exclusion under the regulations. After a rather lengthy discussion by this witness as to how it is conceivably possible that the exclusively trivalent chromium utilized by the Respondent could be converted to hexavalent chromium by the presence of maganese oxide which apparently is a common constituent of the naturally occurring soils in most portions of the United States, the witness was ultimately asked by the Court concerning the above-quoted language appearing in Mr. Scarbrough's letter as follows. The Court: "I gather then -- let me see if I can get a straight answer out of you. I'm not saying that your answers are not straight, it was just not really responsive to my question. My question is, I tend to read that sentence to suggest that any time you find chrome, total chrome in the groundwater, it must necessarily be hexavalent." The witness answers: "Now, that does not follow. There are other possibilities." By the Court: "Okay. So the extent that I have characterized that, you don't agree with that

conclusion. That it's always going to be hex." The witness responds: "No." The Court then said: "Okay. That's all I wondered. I got the impression that maybe you had something to do with that." (Referring to the language in Mr. Scarbrough's letter.) The witness: "That's an if, but not an answer only." The Court: "Sure, it's possible, but it's also possible that -- the mere fact that chrome is found doesn't necessarily mean that it has to be hex, it could be other forms of chromium." The witness: "Right."

Even absent this refutation of the Agency's theory by its own expert, the record, in its entirety, contains sufficient information for the Court to have discarded the Agency's conclusions,in any event.

The two expert witnesses which appeared on behalf of the Respondent on this question, who's credentials make them acceptable to the Court as experts in this field, uniformly testified that there are a variety of mechanisms that could account for the presence of the chromium constituent found in the groundwater in the trivalent form as opposed to the notion that if it is detected it must of necessity be in the hexavalent stage. This conclusion was also supported by the Agency's own expert witness.

Additionally, one need not rely on the opinion testimony of the experts in this matter to come to the conclusion that the Agency's scientific hypothesis is fatally flawed. The Respondent through it consultants subjected all aspects of the Respondent's waste stream to laboratory analysis to detect the absence or presence of hexavalent chromium. The results of this sampling effort and the subsequent laboratory analysis reveal that there is little or no hexavalent chromium in the raw materials used by the Respondent; in the process wastewater that leaves the facility and ultimately ends up in the treatment lagoons; in the wastewater contained in the lagoons or in the sediment sludge that ultimately is deposited at the bottom of the lagoons. Even more significant is the analysis which reveals that the groundwater

samples taken from the Respondent's monitoring wells shows hexavalent chromium to be absent or at least below detectable levels. This final analysis effectively refutes the Agency's hypothesis that some oxidation of trivalent chromium to hexavalent chromium must be occurring in the ground underlying the treatment lagoons. The Agency has never tested these samples nor performed any sampling or analysis of its own, so the analysis presented by the Respondent represents the best and only evidence on this question. There is evidence in the scientific literature which suggests that, under laboratory conditions, maganese oxide can convert trivalent chromium to the hexavalent stage, but apparently that phenomena has not taken place at the Respondent's facility. Additional support for the notion that the Respondent should be granted an exclusion for its wastewater appears in the above-cited Federal Register notice establishing the exclusion in the first place. On page 72036 of that notice, the Agency stated:

> "Finally, to assure that any trivalent chromium which migrates from the waste will not oxidize to the hexavalent state, we will require that the waste be managed typically and frequently in nonoxidizing environments. A non-oxidizing environment is one in which there is either a relative lack of oxygen or one which contains reducing agents sufficiently strong to cause reduction of the contaminent in question. These conditions ordinarily are present in landfills and surface impoundments." (Emphasis supplied.)

In that case, the Agency was addressing primarily those situations where the industrial facility in question uses hexavalent chromium in its process and through chemical reaction attempts to reduce it to the trivalent stage prior to discharge. Even in those situations, the Agency felt that a good case could be made for granting the exclusion under certain circumstances and the notion that a facility which uses exclusively trivalent chromium should be a strong candidate for exclusion is fairly accepted in the Agency's publication. On the same page, the Agency states:

> "We also believe that at present there is no adequate assurance that chromium bearing waste do not contain potentially harmful concentrations of hexavalent chromium unless the industrial process itself is trivalent chromium based." (Emphasis supplied.)

Throughout the Hearing and in its brief, the Agency made frequent reference to the fact that the total chromium found in the waste streams of the Respondent and in the laboratory analysis of the groundwater samples exceeded the drinking water standard for chromium which is 0.05. My examination of the regulations and the Act suggests that this standard may have little or no application to the Respondent's facilities since they were developed by the Agency for purposes of determining whether or not a particular activity constituted open dumping of a solid or hazardous waste and whether or not a sanitary landfill constituted the improper management of a hazardous waste. The Agency's use of this number as a criteria for determining whether or not hexavalent chromium is present in potentially dangerous concentrations is brought into question by the Agency's own publication, i.e., the Federal Register notice referred to above. On page 72036 of that Federal Register notice the Agency states:

> "We also contemplate the generators will demonstrate the absence of hexavalent chromium by using process chemistry information, i.e., showing that the industrial process generating the waste does not generate hexavalent chromium, so that hexavalent chromium will not be found or will be present only in minimal concentrations." (Emphasis supplied.)

The footnote associated with this statement states:

> "Hexavalent chromium concentrations below 5 milligrams per liter certainly will be considered minimal. This level is based on the maximum concentration level for hexavalent chromium to be contained in the amended characteristics of EP toxicity."

There apparently exists some confusion as to which of the two numbers mentioned above are appropriate in evaluating the waste of a particular Respondent or

producer since the Agency suggests that hexavalent chromium concentrations below 5 milligrams per liter are considered minimal on the one hand and the other suggests that the drinking water standard for chromium of 0.05 is important. A resolution of this particular problem is not crucial to the Court's conclusion in this matter since laboratory analysis reveals that hexavalent chromium, to the extent is even present in the groundwater adjacent to the Respondent's facility, is below the levels of detection.

As indicated above, the State of North Carolina has the authority to administer the RCRA program in that State in lieu of the Federal Government and that delegation was in place and operative at all times pertinent to this proceeding. Inasmuch as the Act requires that EPA notify a delegated state, prior to bringing an action, a recitation of the facts surrounding this process is felt to be appropriate.

Upon being notified by the State of North Carolina, in December 1983, that there was a potential that the treatment lagoons on the Respondent's property were subject to RCRA, a dialogue between the Respondent and the State of North Carolina insued which ultimately resulted in an agreement by the Respondent and the State of North Carolina that the Respondent would install a RCRA groundwater monitoring system surrounding its lagoons and a directive to that effect was issued by the State. For reasons not fully explained in the record, the Respondent did not accomplish this activity in the timeframe directed by the State and subsequent thereto an administrative order was issued to the Respondent by the North Carolina agency ordering it to immediately proceed to install and operate the groundwater monitoring system and take other steps required by the Act and assessed a $5,000 penalty on the Respondent for its failure to do so in a timely manner. The record reflects that the Respondent paid the $5,000 penalty to the State of North

Carolina and immediately proceeded to install the groundwater monitoring system which it now employs pursuant to the instructions of the State of North Carolina.

Not only did the Respondent install the groundwater monitoring system but it temporarily shut down its dyeing operating so it could remove all the sludge from the lagoons and have it shipped to an approved disposal site. It also removed all contaminated soil underlying the lagoons and lined the lagoons with an impermeable vinyl liner. Core samples of the underlying soil were analyzed to demonstrate that no soil remained which showed the presence of chromium in levels above drinking water standards. The Respondent installed pumps and now discharges its wastewater to the city sewer system and not to the adjacent stream, as done previously.

During the Hearing, the Court questioned EPA's primary witness as to exactly how the EPA determined that it should bring an action against this Respondent.

The witness was not particularly clear on exactly what transpired between EPA and the State of North Carolina on this question, but generally stated that as part of EPA's normal overview of delegated states operations, it reviewed a long list of RCRA facilities in the State of North Carolina and advised the State that they had problems with several of them. They asked the State to advise EPA as to what it intended to do relative to these various facilities. By letter dated August 16, 1985, addressed to Mr. James Scarbrough, Mr. William Meyer, Head of the Solid Waste Management Branch of the State of North Carolina, stated that he had reviewed the information submitted by EPA concerning proposed orders on RCRA groundwater facilities. In response to an EPA inquiry, Mr. Myers stated that there are several categories of facilities in the State and what the State intended to do with

each. In the first category, there are listed facilities where North Carolina proposes additional enforcement actions and one was listed thereunder. Category 2 was described as "facilities where North Carolina is currently undertaking enforcement actions or is addressing problems in an appropriate manner." Under that listing is the Respondent, John Boyle and Company, Inc., on Page 2 of that letter, which is part of Complainant's Exhibit No. 19, Mr. Meyers states as follows:

> "The short time frame for response dictated by EPA to the State places the State in a position of either allowing the EPA to proceed with the proposed actions or allocating scarce resources from all other hazardous waste activities. There must be a better method to which we can jointly agree that will allow North Carolina to operate our program in a manner EPA has previously authorized. The policies and procedures being implemented by EPA on enforcement issues appears to be a very abrupt departure from normal procedures and North Carolina has not been given adequate guidance or time to respond to these rapid changes." (Emphasis supplied.)

Apparently there was a follow-up to this letter to the State of North Carolina in which EPA advised the State as to which facilities they intended to take independent action on and apparently asked the State to provide EPA immediately with all information and documentation contained in the State's files. Obviously, the State of North Carolina was not particularly pleased at EPA's approach to the problem and on the first page of the letter Mr. Meyer's states to Mr. Scarbrough as follows:

> "In that response, this office offered a follow-up response which more fully justifies the State's actions at the facilities in question. There are two reasons for this: First, EPA's proposed orders do not take into account all the information available for each facility. This includes technical facts and the history and status of other State and EPA actions. Although this information was supplied to EPA early during the August 8th meeting and EPA has been provided copies of relevant documents, Mr. Lank's list of facilities for proposed orders failed to reflect any consideration of some of this information. Secondly, we feel that the State should provide a more comprehensive justification for the appropriateness of our actions at each facility."

The State then, as they agreed, enclosed a detailed summary of the facilities in question and included in that list was the Respondent, John Boyle and Company, Inc. On Page 2 of this letter, which is also part of Complainant's Exhibit No. 19, Mr. Meyers tells Mr. Scarbrough that:

> "As you know, during the past six months, we have spent a considerable amount of time assisting EPA in fulfilling their RCRA over-sight responsibilities. This groundwater exercise alone is producing a substantial drain on our resources. Furthermore, much of that time has been spent by my groundwater staff, thus diverting them from substantive work which would protect the public health and produce measurable environmental results."

Mr. Meyers then goes on to advise EPA that although they wish to be cooperative, the funds that EPA provides the State can not be used for the purposes which this present exercise envisions. On Page 3 of the letter, Mr. Meyers states that:

> "This exercise has also concerned me because it raises issues that potentially would have a negative effect on the ability of the State to implement an authorized RCRA program, and in particular, on my ability to exercise justified enforcement discretion based on site-specific circumstances in compliance and enforcement strategy in North Carolina, rather than inferred priorities by EPA.
>
> "If EPA carries through with the proposed orders, you must be prepared to follow through in the years to come, with adequate compliance oversight and technical review and guidance necessary to meet the requirements of the orders. I must also point out that these actions will tend to seriously undermine the integrity and respect our program has earned in North Carolina; and these orders, if issued, will have a substantial negative effect in terms of program implementation. The approach currently utilized by EPA appears to have only short-term goals and view and no regard to long-term program stability or credibility."

Mr. Meyers proceeds on Page 3 of the letter with a rather diplomatic reflection of his displeasure with EPA's activities in this regard and, on Page 4, states that:

> "Also, as a vast majority of North Carolina's groundwater facilities monitoring systems have successfully detected contamination, we question EPA's allegation of an inadequate system. I would appreciate technical justification for these violations for the above-listed facilities, given the fact that the monitoring systems performed their intended function." (Emphasis supplied.)

It is obvious from Mr. Meyers' letter that the State of North Carolina has the same view of EPA's action in this regard as does the Court. The letter also suggests that for reasons not appearing in this record, EPA has in recent months apparently changed its tactics in dealing with State delegated programs and has generated a flurry of litigation especially in the area of groundwater monitoring systems. Inasmuch as Congress has proclaimed in almost all of the environmental laws which it has enacted to date, that the primary responsibility for enforcing their terms should ultimately rest with the State governments, EPA's actions in this particular case show a rather callous disregard for maintaining a strong Federal-state relationship, which the Administrator of EPA has, on many occasions, stated to be a high priority of his administration.

One can only surmise that EPA's recent vigor in bringing rather questionable cases under RCRA has something to do with the so-called "bean count" that middle-level EPA supervisors must satisfy in order to retain their current grade level and perhaps participate in future salary increases or bonuses. This rather unattractive scenario is exacerabated by the present system within EPA whereby the program employees apparently have the final word as to whether or not to bring a particular action despite the fact that these decisions usually involve legal questions on which Regional Counsel personnel should have the final say. Unfortunately, the traditional roles of program technical personnel vis-a-vis legally trained Regional Counsel personnel have been blurred in recent years to the end that sufficient legal

input has not been obtained prior to the issuance of complaints, not only under this Act, but others. Hopefully, the Court's decision in this matter will spur Regional Counsels, not only in this Region, but throughout the Nation to re-evaluate their position, vis-a-vis the program personnel in the area of who shall have the final decision on whether or not sufficient legal facts exist to justify the filing of a complaint and the bringing of an action.

Conclusions

As to the alleged violations which form the primary thrust of the Complaint, I am of the opinion that, for the reasons above-cited, the Agency has failed to demonstrate that the groundwater monitoring system installed and operated by the Respondent, John Boyle and Company, Inc., violates the cited provisions of the regulations. Therefore, the Complaint must be dismissed.

As to the exclusion question, the record in its entirety suggests that this decision resides within the authority granted to the State of North Carolina by EPA. Inasmuch as the State of North Carolina relied on the advice given to it by EPA, as evidenced by Mr. Scarbrough's letter cited above, in its decision on an informal basis to deny the exclusion to John Boyle, it is suggested that, given the Court's conclusions as to the scientific efficacy of the Agency's reasons for denying that exclusion, the State is urged to reconsider its decision in light of the record and evidence presented in this case. If it turns out to be the case that the State of North Carolina does have this authority, copies of the transcript and the exhibits associated therewith will be made available to the appropriate State of North Carolina officials upon their request.

If the ultimte decision as to whether or not to grant the exclusion rests with EPA, I am of the opinion that such exclusion should be granted. Although counsel for the Complainant has suggested, both in the Hearing and its post-hearing brief, that this Court lacks the authority to rule on this issue, no regulatory or statutory authority is cited to support that notion.

On the contrary, the Agency in a recent case titled Arrcom, Inc., Drexler Enterprises, Inc., et. al., RCRA Appeal 86-6, stated that:

> "Pursuant to these rules, the presiding officer at the hearing, has the authority to adjudicate all issues therein and to issue an initial decision which shall conclude a recommended civil penalty assessment if appropriate and a proposed final order."

Delegation 1-37 of the Agency's delegations manual confirms that the Administrative Law Judge shall:

> "Hold hearings and perform related duties which the Administrator is required by law to perform in proceedings subject to 5 U.S.C. 556 and 557."

In that decision, the Administrator also cited in support for this conclusion the same case cited to the Court by counsel for the Complainant in support of his proposition that the Court did not have such authority. In the Administrator's decision in the Arrcom case, it was stated, quoting from the Louisville Gas case:

> "In short, it is clear that the presiding officer is empowered to make decisions for the Agency. Therefore, as part of the decisionmaking unit of the Agency, the presiding officer, unlike a reviewing court, is free to substitute his judgement for that of a permit issue or the facts when circumstances warranted."

Then the Administrator proceeds to say that:

> "The quoted language is equally applicable to the role of the presiding officer under RCRA compliance hearings."

In summary then, I am of the opinion that if the authority to grant the exclusion rests with the State of North Carolina that agency is urged to re-evaluate the advice it obtained from EPA and give serious consideration to granting the exclusion to the Respondent herein. If such authority resides within the EPA, I am of the opinion that the exclusion should be granted based upon the evidence produced in this Hearing. A careful reading of the Agency's above-cited Federal Register Notice suggests that it was the EPA's intent to grant these exclusions to deserving applicants in order to obviate the burden which the regulations would ordinarily place on such facility owners should they be able to demonstrate that they come under the criteria listed. There is on the other hand nothing in the Agency's publications which suggests that the simplistic approach adopted by Region IV to the effect that if some chromium is found in the groundwater that fact, in and of itself, operates to deny the applicant the benefits established by the exclusion is warranted. Although I am sure that the approach taken by Region IV in this regard provides an easy decision-making procedure, such a proposition does not bring credit to an Agency vested with the authority of the Federal Government to regulate these activities.

Given the highly questionable theory upon which the EPA based this case, it is suggested to counsel for the Respondent that it may wish avail itself of the provisions contained in the Equal Access to Justice Act found in 5 U.S.C. § 504. This Act provides that certain parties who prevail over the Federal Government in litigation are entitled to an award of attorney's fees and expenses unless the Government can demonstrate that its position was substantially justified or special circumstances would make an award unjust. The expenses that may be awarded include expert witness fees and the cost of studies or tests necessary for case preparation.

Many Federal agencies have adopted procedures for the processing of applications for award in administrative proceedings under the Act and EPA is one of these agencies. The procedures for filing an application under the Act in cases heard by EPA are found in 40 C.F.R. Part 17. Ordinarily it is not the province of the Court to suggest such activity, however, the Act itself is of a rather recent vintage and its existence is very likely unknown to private practitioners in small communities in the United States who do not deal on a regular basis with administrative practices before the Federal Government. Additionally, it should be noted that nothing herein stated should be interpreted as an expression by this Court of the validity of any claim, under the Act, which the Respondent may file in the future.

ORDER[2]

For the reasons herein stated, I am of the opinion that the Complaint and Compliance Order, dated October 11, 1985, issued against the Respondent, John Boyle and Company, Inc., should be and is hereby dismissed.

As to the exclusion issue, it is further ordered that if EPA has the authority to grant such exclusion, it is hereby granted. If such authority is vested with the State of North Carolina, it is urged to grant it also.

DATED: July 23, 1986

Thomas B. Yost
Administrative Law Judge

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[2]Unless an appeal is taken pursuant to the rules of practice, 40 C.F.R. 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. See 40 C.F.R. 22.27(c).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

JUL 25 P12:16

IN RE	)	
	)	RCRA-85-69-R
JOHN BOYLE & COMPANY, INC.	)	
	)	
Respondent	)	

CERTIFICATION OF SERVICE

In accordance with § 22.27(a) of the Consolidated Rules of Practice (40 C.F.R. Part 22), I hereby certify that the original of the Initial Decision by Hon. Thomas B. Yost was served on the Hearing Clerk (A-110), U.S. Environmental Protection Agency, 401 "M" Street, S.W., Washington, D.C. 20460, along with the official Agency record and file of this proceeding (service by certified mail return receipt requested); and that true and correct copies of the foregoing Initial Decision were served on the parties as follows: Reuben Bussey, Esquire, U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, Atlanta, Georgia 30365 (service by hand-delivery); Joseph A. Rhodes Jr., Esquire, Haynsworth, Baldwin, Miles, Johnson, Greaves and Edwards, P.A., Post Office Box 10888, Greenville, South Carolina 29603; and O. W. Strickland, Head, Solid and Hazardous Waste Management Branch, North Carolina Department of Human Resources, Post Office Box 2091, Raleigh, North Carolina 27602-2091 (service by certified mail return receipt requested).

Dated in Atlanta, Georgia this 23rd day of July 1986.

Sandra A. Beck
Regional Hearing Clerk