

DECISION AND ORDER

This administrative complaint and compliance order arises under §3008(a) of the Resource Conservation and Recovery Act (RCRA), (the Act), 42 U.S.C. §6928(a), and regulations promulgated pursuant to authority contained in the Act.

The complaint charged respondent with numerous violations of the Act and regulations. However, only the following matters were addressed by the parties: (1) whether respondent had failed to maintain at least two feet of freeboard in the surface impoundments used in its wood treatment facility, as required by 40 CFR §265.222 (paragraph 20-A of the complaint); (2) whether respondent had failed to maintain protective cover to minimize water erosion and to preserve natural integrity around the surface impoundments as required by 40 CFR §265.31 (paragraph 20-B of the complaint; (3) whether respondent had failed to minimize the possibility of releases of hazardous wastes or hazardous waste constituents to soil and surface waters as required by 40 CFR §265.31 (paragraph 20-C of the complaint); (4) whether respondent failed to fund fully a closure trust fund or other financial instrument to equal the closure cost estimate of \$94,600, as required by 40 CFR §265.143 (paragraph 15 of the complaint); (5) whether or not respondent failed to develop a cost estimate for post-closure care as required by 40 CFR §265.144 (paragraph 17 of the complaint); and (6) whether respondent failed to demonstrate financial assurance for post-closure care as required by 40 CFR §265.145 (paragraph 19 of the complaint). Complainant seeks a total penalty of \$10,999 for (4), (5), and (6), the closure/post closure matters; for

the two alleged surfact impoundment violations, a total of \$25,000 in civil penalties is sought.

a. Freeboard and Protective Cover Violations

Respondent has been in the business of producing utility poles treated with creosote and pentachlorophenol since 1972. (TR2 200) Shortly after purchasing the facility, respondent constructed a storage pond for creosote waste and another pond for pentachlorophenol waste. (TR2 202) The ponds are used to store sludge that results from the treatment process, which can then be reused. This sludge is a listed hazardous waste, 40 C.F.R. §§261.20-24, designated K001.

Respondent also deposits water produced in the treatment process in these ponds. The K001 sludge, defined as a bottom sediment, settles at the bottom of the ponds. The process water accumulates at the top. Complainant concedes that process water is not considered hazardous.

On December 20, 1983, Charles Fleming, Alabama Department of Environmental Management (ADEM), and Alan Farmer, EPA, toured the respondent's facility. (CX 3) On that date, violations of the regulations involving the freeboard and protective cover were noted in connection with the ponds. (Id.) Their report states that "[s]urface impoundment had less than 2 feet of freeboard" and, after citing the regulation that requires earthen dikes to have a protective cover such as grass, shale or rock to prevent erosion, states that "(N)one existed for the 2 surface impoundments." (Id.) In addition, a report of a May 1, 1985, EPA inspection noted less than two feet of freeboard and unmaintained dikes. (CX 8) These two alleged violations apparently are the basis for the allegation that respondent failed to minimize the possibility of release of hazardous waste to soil and

surface waters in violation of 40 CFR §265.31.

b. Closure and Post-Closure Bond Violations

Section 3005(a) of RCRA requires the Administrator to promulgate regulations requiring each person who owns or operates a hazardous waste treatment, storage or disposal facility to have a permit issued under RCRA §3005, 42 U.S.C. §6925. Those regulations are set forth at 40 C.F.R. §§270.10, et seq. The permit process is designed to facilitate the orderly phase-out of interim status facilities by either (1) the upgrading of existing facilities to meet the substantive permit standards of 40 C.F.R. Part 264, or (2) the closure of such facilities in a manner which complies with the closure permitting standards of 40 C.F.R. Part 264.

Section 3005(e) of the Act, 42 U.S.C. §6925(e), provides for an interim permit status which allows hazardous waste treatment, storage or disposal facilities in existence as of November 19, 1980, to continue to operate provided the owner or operator of such a facility complies with RCRA §3010, 42 U.S.C. §6930, and submits a permit application to EPA. Such a facility is said to have achieved "interim status."

Until an interim status facility either receives a final RCRA permit requiring compliance with the 40 C.F.R. Part 264 operating standards, or closes in accordance with the 40 C.F.R. Part 265 or 264 closure standards, the facility must comply with all applicable 40 C.F.R. Part 265 substantive standards. As such, since respondent was in business and storing K001 hazardous waste, it was subject to the financial requirements of Subpart H to Part 265 as of November 19, 1980.

40 CFR §265.143 requires that an owner of a facility subject to that section must establish financial assurance for closure of the facility by establishing a closure trust fund, or by obtaining a surety bond or irrevocable standby letter of credit which conform to the requirements of that section. The closure trust fund must be funded with an amount equal to the current closure cost estimate.

Payments into the fund are to be made in equal amounts "by the owner or operator over the 20 years beginning with the effective date of these regulations or over the remaining operating life of the facility as estimated in the closure plan, whichever period is shorter," 40 C.F.R. §265.143(a)(3). Sections 264.142(b) and 143(a)(3) provide that payments are due within thirty days of each anniversary date on which the first closure cost estimate was due.

Respondent established a closure trust fund in September, 1983. (TR2 76 219) The original estimate of the closure cost was \$20,000; respondent deposited one-tenth of that amount, or \$2,000, in January, 1984. (TR2 220) Later that year, respondent increased its estimated closure cost to \$66,300. (TR2 76, 220) On September 4, 1984, within 30 days of its anniversary date, respondent deposited \$4,524, for a total of \$6,637.90, or roughly one-tenth of the estimated closure cost at that time. (TR2 76, 220; RX 7) Respondent's general manager testified that payments reflecting one-tenth of the estimated closure cost rather than the one-twentieth that 40 CFR §265.143(a)(3) would seem to require, were were made because of ADEM requirements. (TR2 200)

In March, 1985, respondent revised its estimated closure cost to \$94,600. (TR2 79, 221) Respondent made no more payments into the fund between March,

1985 and the time the complaint issued on August 15, 1989.

40 CFR §265.145 provides that an owner or operator of a facility with a hazardous waste disposal unit must establish financial assurance for post-closure care of the disposal unit by establishing a post-closure trust fund, obtaining a surety bond, or obtaining a irrevocable standby letter of credit which conforms to the requirements of that section. Respondent had not established a post-closure trust fund as of the time the complaint issued.

DISCUSSION AND CONCLUSIONS

a. Freeboard and Protective Cover Violations

Mr. Alan Farmer, Chief of the south unit of the Waste Compliance Section at EPA, testified for complainant that he had observed less than two feet of freeboard on respondent's two surface impoundments during a December 20, 1983, inspection of the facility (TR2 101, 108) Mr. Farmer testified that, in his opinion, the freeboard was only about three to four inches. (Id).

Respondent points out, and Mr. Farmer's testimony confirms, that the freeboard was never actually measured by the EPA. (TR2 109) Mr. Farmer stated that no measurements were taken during his visit because he questioned the integrity of the dikes and did not want to fall into the impoundments. (Id.)

Although Mr. Farmer acknowledged he did not personally measure the freeboard to determine whether it was less than two feet, his testimony that there was less than two feet of freeboard on the ponds, based upon his personal observations during the December 20, 1983 visit, is credible. In addition, his estimate of the actual amount of freeboard, three to four inches, is so far

below the two feet requirement that it is unlikely that he could have miscalculated by so much. Further, an report from a 1985 inspection (CX 8) also indicates that there was insufficient freeboard. Accordingly, it will be found that complainant has established that there were less than two feet of freeboard between the berm of the ponds and the surface of the water.

Respondent argues that since process water is not considered a hazardous waste under the RCRA regulations, freeboard measurements should be taken not from the berm to the surface of the process water, but from the berm through the water to the level in the pond where the K001 hazardous waste has settled. Following this reasoning, there were more than two feet of "freeboard" around the ponds. This ingenious argument has momentary appeal, until the language of the regulation is examined and common sense catches up.

Respondent's argument on this point must be rejected for several reasons. First, the definition of "freeboard" at 40 CFR §260.10 provides for measurement to the surface of the waste, not to the surface of the hazardous waste, in an impoundment:

"Freeboard" means the vertical distance between the top of a tank or surface impoundment dike, and the surface of the waste contained therein. .

While complainant does not argue that process water here is a hazardous waste, the definition does not contemplate that the measurement may be to the level of the hazardous waste. If that had been the intent of the definition, nothing could have been more simple than express that intention, and it is not reason-

able to suppose that the distinction has simply been overlooked. 1/ Further, even if a measurement to the hazardous waste were intended in the "freeboard" definition, and even if the process water here is non-hazardous before it goes into the pond, it cannot be found that the process water and the K001 are static and never mix.

The provisions of the 40 CFR §265.222(a), which require at least two feet of freeboard between the berm and the surface of the waste in the impoundment, may also be noted, and must be construed with the definition of "freeboard" (40 CFR §260.10):

A surface impoundment must maintain enough freeboard to prevent any overtopping of the dike by overflowing, wave action or storm. Except as provided in paragraph (b) of this section, there must be at least 60 centimeters (two feet) of freeboard. 2/

Safeguarding against overflowing an impoundment necessarily means preventing any waste from flowing over the top. The regulation refer only to the entire content of the impoundment, for it is the entire content that could conceivably overtop the berm under certain circumstances. The regulation does not

1/ It is noted that "solid waste," as opposed to "hazardous waste," is defined at 40 CFR §261.2.

2/ Paragraph (b), referred to in paragraph (a) of 40 CFR §265.222 provides that a freeboard of less than 60 centimeters may be maintained if the owner or operator obtains certification by a qualified engineer that alternate design features or operating plans will, to the best of his knowledge and opinion, prevent overtopping of the dike. The certification, along with a written identification of alternate design features or operating plans preventing overtopping must be maintained at the facility. Nothing in this record suggests that respondent relies upon this exception to paragraph (a), or that such certification was obtained.

make sense if construed in a manner that allows freeboard measurement to the level of the hazardous waste. Accordingly, it must be found that respondent violated 40 C.F.R. §265.222 by failing to maintain at least two feet of freeboard on the creosote and pentachlorophenol surface impoundments.

With respect to the alleged failure to maintain a protective cover to minimize water erosion, respondent takes the position that a sufficient cover -- a pit-run gravel cover, was in place at the time of the inspection and before the complaint issued.

John Steiner, Enforcement Coordinator for the State of Alabama in the waste compliance section of the EPA at the time the complaint in this case was issued, and who drafted the complaint (TR1 47), acknowledged that properly applied pit-run gravel would be an allowable cover pursuant to 40 C.F.R. §265.223. (TR2 54) Mr. Farmer agreed with this statement. (TR2 129-30) Mr. Farmer also testified that he recalled seeing loose gravel on the dikes during the December 20, 1983 visit, TR2 129, and acknowledged that CX 11A, a photograph of respondent's facilities taken before the complaint was filed, showed gravel on the dikes. (TR2 129-30)

Since complainant's witness acknowledges that pit-run gravel, if applied properly, would be an acceptable cover, and since the record shows that gravel was spread around the dikes, the only issue is whether the gravel was applied properly. Complainant asserts that there was evidence of erosion on the dikes, the very occurrence a protective cover is intended to prevent; therefore, according to complainant, gravel could not have been properly applied. Complainant's evidence on this point, however, is limited to Mr. Farmer's testimony. After

agreeing that CX 11A accurately represents what he saw on December 20, 1983, Mr. Farmer was less certain that there had in fact been erosion. He testified that he saw erosion in the photograph (CX 11A), but then refers to the inside edge of the impoundment, as shown in the photograph, by saying that it "could have very well been eroded. . ." (TR2 130) When asked whether the photograph revealed anything to suggest that the integrity of the dike was at risk, he responded that it did not. (TR2 at 131) Mr. Farmer further questioned the integrity of the dikes by testifying that he was afraid to walk up on them during his December 20, 1983 visit. (TR2 at 128-29) However, respondent's general Manager Dr. John Ball, another witness for respondent, testified that they had driven trucks and jeeps onto the dikes on several occasions, TR2 180-81, 218. Nothing in the record casts doubt upon this testimony. Mr. Farmer's testimony is not sufficiently certain on the erosion point to establish a violation of 40 CFR §265.223, even if it could be found that evidence of erosion necessarily means that the gravel cover was improperly applied. 3/

b. Closure and Post-Closure Bond Violations.

With respect to complainant's allegation that respondent failed to maintain a fully funded closure fund, respondent maintains that as of the date of the complaint it was in full compliance with the regulations. The only witness for

3/ It is noted again that respondent was charged with violations of 40 CFR §265.31, failure to minimize the possibility of release of hazardous waste to soil and surface waters; it is assumed that the inadequate freeboard and protective cover allegations go to this charge. No other evidence in support of the §265.31 charge was offered, and nothing in briefs or arguments referred to it. Accordingly, findings and conclusions relating to protective cover and inadequate freeboard will dispose of the 40 CFR §265.31 charge.

complainant on this point conceded that respondent was in compliance with the requirements on the date of its last deposit, September 4, 1984 (TR2, 78-80)

Respondent argues that since its revision of the estimated closure cost (to \$94,600) took place in March, 1985, its next payment into the trust fund was not due until September 30, 1985, thirty days after the anniversary date of the creation of the trust fund. Consequently, respondent argues, there was no violation of 40 CFR §265.143. Complainant's witness did not present any affirmative evidence as to the alleged violations. He testified that another EPA official told him that respondent had not adequately funded its closure trust fund (TR2,24-25). The other official, however, was not called to testify at the hearing. Moreover, when he was questioned about the alleged violations, complainant's witness could not provide details and repeated that he had relied upon the other EPA official. Complainant's witness had personal knowledge of a "Part B call" and a letter sent by ADEM in February, 1985 (TR 2, 79). At that time, complainant's witness testified, respondent had to fund the entire trust account (Id.) However, the correspondence in question was not introduced into evidence by complainant, and so cannot be considered. 4/ Indeed, the only documentary evidence of record concerning the closure fund was submitted by respondent, and is dated after the date upon which the complaint issued.

Accordingly, there is no evidence in the record to support complainant's allegation that respondent violated 40 CFR §265.143, inasmuch as simple asser-

4/ The documents in question were included in the pretrial exchange between the parties as complainant's proposed exhibits 14 and 19. However, they were not offered into evidence, TR1, 16.

tions by persons having no personal knowledge of the facts is insufficient evidence upon which to base a finding of violation. In the absence of evidence to the contrary, respondent's assertion that it was under no obligation to make further payments into the account until September 30, 1985, (after the complaint was filed), is plausible. It will be found, therefore, that complainant did not establish that respondent violated 40 CFR §265.143 by failing to fund fully a closure trust fund in violation of 40 CFR §265.143.

With respect to the alleged violation of 40 CFR §265.145 (failure to maintain a post-closure trust fund), respondent argues that it was planning to make "clean closure" until the time of the complaint, and, as such, was not required to have a post-closure fund. Complainant's witness states that, in "clean closure," the facility removes all contamination to one of three levels: (1) background levels; (2) drinking water standards; or (3) an alternative concentration plant. The latter is a level accepted by USEPA upon determining the amount of contamination is low, and that the cost of completely removing the contamination would be prohibitive (TR2, 82). Generally, however, "clean closure" consists of removing any contamination (Id), for which no post-closure bond is required (TR2, 81-82). Complainant's witness testified that respondent was on notice before the complaint issued that clean closure was thought not to be feasible for its facility and had been so informed in February, 1985, by letter from ADEM (TR2, 85-86). Further, complainant's witness stated that the "Part B call" discussed the need for a post closure plan. As noted above, however, such documents are not in evidence, and, without them, there is no direct evidence that respondent knew it could not make a clean closure. Further, the only documentary ev-

dence introduced on this point was dated after the date on which the complaint issued, RX 8. this point was dated after the date of the complaint (RX 8). Under these circumstances, and where no reason appears for the lack of pre-complaint documentary evidence to establish this alleged violation where such evidence existed, testimony alone as to the position taken by ADEM is insufficient to establish the violation. Accordingly, it must be found that respondent did not violate 40 CFR §265.143.

By the same reasoning, respondent will be found not to be in violation of the allegation that no cost estimate for post closure-care was developed. 5/

Penalty

Complainant sought a \$25,000 penalty for violation of 40 CFR §265.222, failure to maintain two feet of freeboard. The penalty calculation was based upon the belief that the failure to observe this regulation presented a major potential for harm and is a major deviation from regulatory requirements, TR2-57. It is the highest allowable fine for this violation, Id. Complainant's witness testified that the lack of freeboard has a major potential for harm because of the increased chance of spillage, the proximity of the area to the waters of the United States, and the area's tendency to receive large amounts of rainfall. Further, complainant asserts that the freeboard violations was noted not only during the December 20, 1983, inspection, but noted

5/ Respondent states in its brief that it has developed a post-closure care cost estimate of \$30,000. Respondent further states that it presently has \$8000 in a closure fund which it will transfer to a post-closure fund, to be supplemented with additional payments totalling \$22,000.

again in the May 1, 1985, report of another inspection. Under these circumstances, it is determined that the penalty calculation for this charge is reasonable and will be accepted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Stallworth Timber Company, Inc. owns and operates a wood treating facility which utilizes or has utilized creosote and pentachlorophenol as part of its wood treating process, located on Main Street, Beatrice, Alabama.
2. Respondent submitted to EPA in a timely manner a notification of hazardous waste activity and Part A of its permit application as required by §3010 of RCRA, 42 U.S.C. §6930 and achieved interim status under RCRA §3005(e), 42 U.S.C. §6925(e). In its notification, respondent stated that its facility included two surface impoundments which used to manage the hazardous waste generated by its pentachlorophenol and creosote processes.
3. Respondent failed to maintain at least two feet of freeboard, as that term is defined at 40 CFR §260.10, in the pentachlorophenol process and the condenser cooling water ponds as required by 40 CFR §265.222.
4. As an owner or operator of an existing hazardous waste management facility at which hazardous waste was generated, treated, stored, or disposed of, respondent was subject to the standards applicable to generators, treaters, storers, and disposers of hazardous waste as found at 40 CFR Parts 260-265.
5. By failing to maintain at least two feet of freeboard, as that term is defined at 40 CFR §260.10, respondent violated RCRA §3004(a), 42 U.S.C. §6924(a),

and 40 CFR §265.222. A penalty of \$25,000 is hereby assessed for this violation of the Act and regulations.

6. Complainant's evidence did not establish violations of the protective cover provisions of 40 CFR §265.223, or 40 CFR §265.143, §265.144, or §265.145 (funding, cost estimate, and financial assurance provisions). Therefore, since it cannot be concluded that respondent violated these provisions as charged in the complaint, it is concluded that respondent did not violate such provisions.

ORDER

Within thirty (30) days after receipt of this order, respondent shall have modified the surface impoundments, if it has not already done so, so as to ensure that at least two feet of freeboard are maintained, as required by 40 CFR §265.222(a).

A civil penalty of \$25,000 is assessed against respondent for violations of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, and regulations promulgated pursuant thereto. Respondent Stallworth Timber is hereby ordered to pay within (sixty) days from date of service of this order a civil penalty in the sum of \$25,000. Payment shall be by certified or cashier's check made payable to the Treasurer, United States of America, and mailed to: Regional Hearing Clerk, U. S. Environmental Protection Agency, Region IV, Post Office Box 100142, Atlanta, Georgia 30384.



J. F. Greene
Administrative Law Judge

Washington, D. C.
September 29, 1989

CERTIFICATE OF SERVICE

I hereby certify that the Original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on Oct. 6, 1989.

Shirley Smith
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Secretary to Judge J. F. Greene

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