PPC 9523.1984(10)

PENALTIES FOR FAILURE TO SUBMIT A COMPLETE AND ADEQUATE PART B APPLICATION

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

DEC 18 1984

MEMORANDUM

SUBJECT: Recent Clarifications of RCRA Authorities

FROM: Peter Guerrero
Branch Chief
Permits Branch (WH-563)

TO: Section Chiefs
Regions I-X

The attached documents clarifys your authority in two important aspects of the RCRA permit program. First, you will find a decision issued by the Chief Judicial Officer in the case of City Industries, Inc. That decision reversed the ALJ's holding that EPA lacks the authority to assess penalties under Section 3008 of RCRA for failure to submit a complete RCRA permit application.

The second attachment is a technical change, announced in the Federal Register, which clarifies our authority to apply Part 265 standards until closure and post closure responsibilities are fulfilled. Previously, the wording of §265.1 implied that once a facility's interim status was terminated the facility would no longer have to meet §265 interim status standards, i.e. closure, post closure, and financial responsibility. However, EPA has the statutory authority under Section 3004 to enforce the Part 265 standards at facilities which no longer have interim status. The revisions to §265.1 makes it clear that Part 265 requirements apply to RCRA facilities until either a permit is issued or until all applicable Part 265 closure and post closure responsibilities are fulfilled.

Attachments

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV
345 COURTLAND STREET
ATLANTA, GEORGIA 30365

MEMORANDUM

DATE: November 29, 1984

SUBJECT: Administrator's Decision Regarding Authority Under RCRA Section 3008 to Assess Penalties for Failure to Submit a Complete and Adequate Part B Application

FROM: James H. Sargent
Regional Counsel, Region IV

TO: Lee Thomas (WH-562A)
Courtney Price (LE-133)
Lisa Friedman (LE-132S)
Regional Counsels
Regions I-III and V-X

Attached is a copy of the decision issued by the Chief Judicial Office on November 21, 1984 in the case of City Industries, Inc., Docket No. 83-160-R-KMC. That decision reversed the ALJ's holding that EPA lacks the authority to assess penalties under Section 3008 of RCRA for failure to submit a complete and adequate Part B RCRA permit application. This affects many pending enforcement cases in the regions and reaffirms our authority to seek penalties for deficiencies in Part B RCRA permit applications.

Attachment

cc: RCRA/CERCLA Team Leaders

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of	)	
	)	
City Industries, Inc.	)	RCRA (3008)
	)	Appeal No. 83-4
Respondent	)	
	)	
RCRA 83-160-R-KMC	)	
	)	

ORDER

This appeal is from an order of an Administrative Law Judge (presiding officer) dismissing an administrative complaint brought against City Industries, Inc. (respondent). 1/ In that order the presiding officer held that it was inappropriate to assess a civil penalty against respondent for its alleged failure to submit "Part B" of its RCRA permit application. 2/ For the reasons stated below, the initial decision is reversed and this proceeding is remanded to the presiding officer for further proceedings consistent with this order.

1/ 40 CFR §22.20(b) provides that such an order constitutes an initial decision. An initial decision is appealable to the Administrator or his delegates pursuant to 40 CFR §22.30.

2/ The Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. §6928(a)(I) et seq., requires any person who owns or operates a hazardous waste management (HWM) facility to obtain a RCRA permit from the Agency. Pursuant to Agency regulations, owners or operators of facilities in existence on November 19, 1980, are allowed to continue in operation, pending the Agency's final permit determination, if, among other things, they submitted Part A, and subsequently, Part B of the RCRA permit

application. See notes 4 and 5, infra, for descriptions of "Part A" and "Part B" of the RCRA permit application.

Background

Respondent owns and operates a hazardous waste storage facility which was doing business in Orlando, Florida on November 19, 198. 3/ RCRA regulations provide for a bifurcated permit application procedure for facilities in existence on that date, i.e., so called "existing facilities." An owner of an existing facility is required to submit Part A of its permit application first. 4/ Subsequently, at the Agency's request, the owner of such a facility is required to submit Part B of its permit application. 5/

Respondent timely submitted Part A of its permit application and, accordingly, attained "interim status." 6/ However, when

3/ Although respondent is no longer receiving hazardous waste at this facility, it continue to store hazardous waste for some period of time thereafter and accordingly was required to have a permit. See 40 CFR §270.1 (1983). See EDF v lamphier, 714 F.2d 331, 335 (4th Cir. 1983). The record does not show whether respondent is currently storing hazardous waste.

4/ Part A must contain the information listed in 40 CFR §270.13 (1983). This includes a description of the hazardous waste activities which are conducted at the facility, the name and location of the facility, certain information identifying the facility's operator and owner, a scale drawing of the facility, a description of what processes will take place at the facility, e.g., treatment, storage, disposal, the design capacity of these items, identification of the hazardous waste to be handled at the facility, and a topographic map.

5/ Part B must set forth information relating to a facility's operational procedures, such as security arrangements, closure plan, flood plan, detailed plans for ground water monitoring, etc. 40 CFR §§270.14-29 (1983). The information required to be submitted as Part B of the permit application is more extensive and detailed than that required for Part A.

6/ When a Part A application for a facility is submitted to

the Agency (together with preliminary notification of hazardous waste activity required by RCRA §3010), the facility is authorized to operate on an interim status basis, i.e., pending the Agency's final decision on the facility's permit application.

EPA Region IV subsequently requested Part B of the application, the materials which respondent submitted were unacceptable to the region. 7/ Consequently, the Region filed an administrative complaint against respondent charging that it violated 40 CFR §270.10(e) which requires an existing facility to submit Part B of its permit application when so requested by the Agency. A civil penalty of $5,000 was sought in the complaint for this alleged violation.

In its answer the to complaint, respondent contended that its Part B application was adequate and the Region should have accepted it. Alternatively, respondent contended that "failure to submit [an adequate] Part B application is not an action recognizable under the Resource Conservation and Recovery Act for purposes of assessment of civil penalties." (Emphasis added.) The presiding officer agreed with this latter contention and dismissed the administrative complaint with prejudice. This appeal followed.

Discussion

The sole issue on appeal is whether a civil penalty can be assessed against an owner of an existing HWM facility who, despite the Agency's request to do so, fails to submit an

7/ The Region gave respondent a number of opportunities to correct deficiencies which it had identified in respondent's Part B application. Although respondent made attempts at correcting them, it failed to submit a Part B application which was acceptable to the Region. Whether respondent's Part B application was in fact adequate (and therefore was erroneously found unacceptable by the Region) is an issue to be determined on remand.

adequate Part B RCRA permit application. Central to the resolution of this issue is RCRA §3008(g) which states that the Agency is authorized to assess civil penalties only for violations of RCRA requirements:

> Civil Penalties - Any person who violates any requirement of this subchapter [Subchapter III - Hazardous Waste Management] 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. 8/ (Emphasis added.)

The presiding officer held that RCRA contains no requirement that an owner or operator of an HWM facility apply for a RCRA permit or submit an adequate permit application. Accordingly, the presiding officer held that respondent's failure to submit an adequate Part B application is not a violation of any requirement contained in RCRA. I disagree.

40 CFR §270.10(e)(4)(1983) clearly requires submission of a Part B permit application after the Agency requests it: 9/

8/ See also RCRA §§3008(a)(1) & (a)(3).

9/ Implicit in §270.10(e)(4)'s requirement to submit a Part B permit application is the requirement to submit an adequate (or complete) Part B application. Of course, no regulatory requirement is violated where an owner or operator initially submits an inadequate or incomplete Part B application but subsequently corrects it before expiration of the six months deadline referenced in §270.10(e)(4). However, if the owner or operator fails or refuses to correct such deficiencies within the six month period, §124.3(d) allows the Agency to deny the permit and assess any appropriate civil penalty:

> (d) If an applicant fails or refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be
>
> At any time after promulgation of Phase II [operating standards] the owner and operator of an existing HWM facility may be required to submit Part B of their permit application. The State Director may require submission of Part B . . . if the State . . . has received interim authorization for Phase II or final authorization; if not, the Regional Administrator may require submission of Part B.

> Any owner or operator shall be allowed at least six months from the date of request to submit Part B of the application. (Emphasis added.)

40 CFR §270.10(e)(4) was promulgated pursuant to the statutory authority found in RCRA §3005 which directs the Agency to promulgate regulations requiring RCRA permits for owners and operators of HWM facilities. 10/ Accordingly, violating any requirement contained in 40 CFR §270.10(e)(4) is tantamount to violating a requirement contained in RCRA itself. 11/ Therefore,

(Footnote No. 9 cont'd)

> taken under the applicable statutory provision including RCRA section 3008, SDWA sections 1423 and 1424, CAA section 167, and CWA sections 308 309, 402(h), and 402(k). (40 CFR §124.3(d).)

(The presiding officer interprets §124.3(d) as allowing assessment of civil penalty if, and only if, a facility continues to operate after notification by the Agency that its interim status has been terminated for failure (or refusal) to correct deficiencies in its Part B permit application. However, there is no support for the view that §124.3(d) was meant to envision such a sequential approach, and it is hereby rejected.)

10/ The text of RCRA §3005 reads in relevant part as follows:

> (a) Permit requirements. -- Not later than eighteen months after October 21, 1976, the Administrator shall promulgate regulations requiring each person owning or operating a facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit issued pursuant to this section.

11/ Agency regulations promulgated pursuant to statutory authority have the force and effect of law. Service v. Dulles, 354 U.S. 363 (1959); Rodrigues v. Dunn, 128 F. Supp. 604 (1955), aff'd

it is clear that failing to submit an adequate Part B application is a violation of a RCRA requirement, and the presiding officer's

holding to the contrary is reversed. 12/
This case is remanded to the presiding officer for further proceedings consistent with this order. 13/

So ordered.

Original Document signed

Ronald L. McCallum
Chief Judicial Officer

Dated: NOV 21 1984

(Footnote No. 11 cont'd)

249 F.2d 958 (1957). See also Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (1964); Atwood's Transport Liner, Inc. v. U.S., 211 F. Supp. 168 (1962), aff'd 373 U.S. 377 (1963); 3 Mezines, Stein & Gruff, Administrative Law, §13.03 (1977).

It should be noted that interpretive rules, i.e., rules promulgated by an Agency which interpret a statutory provision may not, in certain circumstances, have the force and effect of law. 40 CFR §270.10 is not an interpretive rule; rather it falls into the category of a legislative rule, i.e., a rule which Congress has specifically authorized the Agency to promulgate and as such has the force and effect of law.

12/ It is not necessary for purposes of this decision to consider whether the failure of an existing facility to submit a Part A application is also a violation of a RCRA requirement. Therefore, that issue is neither addressed nor resolved here.

13/ See note 7, supra.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Order In the Matter of City Industries, Inc., RCRA (3008) Appeal No. 83-4 were delivered to each of the following persons, in the manner indicated:

By 1st Class Mail, postage prepaid:

Arthur Greer
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By Hand Delivery:

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Original Document signed

M. Gail Wingo
Secretary to the Chief

Judicial Officer

Dated: NOV 21 1984