UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

In the Matter of AMERICAN CYANAMID COMPANY FORTIER PLANT WESTWEGO, LOUISIANA Respondent	]	CAA Docket No. 84-120-101

1. Clean Air Act, Section 120: Respondent was held to be in violation of an applicable legal requirement, as defined at 40 CFR 66.3(c), a Louisiana Air Quality Regulation, as set forth in the Louisiana State Implementation Plan, where the State had approved an alternate method of compliance with the regulation in the form of a "bubble," or emission trade, and had submitted the "bubble" method to the Administrator pursuant to Section 110(a)(3) of the Clean Air Act, and where the State considered the respondent to be in compliance with the applicable legal requirement by way of the approved "bubble" method, but where the Administrator had not yet acted upon the submitted revision.

Appearances:

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Laurence M. Groner, Esquire, Office of Enforcement and Complaince Monitoring, United States Environmental Protection Agency, 401 M Street, S.W., Washington, D.C., for the Complainant.

Theodore L. Garrett, Esquire, and Alyson C. Flournoy, Esquire, Covington & Burling, 1201 Pennsylvania Avenue, N.W., Washington, D.C. and

Margaret R. Tribble, Esquire, Legal Department, American Cyanamid Company, One Cyanamid Plaza, Wayne, New Jersey, for the Respondent.

Decided July 15, 1985

Before: J. F. Greene, Administrative Law Judge

INITIAL DECISION

This matter arises under Section 120 of the Clean Air Act, 42 U.S.C. §1857 et seq. and regulations promulgated thereunder, 40 CFR Part 66, which provide for the assessment and collection of a civil "noncompliance" penalty against every person who owns or operates a major stationary source (defined as "any stationary facility or source of air pollutants which directly emits or has the potential to emit, one hundred tons per year or more of any air pollutant" 1/) that is "not in compliance with any emission limitation, emission standard, or compliance schedule under any applicable implementation plan . . . .," 42 U.S.C. 7420(a)(2)(A)(i). 2/

Respondent American Cyanamid, the owner and operator of a facility (the Fortier Plant) at Westwego, Louisiana, in the metropolitan New Orleans area, was charged on September 28, 1984, with not being in compliance with "applicable legal requirements" as defined by 40 CFR 66.3(c), i.e. the Louisiana State Implementation Plan at Louisiana Air Quality Regulation §22.3, which provides for the control of emissions of volatile organic compounds from certain storage tanks. §22.3 is enforceable by the complainant as part of the Louisiana State Implementation Plan ("SIP"). Specifically it was alleged that emissions from certain tanks used for the storage of acrylonitrile and methanol at the plant had not

1/ Section 302(j) of the Act, 42 U.S.C. §7602(j).
2/ Section 120(a)(2)(A)(i) of the Act.

been controlled by any of the means detailed in the regulation. The respondent takes the position that, not only is the Fortier Plant in compliance with §22.3 in connection with the storage tanks (TR 131, 134, 162-3), it has exceeded expectations in the control of volatile organic compounds ("VOC") emissions at the plant and has reduced such emissions well beyond the level anticipated by the Louisiana SIP as a whole (TR pp. 123-124). Accordingly, the question presented for decision is whether or not the Fortier Plant, a "major stationary source" by virtue of, in this instance, its emission of 100 or more tons of hydrocarbons per year, is or is not in compliance with the "applicable legal requirement" [40 CFR 66.11(a); 40 CFR 66.3(c)(1)] or "emission limitation" as defined at 42 U.S.C. 7602(k), TR p. 15 (stipulation 14) set forth in the SIP at Louisiana Air Quality Regulation §22.3.

The respondent operates thirteen tanks of more than 40,000 gallons nominal capacity each in which acrylonitrile is stored, and one tank of greater than 40,000 gallon capacity in which methanol is stored. Acrylonitrile and methanol are volatile organic compounds, as defined by Louisiana Air Quality Regulation §4.77 (Ex. 39). The tanks emitted, in 1979, about 117 tons of hydrocarbons per year (R. Ex. 3) and, since 1981, about 140 tons (gov't. Ex. 54).

§22.3 provides, in general outline, that VOC emissions may not be stored in containers of greater than 40,000 gallons nominal capacity unless the container is a pressure tank

> capable of maintaining working pressures sufficient at all times under normal operating conditions to prevent vapor or gas loss to the atmosphere . . .

or

> is designed and equipped with a submerged fill pipe and one or more of the vapor loss control devices described herein. 3/

The vapor loss controls mentioned in the section are:

- internal floating roof (§22.3.1.1)
- external floating roof (§22.3.1.2)
- a "gathering" system which collects and disposes of the vapors and gasses so as to limit their emission to the atmosphere (§22.3.1.3)

and

- "other equivalent equipment or means as may be approved by the Assistant Secretary" 4/ (§22.3.1.4)

It is §22.3.1.4 that gives rise to much of the controversy here. At the time this action was initiated, it was stipulated, the tanks were not pressure tanks, and none were equipped with any of the vapor loss control systems specified. (Stipulations 18-21, TR pp. 16-17). The respondent and the State had agreed that, in

3/ See Exhibit 39, Louisiana Air Quality Regulations with Amendments through September 20, 1982. (Emphasis added)

4/ The Assistant Secretary of the Louisiana Environmental Control Commission, Ex. 39 at §4.73.

anticipation of a national emission standard for acrylonitrile, 5/ the tanks might remain uncontrolled until such time as the level of control under such a standard became known. The respondent, according to this arrangement, would not have to install a vapor recovery system to comply with the State requirement only to learn, possibly soon afterward, that it had to comply with a (presumably) more stringent standard (TR p. 178).

The Fortier plant also has a waste gas stream, the "AOG" (absorber-off-gas) vent for the elimination of waste gas. This stream emitted VOC at the rate of 13,200 tons per year for the year 1977 (Exhibit 11). The VOC emissions from waste gas streams are governed by the provisions of Louisiana Air Quality Regulation §22.8 (Exhibit 39, p. 16). The controls, principally incineration, could be waived under certain conditions, however, and an exemption for the stream was requested (Exhibit 2, October 16, 1973) and granted (Exhibit 10, October 26, 1973) based upon the nonflammability of the stream. The AOG vent was operating under this exemption when, in late 1978, the respondent proposed to build an incinerator for the vent, which would reduce VOC emissions from the vent by a significant amount. In August, 1981, the incinerator was certified to be in operation. VOC emissions from the AOG vent were lowered to about 1520 tons per year, a reduction of approximately 11,680 tons per year, or 90% of the 13,200 uncontrolled 1977 amount. Ultimately the State granted "emission reduction credits" of 2440 tons per year for what was viewed as a reduction

5/ National Emission Standard for Hazardous Pollutants, pursuant to Section 112 of the Clean Air Act, 42 U.S.C. 7412. See TR p. 178.

in excess of the 70% VOC reduction required from the AOG vent by 1982 in the 1977 version of the SIP (Exhibit 6, third page from the end; TR 141-142). 6/ 7/ On May 6, 1982, after notice and hearing the State found the respondent in violation of §22.3 for the storage tank emissions and ordered compliance by using a "bubble," whereby reductions over 70% from the AOG vent would offset the 140 tons per year hydrocarbons emitted by the storage tanks. On July 22, 1982, the "bubble" method of compliance under §22.3 was sent to the Administrator as a revision to the SIP, pursuant to Section 110(a)(3)(A). As of September 28, 1984, the proposed revision had not been approved.

Whether the respondent was in compliance with "applicable legal requirements," i.e. the Louisiana SIP at §22.3 of the Louisiana Air Quality Regulations, on September 28, 1984, depends upon (1) what the SIP consisted of on that date, and (2) the interpretation to be given to §22.3.1.4 of the Regulations.

6/ The 1977 plan as it related to the control of hydrocarbons, however, was later changed after certain parts were proposed by the EPA for disapproval. In the 1979 version of the SIP that was later approved, (Ex. 17, p. 47) the AOG point source was not mentioned separately; the Fortier plant as a whole was listed for 14,781 VOC tons per year, which was to be reduced to 4790 tons by 1982. Of the 14,781 tons, the AOG vent accounted for 13,200, as was noted above. In the current SIP, therefore, only plantwide VOC emission reductions are specified (Ex. 31, p. 47).

7/ 90% of 13,200 (11,680) less 70% of 13,200 (9240) equals 2440 tons of emission credits.

§22.3 requires prevention of VOC vapor and gas loss to the atmosphere from storage tanks of greater than 40,000 gallons capacity, and does so by specifying equipment which presumably will do that job. The tanks must be pressure tanks, or must have a submerged fill pipe and one or more of the vapor loss control devices mentioned, §22.3.1 - §22.3.1.3 (Gov't Ex. 39, pp. 14-15.)

The "bubble concept," on the other hand, as defined at §4.97 of the Louisiana Air Quality Regulations, is

> . . . an alternative emissions plan whereby a facility with multiple sources of a given pollutant may achieve a required total emission by a different mix of controls from that mandated by regulation. Some sources may be assigned more restrictive limits, while others would meet less restrictive ones, providing the resulting total emissions are equivalent. Such a concept may permit a more expeditious compliance plan. (Emphasis added).

Returning to §22.3.1.4, it is difficult to see how "equivalent equipment or means," even allowing a certain latitude for the words "equivalent . . . means," could be read to permit "bubble" compliance with §22.3 without recognizing that the "bubble" would attempt to alter the requirements of the section from "prevention of vapor or gas loss to the atmosphere," (§22.3.1) to a "different mix of controls from that mandated by regulation . . . providing the resulting total emissions are equivalent," (§4.97, Gov't. Ex. 39). By definition, the "bubble" assumes that the resulting total emissions from a facility will be equivalent to those "mandated by regulation," whereas the

"equivalent equipment or means" of §22.3.1.4 clearly refers to prevention of vapor loss from storage tanks. "Bubble" compliance in this case, although State officials clearly believe that it results in equivalent or less total VOC emissions from the facility as a whole, TR pp. 131, 134, 162-163, must be seen as a proposed modification of the requirement of §22.3 of the Louisiana Air Quality Regulations for storage tank vapor loss controls, and, as such, the approval of the Administrator would be required before modification of the plan could take place. 8/ Consequently, the State was justified in seeking such approval pursuant to §110(a)(3)(A) of the Act, as it had with other "bubbles" in the area, TR 167-168, and as it did for the Fortier Plant "bubble" on July 22, 1982 (Ex. 37) after notice and public hearing.

Therefore, until approval is given, whatever the total emissions reduction realized under the "bubble" method may have been, and regardless of the equities of the situation, the Louisiana SIP remained on May 6, 1982, July 22, 1982, and September 28, 1984, what it had been before as far as §22.3 was concerned: VOC emissions from storage tanks must be controlled by vapor loss control systems. See Duquesne Light Co. v. EPA, 698 F. 2d 456, at 471 (D. C. Cir. 1983). As a consequence, despite alleged total VOC emission reductions, and regardless of the length of time involved in the EPA's consideration of the

8/ §110(i) of the Act, 42 U.S.C. 7410(i) sets out limitations upon the ability of either the Administrator or the State to modify unilaterally any requirement of an implementation plan with respect to a stationary source.

proposed "bubble," the respondent remained subject to the vapor loss control requirements of §22.3. Accordingly, the respondent must be found not to have been in compliance with "applicable legal requirements", 40 CFR §66.3(c) as they applied to the control of VOC emissions from large storage tanks.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Section 120 (a)(2)(A) of the Clean Air Act, 42 U.S.C. §7420(a)(2)(A), provides for the assessment and collection of a noncompliance penalty against "every person who owns or operates -- (i) a major stationary source . . . which is not in compliance with any emission limitation . . .". Implementing regulations, 40 CFR Part 66, provide, at §66.11, for issuance of a notice of noncompliance to the owner or operator of any source determined to be in violation of "applicable legal requirements."

2. The respondent is a "person" within the meaning of §302(e) of the Act, 42 U.S.C. §7602(e); the Fortier Plant is a "major stationary source" as that term is defined at §302(j), 42 U.S.C. §7602(j).

3. §22.3 of the Louisiana Air Quality Regulations (Gov't. Ex. 39) and the specific vapor loss controls described therein, §22.3.1 through §22.3.1.3, are "emissions limitations" within the meaning of the Act, §302(k), 42 U.S.C. §7602(k). §22.3 was approved by the Administrator of the Environmental Protection Agency as a requirement of the Louisiana State Implementation Plan, and was the applicable requirement for the control of volatile organic compound emissions from tanks having a capacity of over 40,000 gallons on September 28, 1984.

4. At the Fortier Plant the respondent operates 14 stationary fixed roof tanks in which acrylonitrile (in thirteen tanks) and methanol (in one tank) are stored. These tanks emitted 117 tons of hydrocarbons per year in 1979, and 140 tons hydrocarbons per year since 1981. §22.3 of the Louisiana Air Quality Regulations is applicable to all of these tanks. None of the tanks was a pressure tank, and none were equipped with any of the vapor loss controls specified in §22.3.1.1 through §22.3.1.3.

5. The tanks had not been equipped with vapor loss control sufficient to comply with §22.3.1 through §22.3.1.3 because, in 1979, the respondent anticipated early promulgation of a stringent hazardous air pollutant standard for acrylonitrile (pursuant to § 112 of the Clean Air Act, 42 U.S.C. §7412) and wished to avoid the expense of meeting two standards. State officials agreed to a temporary "offset" of the tanks' emissions against stricter control from the Fortier Plant's absorber off gas vent, TR 171-173, 178; R. Ex. 2-3.

6. In August, 1981, respondent's newly constructed absorber off gas vent (waste gas stream) incinerator was reducing volatile organic compound emissions from the stream from a previous level of 13,200 tons per year hydrocarbons to 1520 tons per year, for a reduction of 90%. State officials credited respondent with 2440 tons of hydrocarbons per year, based upon the reduction in the waste gas stream in excess of the 70% level of control previously anticipated (and set out in the version of the Louisiana State Implementation Plan submitted to the EPA in 1977, Gov't Ex. 6).

7. On May 6, 1982, after notice and public hearing, the State found the respondent to be in violation of §22.3, and ordered compliance by means of a "bubble," which would permit the respondent to offset 140 tons of hydrocarbon emissions from the storage tanks against 2440 tons of added control of hydrocarbon emissions from the waste gas stream over the previously anticipated 70%. On July 22, 1982, this order was submitted to the Administrator of the Environmental Protection Agency as a proposed revision of the Louisiana State Implementation Plan, pursuant to §110(a)(3)(A) of the Act, 42 U.S.C. §7410(a)(3)(A).

8. §110(i) of the Act, 42 U.S.C. §7410(i), makes clear that the State cannot modify a State implementation plan requirement applicable to a stationary source without the approval of the Administrator pursuant to §110(a)(3)(A) of the Act. State approval of "bubble" compliance with §22.3 constitutes a proposed modification of the requirements of the State implementation plan relating to control of volatile organic compound emissions from large tanks (Louisiana Air Quality Regulation §22.3) which would have to be submitted to the Administrator for approval; on July 22, 1982, the May 6, 1982 order requiring "bubble" compliance was submitted to the Administrator for approval.

9. The proposed revision that provides for "bubble" compliance with §22.3, did not modify the requirements of §22.3, and, accordingly, the provisions of the Louisiana State Implementation in effect on September 20, 1982, with respect to control of volatile organic compound emissions from large tanks remained in effect.

10. The respondent was not in compliance with the requirements of §22.3 of the Louisiana Air Quality Regulations on September 28, 1984.

In its able defense of this case, the respondent has argued, based upon language at p. 472 of Duquesne (p. 8 supra), that Section 120 proceedings are barred "during any period in which the EPA unlawfully fails to act on a SIP revision and thereby effectively prevents the source from achieving compliance, "TR 37; R. Brief, p. 2. A reading of this portion of the opinion in Duquesne reveals, however, not that a noncompliance proceeding is barred during a period when EPA has exceeded the statutory period for acting upon a SIP revision, but that any noncompliance penalty should be held in abeyance pending final action:

> Such a regulation will protect a source in compliance with air quality standards from the time EPA should have approved an eventually approved SIP revision and will remove any economic benefit accruing to a source not in compliance with the law if the SIP revision is not approved. . . . . We do not hold, however, as petitioners ask, that the penalty should be tolled once the statutory deadline for acting on revisions has expired. . . ."

Accordingly, it is found that this proceeding is not barred by the holding in Duquesne. 9/

J. F. Greene
Administrative Law Judge

9/ Ruling made at TR p.40