UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of Ashland Chemical Company, Division of Ashland Oil, Inc. Respondent	))))))	Docket Nos. RCRA-IX-83-10 and 83-40

Resource Conservation and Recovery Act - Rules of Practice - Motions to Reopen Hearing - Official Notice - Where primary basis of motion to reopen hearing was that official notice had been taken of a RCRA enforcement memorandum without affording Respondent notice thereof and under all the circumstances, Respondent failed to demonstrate that it was prejudiced by such action, motion to reopen hearing would be denied.

Resource Conservation and Recovery Act - Rules of Practice - Issues Not Raised By The Pleadings - Where issue as to Respondent's entitlement to the beneficial use exemption specified in 40 CFR 261.6 was first raised by counsel at the hearing, Federal Rules of Civil Procedure would be used as a guide in deciding Respondent's contention that the beneficial use exemption was in issue and where it did not appear that beneficial use was tried by express or implied consent of the parties, Respondent's contention in that respect would be denied.

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Opinion and Order Denying Motion to Reopen Hearing

In an initial decision, dated, June 21, 1984, Respondent's contention that its incinerator was a totally enclosed treatment facility as defined in 40 CFR 260.10 and thus exempt from RCRA regulation was rejected. The primary basis for the decision was the conclusion that gaseous emissions from the refinery contained or had the potential for containing hazardous waste or constituents thereof listed in Appendix VIII of 40 CFR 261, to-wit: maelic anhydride, methyl methacrylate and phthalic anhydride, thus precluding compliance with one of the requirements for a facility to be totally enclosed. Respondent's alternative contention that it was entitled to the exemption for hazardous waste which is beneficially used, re-used, recycled or reclaimed pursuant to 40 CFR 261.6 was also rejected, because it had failed to establish that the primary purpose of incinerating liquid hazardous waste, gases from which were passed through a boiler to generate steam prior to discharge to the atmosphere, was energy recovery rather than to destruction of waste. Respondent was ordered to submit Part B of the

hazardous waste management facility permit application, which it had heretofore declined to submit upon the ground it was exempt from RCRA regulation, within 30 days of receipt of the decision.

Ashland received the decision on July 15, 1984 and filed a motion to reopen the hearing pursuant to 40 CFR 22.28 on July 30, 1984. The principal basis of the motion was the fact that in denying Ashland's contention that it was entitled to the exemption for hazardous waste which is beneficially used, re-used, recycled or reclaimed set forth in 40 CFR 261.6, the initial decision took judicial or official notice of an EPA memorandum: "Burning Low Energy Hazardous Wastes Ostensibly for Energy Recovery Purposes" (48 FR 11157, March 16, 1983), without affording Ashland notice of that fact. The motion referred to the finding that the liquid wastestream fed to the incinerator appeared to include maelic anhydride, methyl methacrylate and pthalic anhydride from the list of toxic constituents in Appendix VIII and asserts that this assumption was based on Ashland's use of these materials as process feedstocks and the inclusion of such materials in the Notification of Hazardous Waste Activity. Ashland alleges that these materials were included in the Notification solely because of the possibility the feedstocks might be spilled and some disposition required to be made of the residue and that it was inappropriate to infer such materials were present as hazardous constituents in the liquid wastestream. Ashland further alleges that the assumption in the initial decision that the liquid wastestream reflected the energy value of the process feedstocks was erroneous because the feedstocks were not necessarily present as hazardous constituents in

the liquid wastestream and in any event, were not reflective of the energy value of such stream.

Evidence to be introduced by Ashland if the motion is granted includes identification and concentration of hazardous constituents present in the aqueous (water of esterification) portion of the liquid wastestream, information as to the energy values of the organic and aqueous (water of esterification) portions of the liquid wastestream and information as to whether the aqueous (water of esterification) portion of the liquid wastestream satisfies the criteria for an ignitable hazardous waste under 40 CFR 261.21. Ashland asserts that this evidence was not adduced at the hearing, because its significance became apparent only after the initial decision and order were entered.

Complainant opposes the motion, arguing that Respondent has made no attempt to explain why the evidence which it now wishes to include in the record was not produced at the hearing, that one of Respondent's witnesses testified that the primary purpose of the incinerator was to breakdown hazardous waste and that [inconsistently] Respondent would now come forth with evidence that the primary purpose of incineration was heat recovery and that Respondent's facility consists of an incinerator combined with a separate boiler which absorbs heat from the incinerator and that EPA has consistently viewed such combinations as incinerators subject to regulation as such. Complainant requests that the "order" directing Ashland to submit the Part B permit application within 30 days of receipt of the decision be clarified to indicate that the document contemplated by the order is an acceptable application fully complying with the regulations.

Ashland responded to Complainant's request for clarification under date of August 21, 1984, pointing out that after receipt of the ALJ's clarification of the status of the order pending an appeal,1/ it had filed its Part B application on or about August 13, 1984, that the regulations concerning Part B permit applications were very general, containing narrative descriptions of information to be submitted rather than specific data requirements, that there was no Part B permit application form and that few, if any, Part B permit applications have been determined to be acceptable based upon initial submissions. Ashland says that clarification of the order as requested by Complainant would give EPA the unilateral right in its unfettered discretion to subject Ashland to immense civil penalties by determining its application to be unacceptable, there being no objective

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1/ By letter, dated July 27, 1984 and received August 7, 1984, counsel for Ashland referred to the fact that the order accompanying the initial decision required Respondent to file its Part B permit application with the Regional Administrator within 30 days of receipt of the decision and that a footnote stated that unless appealed pursuant to 40 CFR 22.30 or reviewed sua sponte by the Administrator, the decision would become the final decision (order) of the Administrator. Ashland asserted the understanding that the order referred to was the order of the Administrator, arguing that any other interpretation would effectively deprive it of its right of appeal as it would be required to submit the Part B application prior to appeal or decision thereon in order to avoid potentially ruinous civil penalties. In a letter to Ashland, dated August 8, 1984, the ALJ pointed out that there were two rationales for relieving it of any penalty, i.e., Ashland's good faith belief that it qualified for the exemption as a totally enclosed facility and the unlikelihood that it would persist in its refusal to submit the Part B application after receipt of the decision. Ashland was informed that it was intended the order be complied with, notwithstanding its right of appeal.

standard by which to measure acceptable.2/ Ashland asserts that Complainant's response to the motion to reopen fails to address the primary basis for the motion, which is that the memorandum relied upon as a basis for rejecting its claim of exemption for beneficial re-use under 40 CFR 261.6 was not placed in evidence nor was Ashland informed that judicial notice would be taken of this memorandum. Ashland requested that oral argument be held on all pending motions.

Ashland's motion for oral argument on pending motions was granted, and such argument was held in San Francisco, California on October 11, 1984.3/ In the notice of oral argument, the parties were requested to be prepared to address at least the following issues: (1) record evidence tending to demonstrate Ashland's entitlement to the exemption specified in 40 CFR 261.6 so that it was prejudiced by the ALJ's action in taking official notice of a RCRA enforcement memorandum on the burning of low energy hazardous wastes (48 FR 11157) without affording Ashland notice of that fact, (2) the effect, if any, on this proceeding of the 1982 modifications to its facility whereby wastes formerly discharged to the sewer system were routed to the incinerator, (3) validity of and support for Complainant's assertion that EPA has consistently viewed the combination of an incinerator and a boiler which absorbs heat from the

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2/ The second Determination of Violation and Compliance Order (Docket No. 9-83-RCRA-40) proposed to assess Ashland a penalty of not less than $1,000 for each and every day of noncompliance on and after June 1, 1983 with the order to submit the Part B application. The initial decision suspended the penalty provided Ashland submitted the Part B application within 30 days of receipt of the decision.

3/ The parties have waived further briefing and the motions will be decided on the basis of arguments summarized above and the transcript of oral argument (Tr. 0 - p. No.)

incinerator as one unit and (4) basis, if any, for Complainant's motion for clarification of the order.

Ashland's counsel agreed that prejudice was an appropriate criterion for deciding its motion and citing the testimony of its witness, Harold Mork (Tr. 112, 117-18), argued that it had made a prima facie case for an energy recovery exemption in accordance with 40 CFR 261.6 (Tr. 0 - 5-7). Ashland further argued that the initial decision was in error in concluding that maelic anhydride, methyl methacrylate and pthalic anhydride were in the wastestream and asserted that, in fact, its wastestream had sufficient BTU value to meet EPA's guidelines.4/ Counsel acknowledged that these assertions were not the result of tests or analyses of the wastestream, but were based on knowledge of what happened to the feedstock chemicals during the manufacturing process (Tr. 0 - 10). Ashland stated that if it had been on notice that the cited RCRA memorandum was to be considered, it would have presented evidence of, inter alia, the energy value of the wastestreams going to the incinerator, that the Ashland process actually generated one wastestream coming off of the reactor and that although Ashland chose to separate this waste it did so not primarily because of waste handling considerations, but for reasons of economy and efficiency and that there were significant cost savings in the operation of the plant resulting from the burning of these wastes to produce steam (Tr. 0 - 11-15).

By reference to a schematic of the Ashland facility (Respondent's Exh 1), counsel stated that gases coming off of the reactor are routed

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4/ The RCRA Enforcement Guidance Memorandum: "Burning Low Energy Hazardous Wastes Ostensibly for Energy Recovery Purposes" (48 FR 11157) indicates that BTU values in the 5,000 to 8,000 range are low energy and thus presumptively the burning of such materials is not for energy recovery.

through a packed column whereby glycol is returned to the reactor, remaining gases or vapor is sent to a condenser, that a segment of the vapor stream does not condense and after passing through a couple of tanks (distribution receiver and water of esterification) is sent to the incinerator, that the condensibles are separated into an aqueous (water of esterification) and an organic liquid phase before being pumped to the incinerator via separate pipes (Tr. 0 - 16-18). It was pointed out that if Ashland sent the fumes from the reactor directly to the incinerator as some companies with similar systems allegedly do, the facility would not be subject to RCRA regulation.5/ Counsel stated that another alternative Ashland could have chosen was not to separate the condensibles, but to design a tank whereby the liquids were agitated, resulting in their emulsification, so that materials of a much higher BTU content were fed to the incinerator (Tr. 0 - 19).

Turning to the decision denying its contention that it was entitled to the exemption for a totally enclosed treatment facility, Ashland reiterated its contention that feedstock chemicals were not present in the wastestream, asserted that it was prepared to demonstrate that fact if the hearing was reopened and argued that if the presence of Appendix VIII constituents was sufficient to deny a claim for the totally enclosed treatment facility exemption, then EPA's example of a pipe in which neutralization takes place was not a good one, because neutralization effects only corrosivity and may not effect Appendix VIII constituents.6/ It was

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5/ Because the flow off of the reactor was not steady, but pulsing, routing the fumes directly to the incinerator presents practical engineering problems (Tr. 0 - 19, 30).

6/ Tr. 0 - 20-27. Although Ashland argues that the example of a pipe in which neutralization takes place makes no mention of the possible presence of Appendix VIII constituents, the regulatory clarification memorandum (Complainant's Exh 2 at 6,7) points out that, except in the case of listed wastes, whether the effluent from a totally enclosed treatment facility is regulated depends upon the status of the effluent as it emits the facility. See also 45 FR 33218, quoted initial decision at 29.

pointed out that neutralization is a much less exact form of treatment than incineration.

Concerning the 1982 modification to its facility whereby the aqueous portion of the waste previously discharged to the sewer was routed to the incinerator, Ashland stated that it was prepared to show that the cost of natural gas had increased 600 percent since 1973 when the system was initially installed and that routing the aqueous portion of the waste to the incinerator reduced the amount of natural gas used, thereby effecting additional cost savings (Tr. 0 - 30,31).

Arguing in opposition to the motion, counsel for Complainant stated that if Ashland had performed the waste analysis required by the Interim Status Standards (40 CFR 265.13), evidence as to the absence of the feed-stock chemicals in the wastestream and the energy value of the waste would have been available for introduction at the hearing and there would be no need for Ashland's motion (Tr. 0 - 35,36). He pointed out that Ashland's pleadings made no claim of entitlement to an exemption pursuant to 40 CFR 261.6 and that the matter was first raised by counsel at the hearing. He argued that because the RCRA enforcement memorandum was published in the Federal Register, Ashland either knew or should have known thereof and accordingly, was not prejudiced by the fact the ALJ took official notice of the memorandum.

Counsel referred to a memorandum "Guidance on Determining When a Hazardous Waste Is a Legitimate Fuel That May Be Burned for Energy Recovery in a Boiler or Industrial Furnace," dated February 28, 1984, which states flatly that "An incinerator cannot burn hazardous waste without a RCRA permit." This is based in part upon proposed RCRA rules (48 FR 14472, et seq., April 4, 1983) which at 14483 indicate that an incinerator is

defined as a controlled-flame combustion device in which the combustion chamber and any heat recovery section are not of integral design, i.e., formed into a single manufactured unit such that there occurs significant radiant as opposed to convective heat recovery. This makes it clear that waste heat recovery units added to an incinerator cannot exempt it from regulation as a hazardous waste treatment facility. Counsel stated that these rules were to be published in final form in the near future. It is, of course, obvious that Ashland cannot be bound by a regulation which is not yet effective and no part of this decision is based upon the revised definition of an incinerator.7/

Concerning Complainant's motion for clarification of the order, counsel pointed out that the initial decision allowed Ashland 30 days in which to submit the Part B permit application, that there was testimony in the record 180 days was the estimated time required to prepare and submit such an application, that in view of the fact Ashland had failed to submit the Part B application after being twice ordered to do, it was unlikely to have made any advance preparations to submit the application and thus the application submitted was unlikely to be sufficient for completing the permitting process (Tr. 0 - 41, 42).

Discussion

While it is concluded hereinafter that Ashland hasn't established its contention that the beneficial use exemption was tried by the express or implied comment of the parties, beneficial use will be discussed in case a contrary conclusion is reached on appeal.

7/ The final regulation effective July 5, 1985 (50 FR No. 3, January 4, 1985, at 614 et seq.), adheres to the physical test of integral design for the definition of a boiler, but allows for a case by case assessment where the physical test is inappropriate (Id. at 626).

The Administrative Procedure Act (5 U.S.C. 551 et seq.) provides in pertinent part "When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary" (5 U.S.C. 556(e)). Although official notice of facts may be taken at any stage of the proceeding, including the final agency decision, the requirement that a party, upon timely request, be given an opportunity to show the contrary remains.8/ Accordingly, to the extent that the initial decision was based on official notice of facts in the RCRA enforcement memorandum, Ashland would appear to be entitled to an opportunity to show that the truth is otherwise.

This brings us to the question of the precise facts officially noticed in the initial decision. The decision, citing the RCRA enforcement memorandum (48 FR 11157), officially noticed EPA's policy that the primary purpose of burning low energy hazardous waste was destruction rather than energy recovery, that in making this determination BTU values of the wastes as well as cost savings resulting from burning the material were primary factors for consideration, that BTU values of from 5,000 to 8,000 were considered to be low energy and that because Ashland's wastes included maelic anhydride, which the memorandum indicates has a BTU value of approximately 6,000, Ashland had not established its contention that the primary purpose of burning the wastes was energy recovery. This was considered to be especially true as to the aqueous portion of the waste, which prior to the 1982 modification was discharged to the sewer system. While Ashland could hardly be expected to controvert EPA policy, it could and assertedly is prepared to present evidence that the BTU values of its wastes are

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8/ See the Attorney General's Manual on the Administrative Procedure Act (1947) at 79, 80. The manual indicates that even where facts are officially noticed in a final agency decision, reopening of the record need not be automatic (Id. at 80, footnote 5).

within EPA's guidelines. Ashland, however, should not have been surprised by the significance of the BTU values of its wastes in determining its entitlement to the beneficial use exemption, because irrespective of whether it was on notice of the RCRA enforcement memorandum, which it asserts is not a regulation at all, but only guidance for enforcement personnel, the preamble to the 261.6 regulation makes it clear that burning low energy wastes in industrial boilers under the guise of energy recovery is not within the scope of the exemption. See initial decision at 35, footnote 17. Moreover, counsel in his opening statement recognized that the argument for the beneficial use exemption was less strong as to wastestreams having low or merely some BTU values (Tr. 109).

Complainant is, of course, correct that Ashland did not raise the issue of its entitlement to the beneficial use exemption under 40 CFR 261.6 in its pleadings, but confined itself to the contention its facility was totally enclosed within the definition in 40 CFR 260.10. As to matters not covered by the Rules of Practice in 40 CFR Part 22, it is customary to use Federal Rules of Civil Procedure as guides. Rule 15(b) of the FRCP provides in pertinent part that "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Counsel for Ashland raised the matter of the 261.6 exemption in his opening statement and has pointed to testimony which he contends is relevant to that issue. Under Rule 15, however, implied consent may be found where the parties recognized the issue entered the case at trial and acquiesced in the introduction of evidence on that issue without objection. See Hardin v. Manitowac-Forsythe Corp., 691 F.2d 449 (10th Cir. 1982). See also Haught v. Maceluch, 681 F.2d 291 (5th Cir. 1982)

(introduction of evidence relevant to an issue already in the case may not be used to show consent to trial of a new issue absent a clear indication that the party who introduced the evidence was attempting to raise a new issue).

While Ashland's witness, Mr. Mork, did testify that there was energy value in the vapors and organic liquids fed to the incinerator, there is no indication that this testimony was other than descriptive of the system rather than being directed to the 261.6 beneficial use exemption. Counsel for Complainant does not appear to have been aware that the beneficial use exemption was an issue and the ALJ concluded that the case was not tried on that theory. Initial Decision at 34. Moreover, Mr. Mork did testify that the object of the incinerator was to destroy hydrocarbons (Tr. 126), thus supporting Complainant's contention that Ashland's present claim to the beneficial use exemption under 261.6 is inconsistent with its own evidence and an after-thought.

Under all the circumstances, it is concluded that Ashland hasn't established its contention the 261.6 beneficial use exemption was tried by the express or implied consent of the parties and thus in issue at the hearing. Even if this conclusion was otherwise, Ashland was aware of the significance of BTU values of wastestreams burned in its incinerator, gases from which were passed through a boiler to produce steam, and could have introduced evidence as to the energy values of these wastes. Thus, Ashland was not prejudiced by the ALJ's action in taking official notice of the RCRA enforcement memorandum (48 FR 11157).

There is no reason to doubt Ashland's assertion that conclusions in the initial decision to the effect that the wastestreams included hazardous constituents from the list in 40 CFR 261 (Appendix VIII), i.e., maelic

anhydride, methyl methacrylate and pthalic anhydride, and thus, that these constituents were present or potentially present in emissions from the incinerator, are erroneous. These conclusions were based on the fact that these and other chemicals (initial decision at 21, conclusion 3) were included in the Notification of Hazardous Waste Activity filed by Ashland and there was no other evidence as to the composition of the wastestreams.9/ There is also no reason to doubt Ashland's statement that the initial decision was in error in concluding that the wastestream or streams would have the BTU value of a single low energy hazardous waste constituent, i.e., maelic anhydride. It would seem to be clear, however, that motions to reopen the record should not lightly be granted and that whatever may be the proper construction of the rule permitting reopening (40 CFR 22.28),10/ it should not and cannot be used as a vehicle for correcting errors of strategy or oversights of counsel at the hearing.11/ In this regard, evidence to support Ashland's present assertions that feedstock chemicals were included in the Notification of Hazardous Waste Activity solely because of the possibility of spills and that these chemicals were not present in the wastestreams fed to the incinerator would have been helpful to its case. Because hazardous waste constituents are mentioned in the definition of a totally enclosed treatment facility and also in the regulatory clarification memorandum, Ashland can hardly

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9/ Ashland says that no analyses of the wastestreams were conducted, because it considered the facility was exempt from RCRA regulation. Careful reading of the regulations at 40 CFR 264.340, 265.340, however, seemingly should have alerted Ashland to the significance of the presence or possible presence of Appendix VIII constituents (see initial decision at 30,31).

10/ Complainant says that the rule should be based on fairness and applied only where all facts essential to a decision were not produced at the hearing through no fault of the proponent (Response to Motion at 2).

11/ See Decision Denying Motion to Reopen the Hearing, N.O.C., Inc., T/A Noble Oil Company, Docket No. II-TSCA-PCB-81-0105, May 16, 1983, presently on appeal.

plead ignorance or surprise at the significance of such information. See also note 9, supra. Under these circumstances, it is concluded that the errors in the initial decision referred to by Ashland are not correctable by a motion to reopen the hearing pursuant to Rule 22.28.

The basic premise of Complainant's motion to clarify the order requiring Ashland to submit the Part B permit application by the addition of language requiring the application to be acceptable is that Ashland did nothing to assemble the necessary information until receipt of the initial decision and that accordingly, the application was of necessity deficient.12/ The initial decision relieved Ashland of any penalty, because Complainant conceded the Ashland incinerator presented no harm to the environment, Ashland had a good faith belief that its facility qualified for exemption as a totally enclosed treatment facility and the unlikelihood that Ashland would persist in its refusal to submit the Part B application after receipt of the decision. Ashland promptly filed the application after receipt of the ALJ's clarifying letter (note 1, supra). The only apparent purpose of the clarification sought by Complainant is to subject Ashland at Complainant's discretion to potentially draconian penalties. This is contrary to the intent of the initial decision. Moreover, there is considered to be merit in Ashland's assertions that the regulations as to the content of Part B applications are lacking in precision and that few, if any, such applications have been approved as

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12/ As indicated, ante at 5, Ashland submitted the Part B application on or about August 13, 1984, and although not of record, Complainant, at the time of oral argument, stated that no determination as to the adequacy of the application had been made.

initially submitted. It follows that Complainant's motion for clarification should be and will be denied.

Order

Ashland's motion to reopen the hearing and Complainant's motion for clarification of the order requiring submittal of the Part B application are denied.[13/]

Dated this 10th day of January 1985.

Spencer T. Nissen
Administrative Law Judge

13/ Service of this decision restarts the running of the appeal period specified in 40 CFR 22.30. See 40 CFR 22.28(b).