UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Union Oil Company of California,	)	Docket No. RCRA-09-84-0223
	)	
Respondent	)	

RCRA - Interim Status Standard - Respondent acting under a state regulatory program which had been granted Phase I Interim Authorization held not subject to a penalty for failure to implement unsaturated zone monitoring for its land treatment operation when such requirement had been omitted by mistake or error from the state interim status conditions for continued operation, and these conditions had been determined by the EPA to be substantially equivalent to the federal standards.

Appearances:

David M. Jones, Esquire, United States Environmental Protection Agency, Region IX, 215 Fremont Street, San Francisco, CA 94105.

Timothy Thomas, Esquire, Union Oil Company of California, 461 South Boylston Street, P.O. Box 7600, Los Angeles, CA 90017.

Keith Howard, Esquire, Tinning and DeLap, 1211 Newel Avenue, Suite 200, P.O. Box 5246, Walnut Creek, CA 94596.

INITIAL DECISION

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (hereafter "RCRA"), section 3008, 42 U.S.C. 6928, for a compliance order and assessment of a civil penalty for alleged violations of the Act. 1/

A complaint was issued against Respondent Union Oil Company of California by the United States Environmental Protection Agency on April 30, 1984, charging, in three counts, violations of RCRA. Count I alleged that Respondent has failed to comply with the federal and state requirement that it have in writing and implement an unsaturated zone monitoring program. Count II alleged that Respondent's closure plan failed to provide for certification of closure of a facility by an independent registered professional engineer. Count III alleged that Respondent's closure plan failed to provide an estimate of the maximum inventory of certain hazardous wastes in storage and in treatment during the life of the closed facility. A compliance order to correct these violations was included, and a penalty of $26,000 was assessed. Respondent answered admitting the violation charged in Count II, of failing to provide for certification of closure in its closure plan, but denied

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1/ Pertinent provisions of section 3008 are:

Section 3008(a)(1): "(W)henever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subchapter the Administrator may issue an order requiring compliance immediately or within a specified time period . . . ."

Section 3008(g): "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."

the other violations. As to Count I, alleging failure to implement unsaturated zone monitoring, Respondent contended that it acted in compliance with a state authorized plan. As to Count III, alleging failure to provide an inventory of waste in its closure plan, Respondent denied there was any such federal or state requirement with respect to the wastes involved. It asserted that $500 is an appropriate penalty.

The parties by stipulation have resolved Counts II and III. As to Count I, they have stipulated the facts with 13 attached exhibits that the parties have agreed may be admitted into evidence. 2/ The case has been submitted on the stipulation of facts and both sides have filed briefs. On consideration of the entire record and the briefs of the parties, no penalty is assessed and Count I of the complaint is dismissed.

Findings, Discussion and Conclusion

The alleged violations in this case concern a land farm operated or maintained by Respondent on its San Francisco Refinery since prior to November 19, 1980. The farm is a 6.4 acre site used as a sludge farm for the biodegradation of oily sludges from tank cleaning and wastewater treatment. Wastes treated include dissolved air flotation (DAF) float (EPA hazardous waste No. K048), and API separator sludge (EPA hazardous waste No. K051). 3/ It is not disputed that the land farm is and since November 19, 1980, has been a hazardous waste management facility as defined in 40 CFR 260.10. 4/ Pursuant to the EPA's regulations published on May 19, 1980,

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2/ Exhibits attached to the stipulation are referred to by "Exh." and the exhibit number e.g., "Exh. 1".

3/ Exh. 4 and Exh. 9, p. 2.

4/ Stip. Par. 1.

Respondent's land farm operation became subject to the provisions of RCRA as of November 19, 1980. 5/ Respondent timely filed its notification of hazardous waste activity and Part A of the permit application thereby achieving interim status under RCRA, section 3005(e), 42 U.S.C. 6925(e), so that it could continue operations after that date. 6/

As one having interim status, Respondent became subject to the interim status standards with respect to the management of its land farm, 40 CFR Part 265, including the requirement that it have in writing and implement an unsaturated zone monitoring plan (40 CFR 265.278). The federal standards, however, do not apply to persons regulated by state authorized programs. 7/ It is that exclusion which underlies Respondent's defense. The following facts and background information with respect to the exclusion and its applications to Respondent are pertinent:

RCRA provides for two different types of authorization of state programs, interim authorization and final or permanent authorization. 8/ Interim authorization is involved in this proceeding and it applies to a state which has in existence a hazardous waste program prior to ninety days after the effective date of federal regulations and is for a twenty-four

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5/ Stip., Par. 1. See 45 Fed. Reg. 33123 (May 19, 1980), listing both DAF float and API separator sludge as hazardous wastes.

6/ The notification of hazardous waste activity and Part A permit application are attached to the EPA's main brief as Exhs. A and B. There appearing to be no question about their authenticity, these documents are officially notice. 40 CFR 22.22(f).

7/ See RCRA section 3006, 42 U.S.C. 6926. See also, 40 CFR 265.1(e), which provides in pertinent part as follows: "The requirement of this part [265] do not apply to: . . . . (4) A person who treats, stores, or disposes of hazardous waste in a state with a RCRA hazardous waste program authorized under Subparts A or B of Part 271 of this chapter. . . ."

8/ RCRA, section 3006, 42 U.S.C. 6926.

month period from the effective date of the federal regulations. 9/ The EPA has provided for two phases of interim state authorization. Phase I is involved here and allows states to obtain interim authorization to administer a program which inter alia covers the identification and listing of hazardous wastes and interim status standards for hazardous waste treatment, storage and disposal facilities which had achieved interim status. 10/ Interim authorization differs from permanent authorization not only in being a temporary program but also in the requirements for federal approval. Unlike final authorization which requires that the state program be equivalent to the federal program and consistent with the federal program and other state programs, interim authorization requires only that the existing state program be substantially equivalent to the federal program. 11/

As already noted, the federal regulations became effective on November 19, 1980. 12/ On October 31, 1980, prior to the effective date, California applied to the EPA for Phase I interim authorization to administer its own program. 13/

9/ RCRA, section 3006(c). The regulations covering interim authorization are in Subpart B of 40 CFR Part 271.

10/ 40 CFR 271.121(b).

11/ RCRA, section 3006(b) and (c). The EPA stated that the legislative history underlying the differences in wording between interim and final authorization emphasized Congress' intent that interim authorization be granted in a relatively liberal manner so as not to disrupt ongoing state efforts and to encourage states to continue their efforts so that they will be ready to take over responsibility for the full program when interim authorization is over. 45 Fed. Reg. at 33386.

12/ Supra, p. 4.

13/ See EPA's published notice granting Phase I interim authorization for California, 46 Fed. Reg. 29935 (June 4, 1981), hereafter referred to as "California Interim Authorization". A copy of this document is attached as Exh. 2 to Respondent's prehearing exchange.

Authorization was not granted, however, until June 4, 1981, after the effective date of the regulations. 14/

On April 30, 1981, while its application was still pending before the EPA, California issued to Respondent an Interim Status Document (ISD), authorizing the continued operation of Respondent's facility under interim status conditions pending issuance of a hazardous waste facility permit. 15/ It was stated in the ISD issued to Respondent that it was based on information obtained from the EPA regarding the facility and additional information obtained from Respondent, and that the conditions for continued operation which appear in the document are requirements similar to those presently imposed by the EPA in 40 CFR Part 265 (the interim status standards). 16/ The ISD, however, contained no requirement for unsaturated zone monitoring.17/

Phase I interim authorization was granted to California on June 4, 1981. In granting interim authorization, the EPA noted that California's application had initially disclosed three major problem areas, the relevant one in this proceeding being the State's ability to implement and enforce standards substantially equivalent to 40 CFR Part 265. 18/ EPA said in pertinent part as follows:

14/ California Interim Authorization, 46 Fed. Reg. at 29935.

15/ Exh. 1. The actual state agency administering the state hazardous waste management program was the Department of Health Services. Reference to California includes the Department of Health Services where applicable. It appears that at the time, California had a program of issuing interim status permits to all facilities in California which had submitted completed Part A permit applications to the EPA. California Interim Authorization, 46 Fed. Reg. at 29935.

16/ Exh. 1.

17/ Id.

18/ California Interim Authorization, 46 Fed. Reg. at 29935.

> The second problem area, concerning interim status standards for facilities was also resolved by the State. By means of recently passed legislation (AG 3132), the State has issued interim status permits to all treatment, storage and disposal facilities which had submitted complete Part A permit applications to Region IX. We have determined that each interim status permit contains conditions which are substantially equivalent to the RCRA interim status standards. * * *
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> EPA has reviewed the State of California's complete application for Phase I interim authorization and has determined that the State program is "substantially equivalent" to the Phase I Federal program as defined in 40 CFR 123. In accordance with Section 3006(c) of RCRA, the State of California is hereby granted interim authorization to operate a hazardous waste program in lieu of Phase I of the Federal hazardous waste program. The practical effect of this decision is that generators, transporters, and owners and operators of hazardous waste management facilities in California will be subject to the State of California hazardous waste program in lieu of the Federal hazardous waste program (40 CFR Parts 260-263 and 265) and will not again be subject to Phase I of the Federal Program unless 1) the State fails to obtain final authorization by the deadline specified in 3006(c) of RCRA and implementing regulations or 2) authorization is withdrawn for cause by EPA. 19/

Respondent was investigated for its compliance with the ISD on August 28 and September 1, 1981, and corresponded with the State on various matters relating to the compliance of its land farm. 20/ It was not until until August 9, 1983, that unsaturated zone monitoring was mentioned as possibly applying to Respondent. In a request for information sent by California to Respondent, Responsent was asked to include information on unsaturated zone monitoring "if you [Respondent] are required pursuant to

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19/ Id at 29935, 29936-937. 40 CFR Part 123, referred to in the text, so far as it relates to RCRA, has been redesignated as 40 CFR Part 271. See 48 Fed. Reg. 14146 (April 1, 1983).

20/ Exhs. 4, 6, 7, 9.

your ISD to implement unsaturated zone monitoring." 21/ Respondent by letter dated August 25, 1983, replied that its ISD does not require an unsaturated zone monitoring program. 22/

Subsequent to Respondent's letter of August 25, 1983, a joint team of State and EPA inspectors on November 18, 1983, made a hazardous waste investigation of Respondent's facility. The investigation report, a copy of which was sent to Respondent, listed the absence of an unsaturated zone monitoring program as an ISD deficiency. 23/ The deficiency, however, was not in Respondent's compliance with the ISD as written, but rather with the terms of the ISD itself. On February 2, 1984, the EPA notified California of this deficiency. 24/ California thereupon on March 9, 1984, amended Respondent's ISD to include the requirement of an unsaturated zone monitoring program. 25/ On August 20, 1984, Respondent submittted an unsaturated zone monitoring plan to California. 26/ In the meantime, on April 30, 1984, the EPA had issued its complaint and compliance order which instituted this proceeding.

The EPA's position simply stated is that the grant of interim status authority to Respondent imposed on Respondent the duty to comply with the federal interim status standards, and that Respondent's obligations with respect thereto could not be diminished by subsequent state action. Thus,

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21/ Exhs. 8, 8A.

22/ Exh. 8B.

23/ Stip., Par. 11.

24/ Stip., Par. 12.

25/ Stip., Par. 13.

26/ Stip., Par. 15.

Respondent on November 19, 1980, the effective date of the interim standards, should have had a written unsaturated zone monitoring plan which it was carrying out. 27/

Respondent, on the other hand, contends that it was entitled to rely on the ISD to determine what its obligations under RCRA were. It seems clear from the record that an unsaturated zone monitoring requirement should have been concluded in the ISD from the outset. Respondent's position, however, is that it had no reason to believe that the ISD was deficient in this respect, that it acted in good faith in assuming that it was not required to have an unsaturated zone monitoring plan, and that it should not be penalized for relying on the ISD. Bearing upon Respondent's good faith is the fact that the presence of the land farm and the hazardous wastes treated by this process appear to have been disclosed to the EPA and presumably, therefore, to the State from the beginning. 28/

27/ Respondent contends that the unsaturated zone monitoring requirement is included in the groundwater monitoring requirements which did not go into effect until November 19, 1981. Closing brief at 4. This argument is without merit. The regulation for unsaturated zone monitoring, unlike the regulation for groundwater monitoring, contains no provision extending the effective date beyond November 19, 1980. Compare 40 CFR 265.278 with 40 CFR 265.90. Moreover, unsaturated zone monitoring, as is evident from its very wording, is intended to monitor the migration of hazardous wastes and its constituent in the soil as means for guarding against possible environmental injury over and above groundwater monitoring. 45 Fed. Reg. 33206-208 (May 19, 1980).

28/ See Respondent's Part A permit application attached to Complainant's brief which shows that, among other wastes, Respondent was treating by land application DAF float (K048), and API sludges (K051). Presumably the information in the application was made available to the state in framing the ISD. See Exh. 1 (letter transmitting ISD); Exh. 3, p. 5. In a letter dated February 26, 1982, to California, Respondent responding to a request by California for a report of waste discharge and proposed groundwater monitoring program also described the operation of its land farm and the wastes spread thereon. Exh. 4.

One question not really addressed by Respondent is what its obligations were during the five months that intervened between the effective date of the regulations and the issuance of the ISD, or, to be more precise, since the interim standards exclude only persons subject to an authorized state program, the six months intervening between the effective date of the regulations and the EPA's authorization of California's program. The basis on which this case has been brought, however, is that Respondent has been in continuing default since November 18, 1980. 29/ To decide whether Complainant's proposed penalty of $25,000 is an appropriate penalty for failure to have and carry out an unsaturated zone monitoring plan for five or six months would be to decide this case on an issue which has not really been tried.

In addressing the parties' arguments, it is to be noted that once the state program was approved, Respondent's compliance was governed by the state program and not by the federal interim standards. This is expressly provided in the regulations. 30/ It was also made clear in the EPA's announcement of its approval of the state's program. 31/

Given this fact, what then are the consequences which follow when the ISD omitted either by mistake or for some other reason, the land treatment requirements? Complainant argues that the State was without authority to

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29/ See Complaint, Par. 20.

30/ 40 CFR 265.1(c)(4). See also 40 CFR 271.121(b).

31/ The EPA stated in its announcement in June 1981, that the practical effect of its approval of California's program was that operators of hazardous waste management facilities in California will be subject to California's hazardous waste program in lieu of the federal hazardous waste program (40 CFR Parts 260-263, and 265). California Interim Authorization, 46 Fed. Reg. at 29936. California said much the same thing in a notice sent to Respondent in January 1982. Stip., Par. 5, and Exh. 3, p. 2.

impose requirements less stringent than the federal standards, notwithstanding that the state program had only to be "substantially equivalent" to the federal program. 32/ The legislative history behind the EPA's regulatory provisions relating to interim authorization does not support this argument. Thus the EPA stated as follows:

> The Agency believes that while section 3009 disallows imposition by a State of "any requirements less stringent than those authorized under this subtitle respecting the same matter as governed by (EPA) regulations . . . "section 3009 was clearly not intended to mandate application of a "no less stringent" standard to State programs which seek interim authorization. Application of section 3009 to such State programs is in direct contradiction to the "substantially equivalent" standard for interim authorization mandated in section 3006(c).
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> Thus, EPA will not apply the mandate of section 3009 to States seeking interim authorization. * * * * 33/

It may well be as Complainant appears to argue, that EPA did not intend that the words "substantially equivalent" would permit the state to exclude an important provision like the land treatment requirements. 34/ Whatever error there may have been by the State in excluding these requirements, however, was compounded by the EPA's notice granting interim authorization to the State, wherein the EPA stated: "We have determined that each interim status

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32/ See brief in support of the charges set forth in Count I of the determination of violation (hereafter "Complainant's Main Brief"), at 10; and Complainant's response to Respondent's trial brief (hereafter "Complainant's Reply Brief") at 7-8.

33/ 45 Fed. Reg. 33391 (May 19, 1980).

34/ Complainant's Reply Brief at 7-8.

permit [issued by the State] contains conditions which are substantially equivalent to the RCRA interim status standards." 35/

It is an axiom of law that governmental bodies are presumed to act in accordance with law. 36/ The principle, of course, is not strictly applicable to the issue in this case. Nevertheless, reasoning by analogy, Respondent was entitled to assume that the ISD set out its full obligations under RCRA. Respondent, as Complainant argues, of course, knew that its land farm was of concern to the State of California because of the possible contamination of the groundwater and San Francisco Bay. 37/ Groundwater monitoring, however, was made a condition of the ISD, and Respondent in good faith appears to have been complying with this requirement. 38/ Unsaturated zone monitoring was an additional precautionary measure, and Respondent could have reasonably assumed that there was no irregularity in the omission of this requirement from the ISD. 39/

Complainant argues that Respondent's reliance upon the ISD was unwarranted after the enactment of section 25159.6(c) of Chapter 6.5, Division 20 of the California Health and Safety Code in March 1982. 40/

35/ California Interim Authorization, 46 Fed. Reg. at 29935. Complainant contends that this representation in the notice was inaccurate. Complainant's Main Brief at 11.

36/ See e.g., Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935).

37/ Complainant's Reply Brief at 4-5.

38/ Exh. 1, p. 27; Exhs. 4, 6, 7; Stip., Pars. 5, 6, 8.

39/ See supra, n. 27.

40/ Complainant's Main Brief at at 10-11.

That Act provided in pertinent part as follows:

> 25159.6. Until such time as the department adopts standards and regulations corresponding to and equivalent to, or more stringent or extensive than, regulations adopted by the United States Environmental Protection Agency pursuant to Sections 3002, 3003, 3004, 3005 and 3006 of Public Law 94-580, as amended, the following shall apply:
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> (c) Any person who owns or operates a hazardous waste facility shall comply with this chapter and regulations adopted thereunder and, in addition, to the extent that the facility is defined as a hazardous waste facility in regulations adopted under the Resource Conservation and Recovery Act, as amended (P.L. 94-580), and to the extent that the waste is both hazardous as defined by regulations adopted pursuant to Section 3001 of that act and has not been excluded from regulation pursuant to that section, such person shall also comply with federal regulations adopted pursuant to Sections 3004 and 3005 of that act. 41/

Under Complainant's position, it would be necessary to read into section 25159.6(c) an intention by California to correct any deficiencies in the ISDs it had issued in connection with obtaining Phase I interim authorization. Article 5.5 of which section 25159.6(c) is a part does not specifically refer to regulations already adopted, but speaks generally to California's intended adoption of regulations that will allow it to administer its own programs. 42/ Respondent, therefore, as it argues, had no reason to assume that the statute was intended to affect ISDs already issued by the State which the EPA had approved and which the State had been given interim authority to administer. 43/

41/ Exh. 5

42/ Exh. 5.

43/ Respondent's closing brief at 4.

In determining the appropriate penalty, the issue is not, as Complainant argues, whether the defense of equitable estoppel is available to Respondent. 44/ Respondent does not contend that EPA and California should be estopped from requiring Respondent to have unsaturated zone monitoring. 45/ The issue, instead, is the appropriateness of penalizing Respondent when action taken by the EPA and the State misled Respondent as to what its obligations under RCRA were. The goals of a civil penalty are deterrence, fair and equitable treatment of the regulated community and swift resolution of environmental problems. 46/ It is difficult to see, how any of these goals are furthered by imposing a penalty upon Respondent. This is not a case when failure to exact a penalty would reward a person who has been negligent or careless or shown a disposition to avoid its obligations under RCRA. It would obviously not be fair and equitable to the regulated community to levy penalties for violations caused or induced by mistakes or errors made by those responsible for administering RCRA. Finally, the environmental problem arose in this case because of the mistaken or erroneous action by the EPA and the State, and appears to have been resolved promptly once the mistake or error was corrected. Accordingly, it is concluded that no penalty should be assessed.

The complaint also contained a compliance order. Since, the parties have resolved and settled Counts II and III, and have stipulated that

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44/ Complainant's main brief at 12.

45/ Respondent's closing brief at 5.

46/ EPA, Final RCRA Civil Penalty Policy (May 8, 1984) at 3.

Respondent has submitted an unsaturated zone monitoring plan to EPA and California, it appears the issue of whether the compliance order is appropriate has been mooted. 47/

ORDER

It is hereby ordered that Count I of the complaint is dismissed. 48/

Gerald Harwood
Gerald Harwood
Administrative Law Judge

DATED: Jan 14, 1985

47/ Stip. Introductory Paragraph and Paragraph 15.

48/ Unless an appeal is taken pursuant to 40 CFR 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 CFR 22.27(c).