UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
F & K Plating Company,	)	Docket No. RCRA-VI-427-H
	)	
Respondent	)	

Resource Conservation and Recovery Act - Rules of Practice - Motions to Reopen Hearing - Appeals - Remedy for an initial decision considered to be erroneous is an appeal to the Administrator in accordance with Rule 22.30 (40 CFR Part 22) and where Respondent filed a motion to reopen the record, proposing to offer additional evidence through a witness who appeared at the trial, but failed to show good cause why the evidence was not proffered at the hearing, the motion to reopen was denied.

Appearance for Complainant: David Cohen, Esq.
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Appearance for Respondent: David S. Eldridge, Esq.
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Opinion and Order
Denying Motion to Reopen Hearing

In an initial decision, issued April 14, 1986, the ALJ held that Complainant had satisfied the burden of proof placed upon it by Rule 22.24 (40 CFR Part 22) of demonstrating that liquid wastes in a lagoon maintained

by Respondent exceeded EP toxicity limits for chromium (5 mg/l) set forth in 40 CFR 261.24 and were therefore hazardous. The conclusion that the waste exceeded EP toxicity limits for chromium was based primarily upon analyses of liquid samples, drawn from the discharge pipe into the lagoon and from two points in the lagoon on May 3, 1984. The results, reported as total metals, were 16.7 mg/l, 28.1 mg/l and 28.7 mg/l chromium, over three times and five times, respectively, the EP toxicity limit. The Director of the Oklahoma State Department of Health Laboratory (OSDHL), which conducted the tests, testified that he directed EP toxicity tests to be performed in anticipation of litigation and explained that the results were reported as total metals, because the computer was not programmed to print results in any other fashion (finding 13).

Other evidence relied upon to support the conclusion wastewater in the excess of the EP toxicity limit included tests for total metals on samples drawn by Respondent reflecting chromium concentrations of 17.69 mg/l and 303 mg/l (findings 14 and 16). Reliance was placed on OSDHL Director Brown's testimony to the effect that results of total metals tests for chromium would be equivalent, if solids in the samples were less than one-half percent (finding 10), would not vary by more than 15% or 20% even if acid was used as a preservative, contrary to EP toxicity test procedures and that the difference between total metals and EP toxicity tests would be within the normal variability of the EP toxicity test, which he estimated at plus or minus 20% to 30% (finding 11).

Under date of May 2, 1986, F & K filed a motion to reopen the hearing proposing to introduce evidence through Dr. Charles Marshall, an expert witness for F & K at the hearing, as to variations in reported heavy metals

concentrations that can result from a total metals test as compared to an EP toxicity test. Attached to the motion is an affidavit of Dr. Marshall to the effect that there is a substantial variation between total metal analysis and EP toxicity analysis on a sample extract and that, because proper procedures were not followed, the results may have been substantially different than if the required sample analyses protocols had been followed. The affidavit further states that the number of samples taken was insufficient to characterize the unit as a hazardous waste treatment facility. F & K also asks for re-evaluation of the evidence as to the negative benefits of noncompliance.

In support of the motion, F & K points out that EPA has published regulations as to testing procedures for determining, inter alia, the characteristic of toxicity under 40 CFR 261.24, i.e., "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, incorporated by reference 40 CFR 260.11 and Part 261, Appendix II, and that toxicity is defined in terms of test methods specified in SW-846. F & K alleges that the ALJ found that the total metals test produced about the same results as an EP toxicity test and thus was acceptable as proof the waste was hazardous. It is further alleged that the ALJ relied upon the testimony of Mr. Brown, characterized as obviously very weak, to overcome the lack of documentation, such as chain of custody log and a written sample analysis plan, required by SW-846.

F & K cites Donner Hanna Coke Corp. v. Costle, 464 F.Supp. 1295 (D.C. N.Y. 1979), for the proposition that rulemaking in accordance with the Administrative Procedure Act is required before EPA may adopt a test method other than the published method. Quoting a portion of the cited

decision, which involved enforcement of the Clean Air Act, wherein EPA attempted to justify use of the different test method based on testimony to the effect that there was no significant difference between the results, F & K says that Donner Hanna is virtually on all fours with the instant case.

F & K acknowledges that Dr. Marshall testified at the trial that the result of a total metals test would be different than an EP toxicity test, but asserts that it did not expand on this testimony to include estimates of the extent of the difference, because the rule that the government is bound by its own regulations was considered to be "hornbook law" and F & K never dreamed EPA would be permitted to use a different test method.

F & K attacks the credibility of Mr. Brown's testimony that an EP toxicity test was conducted, pointing out that documentation required by § 1.3 of SW-846 is lacking, that Mr. Brown did not personally perform the test, that the individual performing the analysis did not sign the test report and that Mr. Brown testified filtration was not required. In a supplement to its brief, dated May 5, 1986, F & K emphasizes that § 1.24[1/] of SW-846 defines a toxicity test as a test performed in accordance with methods specified in the manual and that if these procedures were not followed, by definition an EP toxicity test was not performed.

Regarding the negative benefits of noncompliance, F & K excepts to a statement (initial decision at 29) to the effect that savings enjoyed from noncompliance include the cost, estimated at $6,000, of a groundwater monitoring system. F & K asserts that if it had complied, it would not have had wells.

1/ Apparently the intended reference is to 40 CFR 261.24.

Opposing the motion, Complainant emphasizes the requirement of Rule 22.28 that a motion to reopen a hearing must show that the evidence proposed to be adduced is not cumulative and show good cause why the evidence was not adduced at the hearing (Opposition, dated May 12, 1986). Complainant says that the instant motion complies with neither of these requirements.

Regarding the first of the mentioned requirements, Complainant says that because much of the information discussed in the Dr. Marshall's affidavit is simply a reiteration of testimony already given and the balance consists of conclusions drawn from that testimony, the proposed new evidence is clearly cumulative. As to the second requirement, Complainant asserts that there is no reason all of the information in Dr. Marshall's affidavit could not have been presented at the hearing, pointing out that he testified at length therein. Granting a motion to allow additional testimony from a witness who testified at the hearing, concerning a very subject discussed in his testimony, would, according to Complainant, constitute a clear violation of the requirement that good cause be shown for failure to introduce the evidence at the hearing.

Complainant says that it relied upon a test conducted in accordance with SW-846 as proof of the violation, that the ALJ properly found such a test was conducted and urges that the motion to reopen be denied.2/

2/ Complainant also asks that the ALJ not allow the affidavit of Dr. Marshall attached to the motion to be incorporated into the record. The affidavit is part of the record upon which the motion to reopen is based and it would be inappropriate for the ALJ to make any ruling modifying or altering that record.

Discussion

Contrary to the implications of the motion to reopen, the initial decision fully recognized the rule that EPA is bound to comply with its own regulations (Id. conclusion 1 and discussion at 26). In this regard, F & K uses a blunderbuss to describe the alleged extent of OSDHL noncompliance with the testing procedure, SW-846, when a rifle is required. It is true that the samples collected by Mr. Heitman on July 2, 1982, and by Mr. Black on October 12, 1983, were preserved in acid (findings 8 & 9) and that SW-846 specifically prohibits the use of preservatives (finding 26). Complainant, however, relied primarily upon tests conducted on samples drawn by Ms. Jackson on May 3, 1984 (finding 5) of which there is no evidence of the addition of acid or other preservatives. Accordingly, this criticism of the OSDHL tests is not factual.

F & K also attacks the credibility of OSDHL Director Brown's testimony that EP toxicity tests were performed on the May 3 samples even though the analyses reports reflect total metals (finding 13). It is recognized that the analyses reports and the telecon record of May 3, 1984 (initial decision, footnote 5), are persuasive evidence that total metals tests were conducted. Mr. Brown, however, was determined to be a credible witness and gave a reasonable explanation for test results being reported as total metals, i.e., the computer was not programmed to print results in any other fashion.3/

3/ Finding 13. The reasonableness of this explanation is enhanced by the fact most metal analyses requested by the Water Resources Board were apparently for total metals (Tr. 105-07) and by the computer data bank problems described by Mr. Brown (Tr. 131-33).

Although not specifically included in the findings, the fact is that Mr. Brown's testimony is replete with statements to the effect filtering of the samples was accomplished (Tr. 85, 92, 98, 100 and 104). Accordingly, the only possible validity to F & K's criticisms in this respect is whether Mr. Brown, not having personally performed the test, had personal knowledge that the samples were filtered. While he acknowledged that he did not peer over an analyst's shoulder as a test was performed, Mr. Brown testified that there were procedures analysts were required to follow and quality assurance procedures to document that tests were properly conducted (Tr. 102-03). There being no evidence to the contrary, this testimony is sufficient to support a finding filtering of the samples was accomplished.

Probably, F & K's most serious objection is that a written sampling analysis plan was not developed as required by Section One of SW-846 (Respondent's Exh 27). In this regard, Dr. Marshall testified that conclusions as to whether a waste was at or above the regulatory threshold must be drawn on the basis of the sampling plan and not individual samples (finding 27). This concept was recognized in the initial decision and, even though one sediment sample tested above the regulatory limit for cadmium, it was held that Complainant had failed to demonstrate that sediments in the lagoon contained metals in excess of the regulatory limit. The conclusion that water in the lagoon contained chromium in excess of the regulatory limit was based on tests of three samples, over three times in one instance and over five times in the other two instances, the limit of 5 mg/l.4/ Reliance was placed upon a statement in Section One of SW-846 to the effect that low accuracy and

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4/ While one of these samples was taken from the discharge pipe into the lagoon and Dr. Marshall's testimony that this is not a proper method of sampling the lagoon (finding 27) is uncontracted, the discharge of a hazardous waste into the lagoon is sufficient to subject the lagoon to RCRA regulation.

low precision can be tolerated if the contaminants of concern occur at levels far below or far above applicable thresholds (initial decision at 26, footnote 21). The decision noted that Dr. Marshall, who had ample opportunity to do so, did not dispute Mr. Brown's testimony as to the similarity in results of total metals and EP toxicity tests for chromium.5/

F & K's assertion, referring to Donner Hanna Coke Corp., supra, that "(i)f this is not a bay horse case, you've got two shades of reddish-brown" (Brief at 4), overlooks the fact that there were serious flaws in the analysis which led the court in that case to reject EPA's evidence to the effect there were no significant differences between emission readings utilizing the published method and readings obtained by the method actually used. Here, the expert testimony delineates, albeit in a rough fashion, the approximate differences between total metals and EP toxicity tests6/ and, in any event, the findings were that EP toxicity tests were performed on the samples principally relied upon by Complainant.

Although alleged savings from noncompliance were not included in calculation of the penalty, a brief comment on F & K's contentions in this respect is in order. The evidence is that the lagoon long antedated the effective date of RCRA regulations and, if F & K had complied by filing a timely Notification of Hazardous Waste Activity and a Part A permit application, the lagoon would not have disappeared or immediately been rendered illegal.

5/ Id. at 27. This comment is, of course, applicable to tests by OSDHL acknowledged to be for total metals (July 2, 1982, samples) and to samples drawn by F & K which were tested by NAL.

6/ In Donner Hanna, an adjournment was granted in order to allow EPA to call an expert to rebut testimony of plantiff's expert, which witness EPA failed to produce. Here, of course, F & K seeks to introduce contravening testimony through the motion to reopen.

Effective closure may well require installation of a monitoring system and under these circumstances, the cost of monitoring wells may properly be regarded as a cost saved or deferred by noncompliance.

Reduced to essentials, F & K argues that the initial decision is wrong. The remedy for an initial decision, considered to be erroneous, is an appeal to the Administrator in accordance with Rule 22.30 (40 CFR Part 22). It is well settled that motions to reopen the hearing are not lightly to be granted and that the fundamental requirements of Rule 22.28, i.e., that the motion to reopen show that the evidence proposed to be introduced is not cumulative and demonstrate good cause for failure to produce the evidence at the hearing, will be strictly enforced.7/ Such a motion may not be used as a vehicle for correcting errors in strategy or oversights of counsel at the hearing.8/ Here, F & K acknowledges that Dr. Marshall testified that the results of a total metals test would be different than an EP toxicity test (Brief at 4). The only explanation for not producing evidence as to the extent of the alleged differences is the assertion that "* * we never dreamed anyone would conclude * * * that the Agency could use a different testing method" (Id.). In view of the testimony that EP toxicity tests were conducted, this explanation falls far short of the required good cause.

7/ N.O.C., Inc., t/a Noble Oil Company, TSCA Appeal No. 84-2 (Final Decision, February 28, 1985) (motion to reopen denied, because evidence proposed to be introduced was largely cumulative and movant failed to show good cause why the evidence was not adduced at the hearing).

8/ Ashland Chemical Company, Division of Ashland Oil, Inc., Docket Nos. RCRA-IX-83-10 and 83-40 (Opinion and Order Denying Motion to Reopen Record, January 10, 1985).

Accordingly, the motion to reopen the hearing is lacking in merit and will be denied.

ORDER

The motion to reopen the hearing is denied.[9/]

Dated this 13th day of June 1986.

Spencer T. Nissen
Administrative Law Judge

9/ Service of this order will restart the running of the 20-day appeal period specified by Rule 22.30.