UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	RCRA-84-16-R
BROWN WOOD PRESERVING CO., INC.	)	
	)	
Respondent	)	

1. Resource Conservation and Recovery Act - The EPA is bound by the clear language of its own regulations and may not, for any purpose, add to or embelish the definitions contained therein to suit its own ideas of what the regulations mean.

2. Resource Conservation and Recovery Act - Definitions - A device buried in the ground consisting of four (4) wooden sides and a clay bottom, under the facts in this case, is a "tank" as defined in 40 C.F.R. § 260.10.

3. Resource Conservation and Recovery Act - Effect of Internal Memoranda - The use of unpublished internal memoranda to support an enforcement action against a facility owner regarding units, which had previously been considered unregulated, is improper and in violation of the provisions of the Administrative Procedures Act.

4. Resource Conservation and Recovery Act - Burden of Proof - Where the Agency has not proven the allegations in the complaint by a preponderance of the evidence, the complaint must be dismissed.

Appearances:

Andrea E. Zelman, Esquire
For Complainant, U.S. Environmental Protection Agency
Atlanta, Georgia

Thomas H. Brown, Esquire
Sirote, Permutt, Friend, Friedman, Held & Apolinsky
For Respondent, Brown Wood Preserving Company, Inc.
Birmingham, Alabama

INITIAL DECISION

This is a proceeding brought pursuant to Section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 ("RCRA" or "The Act"), 42 U.S.C. § 6928. Section 3008 of RCRA provided[1] in pertinent part:

> (a) Compliance Orders-(1)...[W]henever on the basis of and information the Administrator determines that any person is in violation of any requirements of this subchapter, the Administrator may issue an order requiring compliance immediately or within a specified time period....
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> (c) ...Any order issued under this section may... assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.
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> (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.

On March 31, 1984, the U.S. Environmental Protection Agency, Region IV ("EPA") issued a Complaint, Compliance Order, Consent Agreement, and Notice of the Right to Request a Hearing charging the Respondent, Brown Wood Preserving Company, Inc. ("Brown Wood"), with violation of certain requirements of RCRA. Specifically, the Complaint charged Brown Wood with violations relating

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[1] Any references to RCRA are to the Act as it was in effect in March of 1984 when the original Complaint and Compliance Order was issued to Respondent. In November 1984, Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984), ("HSWA") which significantly amended RCRA. One change brought about by HSWA was a revsion and reorganization of Section 3008, 42 U.S.C. § 6928. Thus, the authority to assess penalties which is cited in the text below as it was formerly found at §§ 3008 (c) and (g) can now be found at §§ 3008(a)(1), (3) and (g). See 42 U.S.C. § 6901 et seq. (1984).

to financial responsibility requirements found in the RCRA interim status standards for owners and operators of hazardous waste treatment, storage, and disposal facilities, 40 C.F.R. Part 265, Subpart H. On March 29, 1985, Complainant moved to amend that Complaint to include additional violations of RCRA requirements. That motion was granted on April 24, 1985. The Amended Complaint and Compliance Order ("The Order") alleged violation of additional requirements of the interim status standards, including the failure to have a groundwater monitoring program in accordance with 40 C.F.R. Part 265, Subpart F, and an adequate closure plan in conformance with 40 C.F.R. Part 265, Subpart G. The Order included a schedule which set forth dates by which Brown Wood was to comply with the specific provisions of which it was in violation. In addition, The Order proposed the assessment of a civil penalty in the amount of $24,000 (twenty-four thousand dollars). The Order also proposed stipulated penalties for Brown Wood's noncompliance with the schedule set forth in the Order.

Brown Wood filed an Answer in which it denied that it treats, stores or disposes of hazardous waste, and therefore denied that it was or should be subject to the interim status standards applicable to such hazardous waste management facilities. Following the opportunity for the parties to settle informally, an exchange of information was ordered. The parties exchanged lists of witnesses expected to be called, proposed exhibits, and additional information regarding this matter. On January 29-30, 1986, a Hearing on the matter was held in Atlanta, Georgia.

Following the availability of the Hearing transcript, the parties filed and exchanged initial submissions of findings of fact, conclusions of law, briefs in support thereof, and replies. The American Wood Preservers Institute ("APWI"), an industry association, moved for leave to file an amicus brief. The parties filed no opposition and the motion was granted.

In rendering this Initial Decision, I have carefully considered all of the information in the record. Any proposed findings of fact or conclusions of law inconsistent with this decision are rejected.

Factual Background

The Respondent, Brown Wood Preserving Company, Inc., is a creosote wood treatment plant located in Brownville, Alabama. In the 1970's in association with the State of Alabama Water Improvement Commission and in compliance with the Clean Water Act, Brown Wood established a system for the treatment of the process water generated in connection with its wood preserving process.

The system consists of collection pits and sumps that collect the process water; it is then pumped into two large settling tanks where the creosote sinks to the bottom and is recycled. The process water is then routed to two open horizontal tanks, where additional settling takes place and the creosote is recycled. The water is then entered into two quick-mixer tanks, where flocculation takes place. The water and the resulting floc is then pumped onto a hill into a sandbed filter where the floc is filtered out as K001 bottom sediment sludge. The process water then progresses through sand into a collection manifold at the bottom of the filter, and flows into a holding pond. The water is then pumped onto a spray irrigation field where additional wastewater treatment occurs and any overflow or underflow from this operation is returned to the holding pond.

The above-described treatment for the wood preserving process water follows specifically the state-of-the-art methodology established by EPA under the Clean Water Act in order for the Respondent to meet the requirements of that Act and to receive an NPDES permit.

In 1980, pursuant to the requirements of RCRA, Mr. Heath, the part-owner of Brown Wood filed a notification under The Act which indicated that they were a generator of hazardous waste K001 (bottom sediment sludge from the wood preserving industry). In that notification, Mr. Heath indicated that the facility was only a generator of such sludge and not a treator, storer or disposer thereof.

In November 1980, Mr. Heath filed the facilities Part A application and on this form indicated "Yes" to the question: "Does or will this facility treat, store or dispose of hazardous waste?" Mr. Heath checked that box because at that time the facility had a future intention to disk plow the K001 sludge generated in its filter beds into the earth rather than having it taken off site for disposal in a licensed solid waste disposal facility. Since that time, Brown Wood has decided not to dispose of its hazardous waste in that fashion but rather to have it shipped off site for licensed disposal. From the outset, Brown Wood never considered itself to be a TSD facility and did not consider either the holding pond or the spray field, or the sand filter bed to be regulated units under RCRA.

When the Respondent filed its original Part A application, it identified the owner of the facility as being the City of Tuscaloosa, since that City was the legal owner of that facility, inasmuch as it issued revenue bonds to finance the facility and as such holds title to the property. EPA subsequently advised the Respondent that this was not a proper designation and an amended Part A application was then filed showing that Brown Wood was the owner and operator of the facility. Subsequently, a follow-up notification and request for information was sent to the Respondent, and all others similarly situated, by EPA asking them to clarify whether or not they were a TSD facility or

owned a TSD facility. Brown Wood thinking that there was still some question about the actual ownership of the facility marked the box that they were a TSD facility.

With that background there now transpires a rather Byzantine series of notifications and interpretations by EPA and the State of Alabama as to the nature of the Respondent's facility and to what extent the various portions of its treatment regime are governed by RCRA and its associated regulations.

At several times between 1980 and the present, the Respondent asked that its Part A application be withdrawn since it did not consider itself to be a regulated facility. The Respondent's rationale for this assertion was that they only generate K001 sludge and that they do so in the sand filter which is a rectangular structure set in the ground with wooden sides and a clay bottom. They took the position that inasmuch as this structure met the definition in the regulations of a "tank", they were, therefore, not subject to regulation under RCRA. They also asserted, on numerous occasions, to both the State of Alabama and the EPA that they were exempt from regulation inasmuch as they were a small quantity generator as that term is defined in the regulations. These requests were met with statements to the effect that since you are a regulated facility you can not withdraw your Part A application and as to the small quantity generator argument, the governmental entities advised that inasmuch as no supporting data was forthcoming which would substantiate this claim, they could not make any ruling thereon. The record does not reveal that any governmental agency ever advised the Respondent just exactly what sort of information was required in order for them to demonstrate that they were, in fact, a small quantity generator. The regulations seem to suggest that one may become a small quantity generator by merely making the

assertion that it falls into that category and that if somewhere in the future it is determined that they are not, then they must suffer the consequences for their mistake in interpretation.

In any event, while all this was transpiring, the requirements for financial responsibility became due under the regulations and notifications were sent to the Respondent telling it that it needed to provide proof of insurance and financial responsibility to the State of Alabama. The Respondent continued to argue that it was not governed by the provisions of RCRA for the reasons above-stated and these pleas were met with more requests for the financial responsibility documentation.

Somewhere in this time frame, the State of Alabama was relieved of its authorization to administer certain portions of the RCRA program and EPA came into the picture. The Agency then filed its first Complaint which proposed to assess a penalty of $5,000 (five thousand dollars) for the failure of the facility to come forth with the necessary financial and insurance documentation. An Answer was filed which essentially denied that they were governed by RCRA and various settlement conferences between EPA, the Respondent and peripherally the State of Alabama were held. Shortly after one of the major settlement meetings, the Agency moved to amend its Complaint to add the additional violations which it had discovered subsequent to the issuance of the first Complaint. The motion was allowed and the new Complaint was issued which now charged the Respondent with violating not only the financial responsibility aspects of the regulations but also the failure to have in place groundwater monitoring systems for the three regulated units and other administrative and internal documentation which the regulations require that such a facility have in place.

The record reveals that at no time did the Respondent, nor the wood processing industry generally, understand that the spray fields which were installed pursuant to the Clean Water Act and, in some cases, the storage ponds as well were regulated units under RCRA. This state of affairs was not clearly enunciated to the Respondent until or shortly before the bringing of this action. In order to fully understand the Agency's rationale in regard to this facility, as well as others in the wood preserving industry, a review of certain internal memoranda is required.

Apparently as early as May or June of 1983, the State of Alabama, which at that time had the authority to administer RCRA in that State, had some questions about the applicability of RCRA to certain facilities in the wood treating industry. This concern was communicated to Region IV EPA and by letter dated March 13, 1984, Mr. James H. Scarbrough, Chief, Residual Management Branch, wrote a letter to Mr. Bernard Cox, Chief of the Industrial and Hazardous Waste Section of the Alabama Department of Environmental Management (hereinafter "ADEM"). This letter contained two scenarios which in essence described two different treatment systems at two separate facilities and then answered questions relative to the application of RCRA to them. The first scenario describes essentially what is found at the Brown Wood facility with the exception that the scenario suggests that there is both creosote and pentachlorophenol treatment of the wood involved. The record in this case suggests that at all relevant times Brown Wood never used pentachlorophenol as a treatment method but only used creosote. The first question addressed by Mr. Scarbrough was: "Is the wastewater which drains from the filter beds a listed hazardous waste because it comes from the treatment of a listed hazardous waste?" Mr. Scarbrough's answer was: "Yes, the water is a regulated hazardous waste" and he based this opinion on the definition of a

hazardous waste which includes a leachate. He suggests that since leachate is defined in 40 C.F.R. § 260.10 as "any liquid, including any suspended components in the liquid that has percolated through or drained from hazardous waste" that therefore the water which drains through the sand bed filter and the K001 sludge contained therein must of necessity be a leachate and as such is therefore a listed hazardous waste.

The next question is: "Would the spray field be subject to RCRA if the water is hazardous even though it is regulated by the Water Division which requires reporting to them?" The answer is: "Yes, since the water from the sludge filter beds would be regulated as a hazardous waste, as explained above, any subsequent treatment, storage or disposal of the water would be subject to the regulation by RCRA. The spray field would be a form of land treatment subject to regulation under Subpart M of Section 265." He further states that regulation under another State program would not exempt a land treatment facility from regulation by the RCRA program.

The third question asked is: "Assuming the water is <u>not</u> hazardous would just the filter beds be regulated because the bottom is clay due the sludge accumulation." The answer was that: "Regardless of the status of the water, the unit where the sludge is accumulated is a regulated unit under Subparts 1 through L or Q depending on the type of construction. He suggests that the sand-gravel beds would probably be regulated under Subpart Q. He also stated that the holding pond would be a regulated surface impoundment under Subpart K and that delisting might be appropriate in some cases for the water of the sand filters.

Although I can understand why the filter beds might be a regulated unit, assuming as Mr. Scarbrough did that the water is not hazardous, one can not understand his reasoning that the holding pond would be a regulated surface

unit under Subpart K because it would not, under the scenario described, contain any hazardous waste.

In any event, this letter from Mr. Scarbrough to the Alabama official which stated that the spray fields, holding ponds and sand pits would all be regulated units was based essentially, at least as to the holding pond or the spray field, on the notion that the water which is discharged from the sand filter is a hazardous waste. It should be noted that this interpretation is contrary to previous decisions by EPA not to consider the wastewater from such facility to be a hazardous waste and it was specifically excluded from regulation under the Federal Register listing which established K001 as a hazardous waste in the first place.

Since the industry and other persons continued to protest this interpretation, concurrence on this issue was requested by Mr. Scarbrough by memorandum dated May 21, 1984. This memorandum was not admitted as an exhibit in the case, but because it provides an essential part of the chronological scenario which gave rise to the admission of follow-up memorandums, it will be made an exhibit in this case as Court's Exhibit No. 1. This memorandum essentially sets forth Region IV's interpretation of its rationale that the holding ponds and spray fields are regulated units and asks concurrence by Headquarters, EPA. In this May 21st memorandum, Mr. Scarbrough states as follows: "The listing K001 includes any sludge formed from wood preserving process waste that uses creosote and/or pentachlorophenol, regardless of where the sludge is formed. If a sludge is formed in the bottom or sides of a surface impoundment, or a sand filter or on a spray field of a land treatment unit, it is K001 sludge. The surface impoundment, the sand filter and the spray filter unit would be subject to all hazardous waste permitting regulations." (Emphasis supplied.) He then goes on to state that

in the case of the sand filter, the water that drains from the filter is a hazardous waste. He then proceeds to repeat his rationale for that conclusion on the basis that the water is a leachate and, therefore, a hazardous waste. The reason the Court sought this memorandum and included it as an exhibit, in addition to the reasons immediately above stated, is that the reply to this memorandum from Mr. John Skinner, Director of the Office of Solid Waste in Washington, D.C., contains language which suggests that there is an assumption in the request that sludge is generated in the pond and the spray field. The memorandum from Mr. Scarbrough to Washington, D.C. seeking concurrence states as a condition of his hypothesis that a sludge is formed both in the surface impoundment and the spray field.

The memorandum in reply to this request for concurrence, which is Respondent's Exhibit No. 36 dated 25 July 1984, states that contrary to Mr. Scarbrough's previous opinion on the subject, the wastewater from the oil water separature tanks and chemical flocculation tanks are not classified as listed hazardous waste, after the listed hazardous wastewater treatment sludges have settled out, even though some flocculated materials is carried along with effluent stream. He goes on to state that when the Agency listed wastewater treatment sludges from wood preserving processes it differentiated between the sludges which settle out from successive treatments of process wastewaters and the wastewater stream itself. He therefore concluded that the wastewater effluents from the two tanks would be subject to regulations only if they met one or more of the characteristics of a hazardous waste as set forth in the regulations. There is no suggestion in this record or elsewhere that the wastewater emanating from the various treatment processes employed by Brown Wood meet any of the "characteristics" as set forth in the regulations.

Mr. Skinner's memo then goes on to state that, although the wastewater emanating from the sand filter is not a hazardous waste, both the sand filter and the holding ponds would be subject to all hazardous waste regulations and permitting standards since they are surface impoundments used to manage a hazardous waste (i.e., the sludge). The memorandum is silent as to how this sludge gets into the holding ponds. He does state that if a sludge is formed in a wastewater treatment tank, filtration device or surface impoundment it is a K001 sludge. Since the May 21, 1984 memorandum from Mr. Scarbrough, wherein he seeks Headquarters concurrence with his opinion on the status of the units involved, states that: "If a sludge is formed it is a K001 sludge." The premise has then now been laid that K001 sludge is in fact found in both the surface impoundment and the spray field as well. Mr. Skinner's memorandum concludes that as to the spray field irrigation field, which is the final step in the wastewater system, no decision has been made by Headquarters as to whether or not that part of the system is a regulated unit. He states that he is currently investigating the status of this unit and that he expects to get back to the Region on this point in the near future.

Therefore, the July 25, 1984 memo, on its face, apparently seems to be of help to the regulated community in as much as it refutes Mr. Scarbrough's earlier contention that since the wastewater emanating from the filter beds is a hazardous waste, therefore, of necessity any holding pond or subsequent treatment facility which manages that waste would be a regulated unit under RCRA. Mr. Skinner's memo then, with no apparent justification, immediately leaps from the decision that the wastewater is not a hazardous waste to the conclusion that the pond which receives this non-hazardous waste will, of necessity, be a regulated unit since it manages the sludge. Just how this sludge which is a listed hazardous waste is generated from a non-hazardous wastewater constituent is not explained at this time.

The next memorandum in the chronology is from Mr. Skinner to Mr. Scarbrough dated November 23, 1984 which is Respondent's Exhibit No. 44. This memo apparently is a follow-up to the earlier memo which left unresolved the decision as to whether the spray irrigation fields were regulated units under RCRA. Mr. Skinner states that since the last memorandum, he has discussed the issue with the Office of General Counsel and has concluded that such spray irrigation units or other land spreading of wastewaters from wood preserving operations constitute land treatment of a hazardous waste, namely the K001 bottom sediment sludge. Therefore, such land spreading or spraying would be subject to the regulations and The Act. He then describes the basis for this conclusion to the effect that the hazardous waste K001 is formed in the soil in a land treatment unit to which wastewaters from wood preserving processes are applied. The mechanism for forming this sludge, he says, is similar to those operating in trickling filters or at the bottom of surface impoundments where aerobic degradation takes place. He states that biological action taking place in such units will lead to an increase of mass from the accumulation of dead organisms. Contaminates in the wastewater could be absorbed on this biomass and co-precipitate with it. Suspended solids also could be separated from the wastewater by simple filtration while passing through the land treatment unit matrix forming sludges. He then states that some facilities have claimed that no sludges are formed in these units or that no hazardous constituents of concern remain in these units at regulatory significant levels. He states that if a facility is able to demonstrate that no bottom sediments sludge is formed as described above, then the land treatment unit would not be subject to regulation under RCRA. He parenthetically states that: "at the present time we are not able to provide any guidance as to how one would make such a demonstration". He concludes by stating that if

sludges are formed in the land treatment unit but the facility is able to demonstrate that no hazardous constituents remain in an environmentally significant concentrations then the facility would have the option of delisting the sludges pursuant to 40 C.F.R §§ 260.20 and 260.22.

We now have a situation where initially EPA, at the regional level, had decided that all of these portions of the treatment system, i.e., the filter beds, the holding pond and the spray irrigation field, were all subject to RCRA and therefore regulated units for the reason that the water emanating from the filter bed was a hazardous waste. No mention of sludge formation was used as a justification for that initial conclusion. The Agency then at the Headquarters' level concluded that the water emanating from the filter unit was not in fact a hazardous waste but that since sludges, must of necessity, form in both the holding pond and the spray field due to the interaction of the organic constituents with the wastewater with the naturally occurring bacteria that is found in the soil, obviously any such material formed, would under the regulatory scheme, be considered K001 bottom sediment sludges. It is this latter conclusion that causes some concern both on the part of this Respondent and all other members of that industry as well as the American Wood Preservers Institute. They suggest that this internal interpretation of the formation of the sludges anywhere in the treatment scheme, are, of necessity, K001 bottom sediment sludges representing a new regulation, the effect of which is to place portions of the wastewater treatment system under the provisions of RCRA where heretofore the Agency and the regulated community had assumed that they were not regulated since they contain no K001 sludges.

At the Hearing, the Agency, at least at the regional level, took the position that they have always have felt that all of these units were regulated. But a careful reading of the memoranda involved suggests that the

Region's original basis for considering them to be regulated were that they handled a hazardous waste, i.e., the water from the sand filter, and not because K001 sludge was generated therein. Since the Region has been corrected on its assumption that the water was a hazardous waste in of itself, the new theory seems to be that since sludges will inevitably form in these units due to the interaction of the wastewater and naturally occurring bacteria in the soil that such sludges, biomasses or whatever description accurately describes this material is, under the regulation, K001 sludge that they now are regulated on that basis.

During all of this time, the Respondent, Brown Wood, continued to urge its case upon the State of Alabama and the Federal EPA to the effect that: (1) they are small quantity generators; (2) that the sand filter is under the definition in the regulations of a "tank" and, therefore, not a regulated unit; and (3) that the storage pond and spray field are not regulated units since they do not manage a hazardous waste as the industry has historically understood that term. Despite these strongly felt beliefs as to the non-applicability of RCRA to their facility, Brown Wood continued, through its consultants and others, to come into compliance and to satisfy the demands put upon them by various governmental regulatory agencies. At one point in time, the State of Alabama indicated to Brown Wood that if they would replace their wood sand filter device with a concreted one and demonstrate that the pond was not leaking that they could be relieved from the obligation of installing a groundwater monitoring system for those units. Apparently at this point in time, the State of Alabama did not consider the spray irrigation field to be a regulated unit. Pursuant to those instructions, the Respondent removed the wood-sided sand filter and replaced it with a concrete filter which everyone now agrees is a "tank" under even the most stringent interpretation of the

regulation's definition. The Respondent also attempted to satisfy the Agency's concerns about financial responsibility by providing the Agency with a trust agreement which the Agency apparently did not feel to be satisfactory.

Examination of Regulatory Scheme

Since the beginning of this controversy the Respondent has steadfastly argued that its wooden sand filter meets the definition of a tank, a position which the regulatory agencies have just as adamantly denied. Since the status of this unit, in my judgement, plays a crucial role in the application of the RCRA regulations to this facility, some examination of this position is warranted. As discussed above, the original sand filter employed by the Respondent as an essential part of its wastewater treatment system is a device consisting of a 20-by-20-by-15 impoundment with a natural clay bottom and sides constructed of preserved wood, having a depth of approximately five (5) feet. 40 C.F.R. § 260.10 contains the definitions which govern the applicability and the administration of the RCRA program. In that section, a tank is described as: "a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic) which provide structural suppport." Simple mathematical calculations reveal that the original sand filter is constructed primarily of non-earthen materials, that is to say, wood, and that only the bottom is of earthen material. In arriving at its conclusion that this device does not meet the regulatory definition of a tank, the Agency takes the position that in order for it to be a tank, it must maintain its structural integrity when removed from the ground and essentially support itself in mid-air. The Agency's position is that since the bottom of the tank is made of earth and clay materials, it would fall

out if removed from the ground and, therefore, it cannot meet the definition of a tank. See the testimony of complainant's witness, William Gallagher, Jr., at page 254 of the Transcript wherein he says: "For purposes of meeting the definition of a tank, we maintain that if the earth was removed from around this tank, it would support itself. Since it has no bottom, it cannot support itself." Obviously, the Agency's position on this matter is at odds with the written definition of a tank as it appears in the regulations, which are binding upon the Agency. Additionally, two expert witnesses appearing on behalf of the Respondent, who are professors of engineering at their respective universities, also disagreed with the Agency's interpretation thereof. They take the position that if a device is made primarily of non-earthen materials which provide structural support, it meets the definition of a tank. The Agency in its argument has added additional language to the regulations which a careful reading thereof does not support. All of the witnesses agreed that the wood sides of the original sand filter do provide structural support. The Agency's concern seems to be that since the bottom of the filter is made of clay, it cannot, under any circumstances, be considered a tank. If this was the Agency's intent, the definition it provided to the regulated community and to the other governmental regulatory agencies should have been more carefully written to suggest that the bottom of the device has to be made primarily out of non-earthen materials. The Agency attempts to bolster its position on this issue by suggesting that clay is not impervious to all substances and that, therefore, it does not contain "the hazardous waste treated therein". Whether or not the device leaks is not at issue here since the Agency has long since discovered that even tanks consisting of steel will on occasion leak and that whether or not a device is entirely water-proof or impervious to all materials contained therein is not part of

the definition of a tank. This contention is obviously ludicrous since the filter bed is designed with a sump in the bottom from which the wastewater is supposed to drain into the holding pond. If it were constructed in any other fashion, it would not accomplish its required function and would overflow onto the ground. I am, therefore, of the opinion that the original wood-sided sand filter employed by the Respondent as part of its treatment system met the definition of a "tank" as contained in the regulations and that the Agency's attempt to informally re-write the definition contained in their own regulations is an improper exercise of prosecutorial discretion.

All parties agree that a treatment device which meets the definitions of a tank is exempt from certain aspects of the regulatory scheme under RCRA including the necessity to have in place a groundwater monitoring system. As indicated above, the Respondent, shortly prior to the filing of the Amended Complaint, had replaced the wood filter with a concrete device which everyone agrees easily meets the regulatory definition of a tank. The main concern apparently in regard to this portion of the treatment scheme is whether or not the old wood-sided filter bed was closed pursuant to an approved closure plan. Testimony at the Hearing indicates that the Respondent is attempting, through its engineering consultants, to convince the regulatory agencies that the old filter bed was "clean-closed" and that, therefore, it was closed in a manner consistent with the regulations. Since I am of the opinion that the old wood-sided filter bed met the definition of a tank, any further discussion concerning its closure is for purposes of this decision, unnecessary.

Having determined that the old sand filter bed met the regulatory definition of a tank and since everyone agrees that the new concrete filter clearly meets the definition of a tank, additional examination of the regulatory definitions is appropriate to determine the effect of this ruling.

The above-cited section of the Federal regulations which contain the definitions applicable to RCRA define sludge as: "any solid, semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility exclusive of the treated effluent from a wastewater treatment plant." (Emphasis supplied.) Everyone agrees that K001 bottom sediment sludge is generated at several locations in the treatment scheme employed by the Respondent, i.e., at the bottom of the oil waste separator and clearly the material to which the floc has been added which settles out on the surface of the sand gravel filter bed. There is also apparently universal agreement among the parties that the wastewater which leaves the sand bed filter is not a hazardous waste under the regulatory scheme established by the EPA. We then are faced with the baseline question of determining whether or not a K001 sludge is generated by this nonhazardous wastewater at some other portions of the treatment scheme, in this case, primarily the surface holding pond and the spray irrigation field. Although the phrase "wastewater treatment plant" is not defined in the RCRA regulations, there is a definition which seems appropriate, contained in the same section of the Federal Register, that being "wastewater treatment unit". This device is defined as: "(1) as part of a wastewater treatment facility which is subject to regulation under either § 402 or § 307(b) of the Clean Water Act; and (2) receives and treats or stores an influent wastewater which is a hazardous waste as defined in § 261.3 of this chapter, or generates and accumulates a wastewater treatment sludge which is a hazardous waste as defined in § 261.3 of this chapter, or treats or stores a wastewater treatment sludge which is a hazardous waste as defined in § 261.3 of this chapter; and (3) meets the definition of tank in § 260.10 of this chapter." The sand bed filter is a part of a wastewater treat-

ment facility which is subject to regulation under § 402 of the Clean Water Act and it does receive, treat and store a hazardous wastewater treatment sludge and it does meet the definition of tank, as we have previously discussed. Applying all of these definitions to the facts at hand, one arrives to the conclusion that any material produced by the interaction of the non-hazardous wastewater contained in either the storage lagoon or the spray irrigation field with naturally occurring bacteria in the soil is excluded from the regulatory definition of a sludge since this material is a treated effluent from a wastewater treatment plant. This reasoning is supported by the language contained in the footnote to Mr. Skinner's July 25 memorandum. (Respondent's Exhibit No. 36.)

Although I am of the opinion that the analysis presented above is an accurate one as it applies to the situation in this case, one need not rely entirely upon such analysis to come to the conclusion that under the regulations neither the storage pond or spray irrigation field are regulated units under The Act or the regulations promulgated pursuant thereto. As discussed earlier the Agency's decision that these units are regulated units under The Act has its genesis in their unpublished theory that any materials created by the non-hazardous wastewater and soil bacteria is, of necessity, K001 sludge. The existence of such sludge must be demonstrated by something more than mere hypothetical theory on the part of the Agency to subject them to the rigors associated therewith of a RCRA regulated facility. The above-described memoranda from Mr. Skinner contain no data to support the notion that, of necessity, K001 bottom sediment sludge is always present in these units. On the contrary all of the testimony from the expert witnesses presented by the Respondent suggests that to the extent any additional biomass or new material is generated by such interaction it does not constitute K001 bottom sediment

sludge. The Respondent's witnesses uniformly testified that a sludge, as that term is universally accepted in the engineering community, means a visible measurable substance resulting from the treatment or management of some form of waste. Their testimony was that even if some material is generated by the biological action which takes place in the soil, it no longer has the characteristics of the constituents of concern in solution in the non-hazardous wastewater since that is one of the functions of biological treatment. By that it is meant that the bacteria which through evolution or acclimation, have the ability to feed on such organic materials, change its nature by the very act of their interaction with it and that the resulting material no longer has the same chemical make-up that was originally present. The Agency takes the position that the sludge generated in these two units, i.e., the lagoon and the spray irrigation field, may, in fact, be invisible and unmeasurable by normal means, but since they are of the opinion that such material is, in fact, generated, it is, by definition K001 bottom sediment sludge. It is this regulatory leap of faith which is of primary concern not only to this Respondent but to the entire wood treatment industry since it is contrary to the scientific community's previous notion of how these materials are generated.

Mr. James David Hagan II, one of the Agency's primary witnesses on the issue of the presence of K001 sludge in the treatment pond, testified on this issue at some length. It is felt that a recitation of this witnesses testimony is important to determine the validity of the Agency's position on this issue. This witness, who is an inspector and employee of the State of Alabama's Hazardous Waste Division, testified that he saw K001 sludge in the holding lagoon and that was one of the basis for his agency's as well as EPA's assumption that that is certainly a regulated unit. The following dialogue takes place on pages 165, 166, 167 and 168.

"MR. BROWN: Just a few more, Judge.

BY MR. BROWN:

Q. Can you explain what would happen if surface oil was on the pond?

A. Surface oil?

Q. Uh-huh (affirmative).

JUDGE YOST: What kind of oil are we talking about? Just any kind of oil?

MR. BROWN: Right, any kind of oil, oil associated with creosote.

JUDGE YOST: Okay.

THE WITNESS: You're talking about the carry oil or the fractions of creosote?

MR. BROWN: Light fractions.

THE WITNESS: They would float on the surface of the impoundment.

BY MR. BROWN:

Q. Is surface oil K-001 type surface oil that we're talking about?

A. No; it would not be considered to be K-001.

Q. Would it stain the soil along the bank when the wind blew the water around?

A. Possibly.

Q. Okay. Or if the water level dropped some, it would leave that stain?

A. Possibly.

Q. Could the black substance that you saw around the edge of that pond have been a stain rather than a sludge?

A. The black substance that I saw was a sludge. It met the definition of a sludge in the Alabama Hazardous Waste Management regulations. That was the only determination at that point that I was required to make."

"Q. Could it have been a sludge?

A. It was a sludge. A sludge can be a stain; a stain can be a sludge.

Q. What's the difference between a stain and a sludge?

A. I'm not sure there is a difference.

Q. Okay. So, that could have been a stain from oil, couldn't it? I mean you didn't test it to find out if it has any K-001 constituents, did you?

A. It met the definition of a sludge.

Q. Did you test it to see if it had any K-001 constituents?

A. No, but, as I've already described, that's not necessary to meet the listing description for K-001.

Q. What you saw on that bank of that pond could very well have been a stain from an oil residue, couldn't it?

A. It was also a sludge.

JUDGE YOST: Well, I don't understand. You keep referring to this regulation. Does the regulation describe this sludge?

THE WITNESS: Yes, sir; it gives a specific definition for sludge.

JUDGE YOST: Well, what is the definition?

THE WITNESS: It is the —

JUDGE YOST: Something that results from the process that they're engaged in?

THE WITNESS: It's any solid, semi-solid, liquid waste generated from a municipal, commercial or industrial waste water treatment facility, municipal water treatment facility or air pollution control facility, and it's exclusive of the effluent from those facilities.

BY MR. BROWN:

Q. Now, that's the general sludge definition. Is that right? Is that what you're quoting now?

A. Right."

"Q. Okay. Well, you're not claiming that any and every sludge is a hazardous waste, are you?

A. No.

Q. Only sludge — For purposes of this case, only sludge containing K-001 constituents would be a hazardous waste, wouldn't it?

A. No. Sludge generated in a waste water treatment facility from the treatment of waste water that comes from a wood preserving facility that uses pentachlorophenol or creosote is K-001, irrespective of its constituents.

Q. What regulation says that?

A. It's in the identification and listing of the Alabama Hazardous Waste Management regulations, Section 234, 4-234 through 4-235.

Q. Let me ask you this. If what you saw on the side of that pond was an oil stain, do you content that that is K-001 bottom sediment sludge?

A. I have no knowledge of whether that is an oil stain or ---"

The obvious inability of this witness to provide any sort of logical and sensible answers to the questions posed, in my judgement, points out the obvious flaws in the Agency's theory concerning the generation of K001 bottom sediment sludges. At one point the witness states that the dark stain he observed on the edge of the lagoon, if it were surface oil, it would not be considered K001 and yet he then goes to state that if he saw something there, it must, of necessity, be K001 sludge.

Professor Warren S. Thompson, appearing as an expert witness on behalf of the Respondent, discussed the Agency's theory as to the generation of K001 sludge both in the pond and the spray irrigation field at some length. Professor Thompson, who had visited the Respondent's facilities on many occasions, emphatically testified that at no point had he ever observed anything vaguely resembling K001 sludge, either in the holding lagoon or the

spray irrigation field. He agrees that the spray irrigation field is a biological treatment system and it is for that reason that the EPA recommended its use in order to meet the "zero discharge" limitations imposed by the Clean Water Act. He also emphatically stated his opinion that the materials formed in the spray irrigation field by this biological activity can in no way be considered as K001 sludge, as that term is defined in the regulations and as the scientific community has viewed such a sludge. On page 221 of the Transcript he emphasized the Agency's position by quoting from Lewis Carroll's book Through A Looking Glass to the effect that: "When I use a word, Humpty Dumpty said, in a rather scornful tone, it means just what I choose it to mean, nothing more, nothing less." The witness then goes to say:

> "And this is a word that EPA is using, sludge. It can refer to carload quantities, or it can refer literally to monomolecular layers when we're talking about spray irrigation fields. One cannot identify visually or by measurement a K001 sludge on a spray irrigation field.
>
> "So when I say that I disagree with Mr. Skinner, that is the reason, is that he is overlooking his own regulations in that regard."

Professor Thompson testifies again on this question on pages 224 and 225 of the Transcript, upon cross-examination by EPA counsel. When asked: "Isn't it true that biological activity that is going to take place at the top, takes place right at the top layer (discussing the spray irrigation field)?" He answers:

> "There is biological activity that takes place in the upper I'll say 12 inches of the soil, primarily in the top six inches of the soil. Now, this biological activity is activity associated with the breakdown of the dissolved preservative constituents in solution in the waste water, and with the wood sugars -- There's still some wood sugars from the wood preserving process that are also in solution, and these are degraded biologically and photo-chemically on the spray irrigation field."

> "Question: And isn't it true that that biological mass that's breaking down those constituents is considered K001 sludge?
>
> Answer: This is a point where I disagree with that. The fact that there is a biological activity taking place does not necessarily mean that a sludge is forming."

Professor John Ball, also appearing as an expert witness on behalf of the Respondent, addressed both the question of the Agency's interpretation of the definition of a tank and its notion about the formation of K001 sludge both in the holding pond and the spray irrigation field. On page 395 of the transcript, Dr. Ball discusses EPA's contention that the biomass material, which is generated in the spray irrigation field and purportedly generated in the holding pond, constitutes K001 sludge. He states that as to all the sludges that he has ever had anything to do with, he has been able to distinguish them and wood preserving sludges he can easily distinguish. He was asked whether he had ever seen or heard of, prior to the testimony in this case, either an invisible sludge or a sludge you cannot see with the naked eye or a sludge you cannot measure under a standard test. He states that other than before the K001 question came up, "...I never heard or ran across anyone who has claimed that he is working with a sludge that is some sort of sludge that you can't see, invisible type sludge." On page 398 of the transcript, Dr. Ball also discusses the physical and biological changes that occur when bacteria attack and consume organic chemicals, such as naphthalene or other constituents of the wood preserving wastewater. He suggests that you do not end up with the same materials you started with because the bacteria eat into the molecules and it becomes another organic material entirely, which is certainly not K001 sludge.

On page 407 of the transcript, Dr. Ball discusses his opinion concerning whether or not the wooden filter that has now been replaced by the concrete

filter and which is identical to the one still remaining is or is not a tank under the definition in the EPA regulations. He stated he believes, under that definition, that it is a tank. He explained that: "It is made primarily of wood. "And when I think about that, 'primarily' to me means most of it is made of wood, most of the structural part, and it is made of wood. Under the definition it says 'primarily made of non-earthen materials', which to me would mean some of it could be made of earthen materials." On page 408, Dr. Ball continues his discussion about his problems with EPA's extension of the definition of a tank as it appears in the Federal Register and states that he thinks that they are going too far with that regulation in that they would suggest that you take the device in question and suspend it in mid-air and if it is able to hold itself together and maintain its integrity it is a tank and, if not, it is not a tank. It was his opinion that this extension of the written definition is unwarranted and improper. Dr. Ball, who also visited the facility on several occasions and took samples of the material in the holding pond and in the spray field, testified that on numerous occasions he has been there, he has never seen anything in either of those two areas that would vaguely resemble K001 sludge or anything similar. In addition, the testing performed by Dr. Ball at the Respondent's facilities did not reveal the presence of any K001 sludge, or, as to the spray field any of the K001 constituents in any significant quantities which would render them subject to regulation under The Act. Dr. Ball also expressed his vigorous disagreement with Mr. Skinner's (EPA Headquarters) theory about the generation of biomass which would be considered K001 bottom sediment sludge. He suggests such a theory is only that. No data has been presented by EPA or Mr. Skinner to substantiate his theory. His many years of experience in

dealing with wood processing operations and the generation of sludges by that industry, as well as by the petroleum industry, leads him to believe that there is no substance to Mr. Skinner's supposition in this area.

Discussion

As indicated in the letter from Mr. Scarbrough, EPA Region IV, to Mr. Bernard Cox, Alabama Hazardous Waste Management Office, the sole reason, at that time, for the Agency considering the holding pond and the spray irrigation field to be regulated units was that they managed a hazardous waste, i.e., the water emanating from the bottom of the sand filter. Nothing in that letter suggests that Mr. Scarbrough considered these units to be regulated for the reason that there was some K001 sludge generated therein. It was only after the later pronouncements by Mr. Skinner that: (1) the wastewater is not a hazardous waste; and (2) any sludge materials generated in these two units would, of necessity, be K001 bottom sediment sludge that the Agency appeared to change its position as to the rationale for regulating these units. The regulated industry, on the other hand, having read EPA's prior decisions in 1980, to the effect that the wastewater generated by such a filter is not a hazardous waste, never considered facilities such as the holding pond or spray irrigation field to be units regulated under RCRA. It was only upon reading Mr. Skinner's rather novel approach to this issue did they become seriously concerned about EPA's change of position and have, in fact, formally petitioned EPA Headquarters to review and change its opinion on this question about the generation of K001 sludge in surface impoundments and spray irrigation fields. The record indicates that EPA Headquarters is taking this question under advisement and has not yet issued a reply to the petition for reconsideration.

The record is equally clear that no one from either EPA or the State of Alabama has ever sampled any of the materials in the holding pond or spray irrigation field and subjected such samples to laboratory analysis to determine the presence of either the wastewater constituents of concern or K001 sludge. The Agency's position is that anything generated from the interaction of this non-hazardous wastewater with naturally occurring bacteria is, by definition, K001 sludge, and that if the regulated community wishes to dispute that contention, they must do so by proving the negative to the Agency through a de-listing petition. The Agency has also expressed its position, in writing, that they have no idea of how a regulated facility would make such a demonstration to EPA.

The evidence in this case shows, by a substantial preponderance of the evidence, that the Agency has failed to prove its theory as to the spontaneous generation of a hazardous sludge from a non-hazardous wastewater. On the contrary, the only evidence given on this question by anyone who is qualified by virtue of his education and experience to render such opinions disagrees violently with Mr. Skinner's contention that all new materials created by some biological activity following the sand filter portion of the wastewater treatment device is a regulated hazardous waste, i.e., K001 bottom sediment sludge.

The Agency's position in this matter has placed the regulated community in an untenable position wherein by the expression of a unsubstantiated scientific theory they have required that community to demonstrate to it the non-existence of these materials when they are unable to provide any guidance whatsoever to the regulated community as to how this might be accomplished. Since no one at EPA or the State of Alabama has ever seen, measured, tested or analyzed any such freely occurring sludge, their position in this matter remains solely that of an undocumented theory.

While it may well be true that some wood processing facilities do generate K001 sludge in their holding ponds or spray fields, the record is devoid of any evidence which suggests that such sludge is generated at facilities employing the EPA-recommended treatment system utilized by this Respondent.

I am also of the opinion that the two memoranda sent by Mr. Skinner to Mr. Scarbrough, wherein this new theory is articulated, have no regulatory force or effect since it amounts to an extension of the previously recognized realm of regulated facilities and is, therefore, in violation of the provisions of the Administrative Procedure Act (APA) which clearly require that such pronouncements be the subject of publication, comment and final promulgation in the Federal Register. This argument concerning the invalidity of EPA's attempt to circumvent the provisions of the Administrative Procedure Act through the use of internal memoranda was discussed at some length in the amicus brief filed by the AWPI and the cases cited therein. I am, therefore, of the opinion that even if there were some scientific validity and supportive data to aid Mr. Skinner's new interpretation, it still would have to go through the APA process of notice and comment with the opportunity of the regulated community to scrutinize the scientific basis for such pronouncement.

An excellent discussion of this notion, as it applies to EPA activities, is found in the matter of U.S. Nameplate Company, Respondent, RCRA Docket No. 84-H-0012, issued by the Chief Judicial Officer of EPA on March 31, 1986. That decision concluded by stating:

> "Clearly, these reference were insufficient to give U.S. Nameplate 'effective enough knowledge so that it might easily and certainly assertain the conditions by which it was to be bound.' Based upon these imprecise references, U.S. Nameplate could not have been expected to know, or even suspect, that the Agency considered sludge from the etching from stainless steel to be 'F006 hazardous waste'."

In that case the Agency attempted to hold U.S. Nameplate responsible for managing its sludge from stainless steel etching as a regulated hazardous waste when neither the listing document, the background document nor other materials would suggest to U.S. Nameplate that the sludge that they were generating was included in the definition given in the regulations. The Agency in that case argued that they had, in fact, listed and indexed the documents referred to and that, therefore, that was sufficient under the APA to put the general public on notice as to the requirements. The Administrator disagreed with the Agency enforcement staff on that question and stated that mere publishing and indexing of the materials was not sufficient under the APA to advise the regulated community as to its responsibilities in handling such waste under RCRA.

In the instant case, the Agency has not even accomplished the bare minimums suggested by the APA either through publication, indexing or otherwise. The only notice to the regulated public in this case would be if they happened to get their hands on Mr. Skinner's two memoranda which were internal to the Agency, not publicized, not indexed, and not published in any fashion. Clearly, the attempted use of EPA of the theories contained in Mr. Skinner's internal memoranda do not even approach a threshold compliance with the requirements of the APA.

In this regard, the Agency argues that the pertinent memoranda are merely "interpretive rules" and as such fall within the exception provided by § 553 of the APA. This issue was also addressed in some detail in the Nameplate case, supra. See pages 10-11 of that opinion which quotes Lewis V. Weinberger, 415 F.Supp. 652 (D.N.M. 1976) as follows:

"The IHS contract care policy in dispute should have been published in the Federal Register. It falls within the scope of "statements of general policy or interpretations of general applicability formulated and adopted by the agency" under 5 U.S.C.A. §552(a)(1)(D) (1967).

"Regarding the necessity for publication of the memorandum in the Federal Register versus merely making it available for public inspection and copying, the Court stated:

"In reaching this conclusion, the Court has taken into account the provisions of section 552(a)(2) dictating that 'those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register' need only be available for public inspection and copying. 5 U.S.C.A. §552(a)(2)(B) (Supp. 1976).

"In determining whether particular policy or interpretive statements are required to be published or whether they need only be made available, subsections (a)(1) and (a)(2) of section 552 must be read together: 'statements of general policy must be published; interpretations which have been adopted by the agency must be available and interpretations of general applicability must be published.' K. Davis, Administrative Law Treatise §3A.7 (Supp. 1970) [hereinafter cited as Davis].

"A policy statement is not qualified as 'general' nor is an administrative interpretation deemed to be 'of general applicability' if: (1) only a clarification or explanation of existing laws or regulations is expressed; and (2) no significant impact upoon any segment of the public results. See Hogg v. United States, 428 F.2d 274 (6th Cir. 1970); Anderson v. Butz, 37 Ad.L.2d 852 (E.D.Cal. 1975). See generally Davis §§ 3A.7,.9. Therefore, such material need not be published. Also within the availability requirements of §552(a)(2)(B) are statements affecting only an agency's internal or housekeeping operations and adjudicatory opinions which may be relied upon as precedents by the agency. See Hogg v. United States, supra; Davis §§ 3A.7,.9.

"'Statements of general policy or interpretations of general applicability' which fall within the publication requirement of section 552(a)(1) have been variously defined. Generally, however, policy or interpretive statements are deemed to fall within the scope of 552(a)(1)(D), requiring their publication, when they adopt new rules or substantially modify existing rules regulations, or statutes and thereby cause a direct and significant impact upon the substantive rights of the general public or a segment thereof. See Anderson v. Butz, supra."

> "The IHS memo serves as the present authorization for excluding off-reservation Indians' from the class of beneficiaries eligible for contract health care. As such, it is a 'statement of general policy' within the meaning of §552(a)(1)(D)."

Since the effect of these memoranda is to place portions of a wastewater treatment system (i.e., the holding pond and spray field) under the strictures of RCRA, which the regulated community theretofore did not consider to be regulated, they have a "direct and significant impact on the substantive rights" of a segment of the general public. They, therefore, must be published.

The Agency also argues that the regulated comunity should have been put on notice that these units were considered to be regulated under RCRA by reading the relevant "background document". I have carefully read this document and although several very general statements appear which might make one suspect that they are regulated, they lack the precision and completeness which the courts have required.[2] This vagueness is underscored by the Agency's own doubts about the status of the spray fields as evidenced by Mr. Skinner's first memorandum (Respondent's Exhibit No. 36) wherein he told Mr. Scarbrough that his office is currently investigating that issue and will advise him later.

Additionally, the "background document" was not published in the Federal Register, but merely mentioned in the preamble to the Federal Register Notice which originally listed K001. As to this situation, the Applachian Power court held that:

> "Any agency regulation that so directly affects pre-existing legal rights or obligations, Lewis v. Weinberger, 415 F.Supp. 652 (D.N.Mex. 1976), indeed that is 'of such a nature that knowledge of it is needed to keep the outside interest informed of the agency's requirements in repsect to any subject within its competence,' is within

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2 Appalachian Power Co. v. Train, 566 F.2d 451 (1977).

the publication requirements. United States v. Hayes, 325 F.2d 307, 309 (4th Cir. 1963). As the substance of a regulation imposing specific obligations upon outside interests in mandatory terms, Piercy v. Tarr, 342 F.Supp. 1120 (N.D.Cal. 1972), the information in the Development Document is required to be published in the Federal Register in its entirety, or, in the alternative, to be both reasonably available and incorporated by reference with the approval of the Director of the Federal Register. 5 U.S.C. §552(a)(1).

"[1 C.F.R.] §51.6(a) requires that the 'language incorporating material by reference shall be as precise and complete as possible,' while §51.7(a) provides that 'each incorporation by reference shall include an identification and subject description of the matter incorporated, in terms as precise and useful as practicable within the limits of reasonable brevity.' The obvious meaning of those two sections is that an incorporation by reference must give one affected enough knowledge so that he may easily and certainly ascertain the conditions by which he is to be bound.

"The agency has failed to comply with either of the requirements. The language of the incorporation by reference is neither precise, nor complete, nor useful."

The Administrator in the U.S. Nameplate case, supra, reviewed the language in the preamble which the Agency argued satisfied the incorporation by reference requirements and held that:

"Here, as previously stated, neither the background document nor the statement contained therein that defines electroplating to include chemical etching was published in the Federal Register. However, the Region does claim that the background document was referenced or 'noted' in the Federal Register at the time 40 CFR §2651.31 (F006) was originally promulgated. 45 FR 33084, 33112, 33113 (May 19, 1980). In response, U.S. Nameplate claims, and the Region does not dispute, that the only references in 45 FR 33084 et seq. (1980) to the background document are as follows:

"[A]mong other things, the docket contains background documents which explain, in more detail than the preamble to this regulation, the basis for many of the provisions of this regulations. 45 FR 33084"

"And at 45 FR 33112 and 33113:

> "Detailed justification for listing each hazardous waste in Subpart D [Subpart D contains the Agency's list of hazardous waste from non-specific sources, i.e., §261.31] is contained in specific background documents and so will not be set forth in this preamble."

> "Clearly, these references were insufficient to give U.S. Nameplate 'effective enough knowledge so that [it might] easily and certainly ascertain the conditions by which [it was] to be bound.' Based upon these imprecise references U.S. Nameplate could not have been expected to know, or even to suspect that the Agency considered sludge from the etching of stainless steel to be 'F006 hazardous waste.'"

The language in the preamble to the regulations listing K001 bottom sediment sludge is equally vague and does not satisfy the requirements set forth above.

For the reasons previously set forth, I am of the opinion that neither the memoranda nor the background document can be legitimately used by the Agency to bolster its case against this Respondent.

I am, therefore, of the opinion that the attempted use by the Agency of the unsupported theories espoused by Mr. Skinner in his two memoranda in an enforcement action such as is before me in this case is clearly unauthorized. In addition, the evidence adduced at the Hearing demonstrates that the basis for Mr. Skinner's scientific theory concerning the spontaneous generation of a hazardous waste sludge from a non-hazardous liquid medium is unsupported and in direct conflict with the sworn testimony of the two expert witnesses presented by the Respondent. The rules of procedure in these matters place the burden of establishig a prima facie case upon the Agency and they have not done so in this case. The mere presentation of unsupported internal memoranda which, in essence, create a new violation under The Act, not heretofore recognized, does not satisfy that burden. To merely come into an

enforcement proceeding with essentially an unsupported enforcement philosophy which has not undergone the scrutiny required by the APA and to use such a theory to boot-strap its position on the validity of its case is not authorized under the rules applicable to these proceedings. Even if one were to take the position that the Agency has satisfied its initial burden of proof as to the validity of its charges, the evidence presented by the Respondent in this case clearly rebutts any such presumption. In any event, the Agency has not sustained its burden with a preponderance of the evidence as required by the rules. (40 C.F.R. § 22.24.)

Based on the discussion above, I am of the opinion that the wood-sided sand filter meets the definition of a "tank" as that definition is expressed in EPA's own regulations and, therefore, that device is not a regulated unit under the provisions of RCRA. In addition to being scientifically unsupported, the Agency's notion about the subsequent generation of this hazardous waste is contrary to the definition of a sludge as heretofore set forth in the regulations and could not stand in any event. As stated above, the definition of a sludge excludes the treated effluent from a wastewater treatment plant and the only definition that approaches an explanation of what a wastewater treatment plant is is defined as a wastewater treatment unit which the facilities employed by the Respondent, in this case, clearly meet.

I am, therefore, of the opinion that, for a variety of reasons, all of which are enunciated above, the Agency has failed to show that the Respondent, Brown Wood Preserving Company, Inc., has violated the provisions of RCRA in the particulars set forth in the initial and Amended Complaint since none of the facilities which they operate are units regulated under RCRA.

Since I am of the opinion that the Agency has failed to sustain its burden of proving that the violations alleged in the Complaint did, in fact, occur there is no need to discuss the appropriateness of the penalty suggested by the Agency in its Complaint.

In addition to the reasons given above, the record also suggests that the Respondent, Brown Wood Preserving Company, Inc., would be entitled to the small quantity generator exemption since the record suggests that although the sand filters in question had been in operation, at least, since the mid-1970's it only generated K001 sludge in an amount considerably less than 2,200 lbs., which is the cutoff limit.* The Agency's observation that the small quantity generator exemption does not apply to this facility was based solely on the notion that the holding pond and spray irrigation fields were regulated hazardous waste management units and, therefore, any exemption to be enjoyed by one who would otherwise qualify as a small quantity generator would not be available to this Respondent. Since I am of the opinion that the Respondent does not, in fact, treat, handle, store or dispose of hazardous waste on its facility, the benefits accruing to one who qualifies as a small quantity generator could certainly be enjoyed by this Respondent should such a determination become necessary in the future.

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*See the testimony of Complainant's witness, James D. Hagan at Pg. 153 of the transcript, wherein he states that the cleanout of the old wooden filter only generated about a wheelbarrow load of K001 sludge.

ORDER[3]

For the reasons herein above stated, I am of the opinion that the original and the Amended Complaint, issued in this matter against the Respondent, Brown Wood Preserving Company, Inc., should be and is hereby dismissed.

DATED: May 30, 1986

Thomas B. Yost
Administrative Law Judge

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[3]Unless an appeal is taken pursuant to the rules of practice, 40 C.F.R. 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 C.F.R. 22.27(c).

M 21, 1989

Regulation of Wastewater Treatment Effluent from Processes that Generate K001 and F006 Wastewater Treatment Sludge

Matthew Straus, Acting Chief
Waste Identification Branch (WH-562)

James H. Scarbrough, Chief
Residuals Management Branch
Air and Waste Management Division

This is in response to your questions concerning regulation of wastewater treatment effluent from K001 and F006 processes.

The listing K001 includes any sludge formed from wastewater from wood preserving process wastes that use creosote and/or pentachlorophenol, regardless of where the sludge is formed. If a sludge is formed in the bottom or sides of a surface impoundment, on a sand filter or on a spray field of a land treatment unit, it is K001 sludge. The surface impoundment, the sand filter and the spray field would be subject to all hazardous waste permitting regulations.

The effluent remaining after the sludge settles out is not a listed hazardous waste. It would only be subject to the characteristics.

However, in the case of the sand filter, the water that drains from the filter beds is a hazardous waste.

This is based on the definition of hazardous waste, specifically §261.3(c)(2) which states hazardous waste includes:

> . . . Any solid waste generated from the treatment, storage or disposal of a hazardous waste, including any sludge, spill residue, ash, emission control dust or leachate (but not including precipitation runoff), is a hazardous waste.

The sludge that accumulates on the sand filter beds would be regulated as a listed hazardous waste from a specific souce per §261.32, waste code number K001. The water which drains from the filter beds would be regulated as a hazardous waste since it would be "leachate" generated from the treatment and storage of a hazardous waste (i.e., K001 sludges).

"Leachate" is defined in §260.10 as:

> any liquid, including any suspended components in the liquid, that has percolated through or drained from hazardous waste.

The regulations would apply to F006 sludge exactly the same way as described above for the K001 sludge.

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COURT'S EXHIBIT NO. 1

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MAY 2 1 1984

Request for Concurrence on Scope of F006 and K001

Chief, Residuals Management Branch
Air and Waste Management Division

Matthew Straus, Acting Chief (WH-562)
Waste Identification Branch

The purpose of this memorandum is to request your concurrence with our interpretation of the listing for F006 and K001.

I am requesting written concurrence. Therefore I have provided our interpretation in a response format. If you agree with our position, please sign the attached memo as soon as possible.

Because we have several permit actions and several enforcement actions including an Order we have issued pending, based on our interpretation, your concurrence is requested within 10 working days; if no response is received, concurrence will be assumed.

If you have any questions please contact Bill Gallagher of my staff at FTS 257-3016.

James H. Scarbrough

bcc: Beverly spagg
WCS
WES
WPS
Mickey Hartnett

This went out!

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

IN RE	)	
	)	RCRA-84-16-R
BROWN WOOD PRESERVING CO., INC.	)	
	)	
Respondent	)	

CERTIFICATION OF SERVICE

In accordance with § 22.27(a) of the Consolidated Rules of Practice (40 C.F.R. Part 22), I hereby certify that the original of the Initial Decision by Hon. Thomas B. Yost was served on the Hearing Clerk (A-110), U.S. Environmental Protection Agency, 401 "M" Street, S.W., Washington, D.C. 20460, along with the official Agency record and file of this proceeding (service by certified mail return receipt requested); and that true and correct copies of the foregoing Initial Decision were served on the parties as follows: Andrea E. Zelman, Esquire, U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, Atlanta, Georgia 30365 (service by hand-delivery); Thomas H. Brown, Sirote, Permutt, Friend, Friedman, Held & Apolinsky, P.C., Post Office Box 55727, Birmingham, Alabama 35255; David R. Berg, Esquire, Stanley M. Spracker, Esquire, Carmen M. Shepard, Esquire, Weil, Gotshal & Manges, 1101 Fourteenth Street, N.W., Washington, D.C. 20005; and Walter G. Talerak, Esquire, American Wood Preservers Institute, Tysons International Building, Suite 405, 1945 Old Gallows Road, Vienna, Virginia 22180 (service by certified mail return receipt requested).

Dated in Atlanta, Georgia this 30th day of May 1986.

Sandra A. Beck
Regional Hearing Clerk