UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	RCRA-85-67-R
A. B. CARTER, INC.	)	
	)	
Respondent	)	

Resource Conservation and Recovery Act - Where the Agency brings an action based upon erroneous conclusions as to what the record before it meant, the complaint must be dismissed, if the record in its entirety demonstrates no violation of the regulations.

Appearances:

Reuben T. Bussey Jr., Esquire
U.S. Environmental Protection Agency
Atlanta, Georgia
For the Complainant

Eric C. Schweitzer, Esquire
Ogletree, Deakins, Nash, Smoak and Stewart
Greenville, South Carolina
For the Respondent

INITIAL DECISION

This is a proceeding under § 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation Recovery Act of 1976, as amended, (42 U.S.C. 6928, 1980 Supp.). The proceeding was commenced by the issuance on October 15, 1985 of an administrative complaint and compliance order against A. B. Carter, Inc., the Respondent alleging certain deficiencies in the company's groundwater monitoring program. The Respondent submitted its answer and hearing request on November 13, 1985 in which they denied the

allegations of the complaint. Following the issuance of the complaint and compliance order the parties met on several occasions in an attempt to resolve the matter and to advise the Respondent as to exactly what it was they found deficient in the Respondent's program inasmuch as the complaint itself was not very specific in that regard. Throughout the period between the filing of the complaint and the holding of the hearing there was extensive discovery including the taking of the deposition of several EPA employees.

Since the matter was unable to be resolved in an informal manner a hearing was held on June 16, 1987 in Charlotte, North Carolina. Specifically the complaint alleged in Paragraph 7 that the Respondent has failed to develop sufficient hydrogeological information to verify that the rate and extent of migration of the hazardous waste or hazardous wastes constituents has been defined by the existing groundwater monitoring system as required by 40 C.F.R. § 265.93(d)(4), and in Paragraph 8 that the Respondent has failed to submit a groundwater quality assessment plan that is adequate to meet the requirements of § 265.93(d). Although the complaint apparently alleges two separate violations they are in fact one and the complaint proposed the assessment of a single penalty in the amount of $13,000 against the Respondent in this case.

Following the availability of the transcript, initial submissions of findings of fact, conclusions of law and briefs in support thereof, and replies were exchanged between the parties and filed. In rendering this initial decision, I have carefully considered all of the matters in the record, the briefs and suggested findings filed by the parties, and all proposed findings of fact and conclusions of law inconsistent with this decision are rejected.

Factual Background

A. B. Carter's plant in Gastonia, North Carolina, manufacturers ring travelers used in the textile industry as well as nodders, spikers, stamp dispensing machines, stampings, screw machine parts, and wire. The plant operates a wastewater treatment facility for the management of wastewater from electroplating and wire cleaning operations. The average flow of wastewater from these operations is approximately 22,000 gallons per day. Following treatment and settling in a series of batch treatment tanks, the supernatant in drained into the treated wastewater storage pond while the settled sludge (F006) is drained to one or two adjacent sludge ponds. Pursuant to the regulations the company timely installed a groundwater monitoring system consisting of one upgradient and three downgradient wells. At the request of the North Carolina of Human Resources (DHR), Carter ceased monitoring of well number 4 which was a downgradient well and installed well number 5 as an alternative downgradient well of the sludge ponds. A sixth downgradient well was also installed in late 1985.

As required by the regulations Carter submitted their original groundwater monitoring plan outline to DHR in January 1983. The groundwater assessment outline required to be submitted as part of this plan called for the of a series of additional wells to determine the rate and extent of contaminant irrigation should an assessment program prove necessary. In March 1983, Carter began quarterly monitoring of the four original wells for one year.

The first semi-annual sampling for indicator parameters in September 1984 revealed a significant increase in specific conductants, indicating that a facility could be affecting grounwater quality. As required the wells were resampled on October 23, 1984 and this confirmed their earlier results. This

resampling exercise triggered the implementation of the groundwater assessment program at issue in this case. Carter notified DHR of these results on December 4, 1984.

As a result of this data, Carter developed a groundwater assessment plan which was submitted on December 17, 1984 in conformance with 40 C.F.R. § 265.93(c). The plan was reviewed by Gary D. Babb, a geologist with the Solid and Hazardous Waste Management Branch of the Environmental Health Section of DHR. Mr. Babb suggested certain revisions of the assessment plan based upon the analytical results of the February 6, 1965 sampling inspection. DHR suggested certain minor adjustments in the sampling program and the primary input of the State at that point was to suggest the use of geophysical methods of plume delineation. This program consist of the use of electrical conductance testing in an attempt to delineate the extent of the plume down-gradient from the waste storage ponds. An April 22nd deadline was set for receipt of Carter's revised groundwater assessment and sampling analysis plans. Carter submitted their revised groundwater assessment plan on April 5th within said deadline. This revision included all of the changes suggested by the State and the Respondent, Carter, then proceeded to implement the geo-physical plume delineation plan. They reported the results of the initial efforts in this regard and advised the State that they would in the meantime continue to do more extensive monitoring with their existing monitoring wells and upon approval of the data submitted up to that point would begin to drill additional wells to determine not only the exact delineation of the plume in a horizontal way but also to establish the vertical extent and concentration of contaminants in the second more intensive phase of assessment.

It was about this time that the EPA filed its complaint suggesting that the assessment plan produced by the Respondent was inadequate. The effect of the bringing of this litigation was to halt the program that the Respondent

had in place and had been approved by the State agency. Upon requesting advice from a State agency as to how to proceed in this matter the State said since EPA had taken over the case that they should talk to EPA about any questions they had about the problems with their assessment plan. As suggested above there followed from this point several meetings and conferences between EPA and the Respondent and its various consultants to determine what problems EPA had with the Respondent's groundwater quality assessment plan. The EPA suggested some additional soil borings which the Respondent did. During this period of time the Respondent also provided the State with a closure plan for the waste storage pond which was ultimately approved by that Agency.

After receiving input from the State of North Carolina, Carter moved into the second phase of its assessment program in late 1986 by the installation of six new downgradient wells in three clusters. In addition, six temporarily case soil borings were installed in plume delineation. Finally, well number 10 was also installed to be used for pump tests. All of these wells and borings were located using information collected in the resistivity geophysical survey conducted in the first phase of the groundwater assessment.

In early 1987 Carter met with DHR to discuss the groundwater program. As this meeting, Carter proposed, and DHR agreed that four additional temporarily case borings should be installed to further refine characterization of the plume. These wells were subsequently installed in April 1987.

Discussion and Conclusions

As noted above Paragraph 7 of the complaint suggests that the Respondent had failed to develop sufficient information to verify the rate and extent of migration of the hazardous waste constituents by the existing groundwater monitoring system. (Emphasis supplied.) The problem with that statement is

that it is confusing in that it is not the function of the existing groundwater monitoring system installed pursuant to the regulations to perform the function that the complaint suggests it should perform. The only function that an original groundwater monitoring is to perform is to detect the migration of wastes from a waste pond or other waste storage facility. If in fact such migration is detected then other parts of the regulation require more extensive investigation and analysis which gets into the assessment aspects of the regulations which are actually the subject matter of this complaint and case.

At the outset it should be noted that the State of North Carolina disagreed with EPA's evaluation of the Respondent's activities and resisted the request of EPA to take over this matter and prosecute it on its own. This is borne out by several letters from the Director of the State agency to EPA wherein he expressed his concern and disagreement with EPA's approach to the problem. It was the position of the State of North Carolina that the Respondent was cooperating with it and was proceeding along in a phased assessment program which would ultimately produce the precise information which EPA said had been missing from the documents it had in its hand at the time the complaint was drafted.

At no point in time did EPA ever contact the Respondent or its consultants to determine exactly what additional steps the Respondent planned to take in its assessment program and for that reason made several erroneous assumptions concerning exactly what it was the Respondent intended to do after it had finished its resistivity geophysical study.

The Agency witness who testified on this issue stated that as he read the report filed with the State of North Carolina by the Respondent that they intended to do nothing further after they had completed their geophysical

study and that for this reason they found the plan to be defective. This conclusion flies not only in the face of the record as it existed at the time that the decision on EPA was made but as developed by the testimony in the case. The use of the resistivity study was merely to get a gross outline of the horizontal aspects of the plume and then use the additional drilling of the wells to determine the exact parameters and depth and extent of migration of the plume and the concentration and contaminants contained therein. It was admitted by several EPA witnesses that some of the things that they had required the Respondent to do were not in fact required by the regulations but that they were concerned that the Respondent did not intend to take any further steps beyond conducting the resistivity geophysical study and that in their judgement was insufficient to determine the rate and extent of migration which the regulations require. The Respondent does not take issue with this conclusion except that their own witnesses all testified in the record supports the notion that they did not intend to simply use the resistivity studies for that purpose but merely as a first step in a phased program of investigation which would ultimately result in all of the information which EPA felt was missing in its original and initial evaluation of the situation.

For example, prior to the filing of the complaint and compliance order on October 11, 1985 Carter had collected the following information on site hydrogeology: (1) two soil borings, one upgradient and one downgradient performed on July 18, 1985; (2) a third boring to auger refusal, to determine the depth to rock, performed on July 22, 1985; (3) a complete geophysical resistivity survey, including four resistivity soundings to indicate subsurface conditions and resistivity testing through a grid of 14 stations to determine the horizontal extent of contamination; and (4) a constant head permeability test. This information was submitted with the September 9, 1985 groundwater assessment report, but was apparently not reviewed by EPA the complaint was issued.

Jarvis Middleton, a previous EPA employee who drafted the complaint and compliance order in this case, stated in his deposition that "from my general knowledge stratigraphy and the geologic nature of the piedmont soils in that area, it could have been interpreted that Carter (very well indeed may have an adequate system." Middleton went on to state that there was a prima facie case that Carter has an adequate system but that it couldn't be supported by the data that they had submitted. It is, therefore, apparent from that testimony as well as the testimony of other EPA witnesses that they really had no problem with the groundwater monitoring system initially installed by the company but their concerns were more directly addressed at the groundwater assessment plan.

As suggested above, the Agency witnesses who testified at the Hearing based their concerns about the Respondent's plan on two assumptions which in my judgement based on the this record are erroneous. (1) that the company did not plan to do anything further in the way of assessment beyond the conducting of the geophysical study and did not plan to drill additional wells; and (2) that the report filed with the State as a progress report constituted the groundwater assessment plan required by 40 C.F.R. § 265.983(d)(5) It was the uncontroverted testimony of the Respondent's witnesses that the status report which the Respondent filed with the State agency was not ever intended to be the groundwater assessment plan but merely a progress report to the State advising them the results of the first step of the first phase of the program of groundwater quality assessment.

Even the EPA witnesses agreed that the use of a phased program was appropriate in such an endeavor and that the nature of the substrata underlying the Respondent's facility lended itself well to the use of the resistivity study as a first step in determining where to locate additional monitoring

wells. This is true due to the nature of the Respondent's wastes as well as the basically homogeneous nature of the subsurface in and around and under the Respondent's facility. These two factors make the use of the resistivity study highly desirable. This factor was agreed to by the EPA witnesses. The EPA witnesses further agreed that it made good sense to conduct the resistivity study first and depending on the results obtained from that exercise to then go ahead and establish the location and number of the additional monitoring wells to be drilled and to attempt to locate the monitoring wells before receiving such information would be illogical.

Mr. Arnett, who testified as an expert hydrogeologist for EPA, testified that one of the problems with Carter's groundwater assessment program was that they did not go into any great detail on the hydrogeology of the site. Subsequently, however, this same witness stated that the regulations did not specifically require detailed hydrogeologic information. In fact, Arnett admitted on cross-examination that "if I came out and said that (lack of detailed hydrologic information) was a deficiency that led to this action,... then I am in error." See transcript pg. 79.

Another factor in the case that seemed to concern EPA was the length of time that had elapsed between the time the hydrological report was filed with the State agency and the time the actual drilling of the additional monitoring wells was commenced. I find this concern to be rather ironic since it was the filing of this action by the Federal agency which halted the ongoing program that the Respondent had in place and had been agreed upon with the State agency. The Respondent's consultant felt that in face of EPA's allegation the groundwater assessment plan was inadequate, it would be foolhardy to advise its client to proceed with a plan which they thought was adequate

in the face of EPA's objections without first finding out the nature of EPA's specific concerns. Under the facts in this case, I find no fault with the Respondent's activities in this regard.

As is evident from the above discussion, EPA, in essence, brought this action while the Respodent and the State of North Carolina were in agreement as to what the plan of action was to be in regard to the Respondent's ground-water contamination problem. Both the Respondent and the State of North Carolina knew that the geophysical study was but the first step in a phased program of assessment to be undertaken by the facility. EPA, it seems, was the only party which did not understand what was going on and apparently made no effort to find out prior to bringing this action. The only effect the filing of the complaint had was to interrupt a perfectly sensible and scientifically prudent course of action which was ongoing and in conformity with the regulations.

According to Mr. Jarvis Middleton, a former EPA employee, who was deposed prior to the Hearing, the Region had developed a task force to examine all of the potential groundwater problems in the Region and take action on certain of them by a November 8, 1985 deadline. Who ordered this activ ty or imposed the deadline is not clear from this record. It appears, however, that the effect of this burst of regulatory zeal on the part of EPA was to issue a number of complaints without thoroughly investigating the full background of each case.* The record reveals that there were certain cases which the State of North Carolina agreed should be handled by EPA. This was not one of them. On the contrary, the State on several occasions expressed both orally and in writing, its disagreement with EPA as to this Respondent. Why EPA

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*See also John Boyle & Company, Inc., RCRA-85-69-R.

was so adamant in its decision to take over the A. B. Carter case is not explained. Mr. Middleton's testimony suggests that EPA had not only a deadline but also perhaps a quota of cases to bring. The Region's posture in this matter, in the face of the Agency's fervent desire to encourage State and Federal cooperation is strange to say the least.

My review of the entire record in this case suggests that EPA has failed to prove by substantial evidence that the groundwater assessment program designed and executed by the Respondent was in violation of the above-cited regulations. In any event the bringing of this action was at best premature in that EPA before it filed this complaint should have made further inquiries from the Respondent and the State agency as to just exactly what the additional steps planned to be taken by the Respondent were. Had they taken the trouble to do this the assumptions upon which they based their concerns in the complaint, which subsequently were found to be erroneous, would not have been made. For all the reasons given above and based on the record in its totality I am of the opinion that the allegations in the complaint have not been proven and therefore must be dismissed.

ORDER[1]

For the reasons herein stated, I am of the opinion that the complaint and compliance order, dated October 15, 1985, issued against the Respondent, A. B. Carter, Inc., should be and is hereby dismissed.

DATED: October 6, 1987

Thomas B. Yost
Administrative Law Judge

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[1]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).