UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	II RCRA-85-0301
COMMONWEALTH OIL REFINING CO., INC.	)	
	)	
Respondent	)	

Resource Conservation and Recovery Act - Duty to Amend Part A Application - Where a facility changes it operations which results in the storage of a hazardous waste not identified in its original Part A submittal, it has a legal duty to file an amended Part A application to reflect such change.

Resource Conservation and Recovery Act - "Mixture Rule" Interpreted and Applied - If a waste stream is determined to be hazardous by application of the mixture rule, surface lagoons which receive such hazardous wastes are "land disposal facilities" even though they are part of a treatment scheme covered by an NPDES permit.

Resource Conservation and Recovery Act - Failure to Submit a Part B Application - Where it is determined that certain facilities are governed by the provisions of RCRA and are not included in the exceptions listed in the statute, they lose interim status as of November 1985 and the owner or operator thereof must comply with the statutes and regulations applicable thereto.

Appearances:

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INITIAL DECISION

This matter is before me on a motion for accelerated decision filed by the Respondent, Commonwealth Oil Refining Company, Inc., hereinafter referred to as CORCO, pursuant to 40 C.F.R. § 22.20. This matter was commenced by the service of a Complaint by Conrad Simon, Director of Air and Waste Management Division, Region II, U.S. Environmental Protection Agency (EPA), on July 1, 1985. An Answer to that Complaint was timely filed and subsequent thereto, with leave of the Court, the Complainant filed an Amended Complaint on March 3, 1986. In the interim between the filing of the original Complaint and the Amended Complaint there was a series of motions made by both parties and extended negotiations in hope of settlement which did not resolve the case. Following the filing of an Amended Answer a prehearing exchange was made between the parties and on April 19, 1987 the Respondent filed the above-referenced motion for accelerated decision. A response to said motion was filed by the Complainant and subsequent thereto reply briefs were filed by both parties.

In the initial brief submitted by the Respondent in support of its motions for an accelerated decision it was stated that it has been agreed by counsel for EPA and CORCO that the present case involves two basic questions of law, namely, (1) whether the mixture rule contained in 40 C.F.R. § 261.3(a)(2)(IV) can be interpreted to conclude that CORCO's downstream wastewater treatment lagoons are subject to RCRA; and (2) whether the interim status automatic termination provisions contained in § 3005(e) of RCRA (42 U.S.C. § 6925) can be interpreted to conclude that CORCO's downstream wastewater treatment lagoons are "land disposal facilities" subject to the November 8, 1985 statutory deadline.

Factual Background

One of the matters that caused this case to take so long to come to its present state is that the Respondent alleged that it was immune from prosecution by the EPA inasmuch as it had filed a petition under Chapter 11 of the Bankruptcy Code and therefore the action commenced by EPA was barred by the provisions of said law. The Bankruptcy Court ruled in favor of EPA on this question Respondent then appealed to the Fifth Circuit of the United States in a case entitled Commonwealth Oil Refining Company, Inc. v. United States Environmental Protection Agency, Nos. 85-2827 and 85-2828, Slip Opinion (5th Ct. Nov. 25, 1986). All of the above-mentioned Courts agreed with EPA that the provisions of the Bankruptcy Code do not preclude an action such as this where a Federal regulatory agency is seeking compliance with Federal laws and regulations. By way of background it should also be noted that the Complaint does not seek a civil penalty but merely seeks the issuance of an order directing the Respondent CORCO to comply with the laws of the United States and with the parAllel regulations of the Commonwealth of Puerto Rico.

CORCO was organized in 1953 and operated as an independent petroleum refinery and petro-chemicals manufacturer in the Commonwealth of Puerto Rico. Following several years of unprofitable operations in the mid-1970s, in March 1978 CORCO and several of its subsidiaries filed petitions in the Bankruptcy Court of Texas under Chapter 11 of the former Federal Bankruptcy Act. CORCO continued to operate its petroleum refining and petro-chemicals business under the provisions of Chapter 11 as debtor-in-possession.

In 1980, CORCO filed with EPA its preliminary notification of hazardous waste activity under RCRA. In November of that same year, CORCO submitted a Part A application, which they describe as protective filing, and received

interim status. It emerged from bankruptcy by 1981 when it implemented a plan of arrangement which had been approved by its creditors and stockholders and confirmed by the Bankruptcy Court.

Prior to its emergence from its earlier bankruptcy, CORCO had instituted a cost-reduction program resulting in substantial layoffs of plant and administrative personnel and other cost cutting measures. Despite these actions, net revenues deteriorated over the summer of 1981, and as a result, former management decided to take further steps to stabilize CORCO's operating cost including curtailment of its petro-chemical operations. In November 1981, CORCO suspended all chemical operations and announced further manpower reductions in its continuing refining operations and administrative staff.

Beginning in December 1981 and continuing in February 1982, prices for gasoline and related oil products dropped significantly and in view of the outlook at the time reflecting continued depressed petroleum market conditions, CORCO was forced to consider other operating alternatives, including the suspension of refining operations and operation of its facilities as a products terminal. CORCO's ability to continue its refining operations was further jeopardized when CORCO's largest customers in Puerto Rico made alternative arrangements for their product requirements by the end of the second quarter of 1982.

Finally, CORCO announced the layoffs of additional employees and suspended all refining operations in March 1982. Since that time, CORCO has operated as a products terminal under which it purchases products to supply certain customers and stores and distributes products for others. While this business met with some success, it stabilized at a level which did not provide sufficient cash flow to enable CORCO to continue to meet its obligations as they matured, and CORCO continued to incur losses from its overall operations.

On April 12, 1984, EPA called in the Part B application under RCRA. At that very time, management of the Company changed completely, attended by the resignation of a majority of the board of directors and the election of the appointment of the new chairman of the board, president, chief executive officer and new vice presidents. Plagued again by economic difficulties and beset by inconsistent demands of creditors, CORCO was again forced to seek the protection of the bankruptcy laws and thus filed a voluntary petition under Chapter 11 on July 11, 1984. The large petro-chemical and refining complex which has been owned and operated by CORCO as above-described has not operated since 1982.

Physical Design and Operating Procedures at the Existing Facility

The CORCO refinery was designed to produce a maximum of gasoline per barrel of crude oil. The process units utilized to accomplish this treat the different fractions of the crude oil, which vary significantly in viscosity and convert them into gasoline. The heaviest fractions are processed at the Visbreaker unit, where the large heavy molecules are broken by the effect of the very high temperature. The Visbreaker unit processes both the heavy fraction of the crude oil and the slop oil recovered from the wastewater treatment system. CORCO's wastewater treatment system and facility operates under a current NPDES permit.

The wastewater treatment system consists of an API separator, a dissolved oil flotation unit, an aeration lagoon and an equalization lagoon. The system operates to serve a dual purpose, complying with the NPDES permit and in recovering hydrocarbon raw material in the form of slop to be processed in the Visbreaker unit.

Of the five petroleum refining listed (wastes) described in its Part A application, are the dissolved air flotation float (K048), slop oil emulsion solids (K049), heat exchanger bundle cleaning sludge (K050), API separator sludge (K051), tank bottoms (K052), none enters the wastewater treatment system lagoons, in the opinion of CORCO. At the time the entire petrochemical and refining facility was in operation the materials which the regulations list as "wastes" was, according to CORCO, actually raw material recovered in the form of slop to be reprocessed in the Visbreaker unit on a regular basis. It is the Respondent's contention that the slop oil and emulsion solids which consist of all recovered raw materials is stored in the tank for processing in the Visbreaker unit and this oil is not disposed of in the wastewater system lagoons. The slop was reprocessed on site when the refinery was operating. When the refinery is not operating the slop oil is sold as feed stock or heating oil. In addition to the above-described procedural activities it should be noted that the Agency on April 22, 1987 also filed a motion for an accelerated decision in this matter and that a reply to that motion and brief was also filed by the Respondent, CORCO.

In its brief in support of its motion for accelerated decision, the Agency reiterated the counts found in its original and Amended Complaint which are substantially as follows: the Agency alleges that the Respondent has stored hazardous wastes in tanks without a permit; failed to submit its Part B of its RCRA permanent application; and failed to certify that its facility is in compliance with the applicable groundwater monitoring and financial responsibility requirements. Respondent is, therefore, in violation of RCRA §§ 3005(a) and (e)(2) and 40 C.F.R. § 270.10(e)(4).

In addition, Respondent failed to submit a closure and post-closure plan in violation of both Puerto Rico and Federal regulations and failed to develop a groundwater sampling analysis plan, failed to conduct sampling and analysis,

failed to prepare a groundwater quality assessment plan, and failed to develop a hazardous waste analysis plan. The Agency, in its brief, suggests that the admissions made by Respondent in both its Answer and prehearing exchange as well as documents previously submitted by Complainant as part of its prehearing exchange and those submitted with its brief clearly establish that there are no genuine issues of material facts concerning these violations and that, therefore, the Complainant is entitled to an accelerated decision in its favor on all issues.

A further description of the operation of the existing facilities at CORCO's plant are described in the Agency's memorandum as follows: "The wastewater treatment system associated with the refining complex consists of an API separator unit, a depurator dissolved air flotation (DAF) unit, and a wastewater lagoon system with five lagoons. The API separator receives oily process waters from the refinery complex which are conveyed by a sewer system, and oil skimmings from the storm water ditch, for separation of oil and water phases. The oil phase from the API separator was pumped to slop oil tanks known as slop oil tanks numbers 1008 and 1030. The water phase from the API separator was pumped to the DAF unit which removes additional oil and solids from the water in a "float phase". This DAF float is a RCRA listed hazardous waste (K048). This listed hazardous waste is fed back to the API separator. Effluent from the DAF unit is then sent to the aeration lagoon and then discharged to the oxidation lagoon and then to the ocean.

The slop oil tanks, mentioned above, were used for the storage of slop oil which was reprocessed through the refinery. The storage of slop oil in those tanks resulted in the formation of slop emulsion solids, a listed hazardous waste (K049). The total capacity of these tanks was estimated to be between 8,000 and 10,000 barrels. When the refinery is not operating, the slop oil

cannot be reprocessed on site. The oil lagoon is an unlined surface impoundment approximately 320 feet long by 325 feet wide by 8 feet deep. The oil lagoon received 404 tons of API separator sludge (K051) and 2,072 tons of wastewater treatment lagoon sludge containing D005, D006 and D008.

One of the factors which caused the Agency to issue its Amended Complaint was that the between the time the first Complaint was issued and the amendment was sought, Congress passed an amendment to RCRA which, by its terms, suggests that any facility which has not filed an approved Part B application automatically lost its interim status on November 8, 1985.

It is not disputed that CORCO did not submit its Part B application and is presently not in compliance with applicable groundwater monitoring requirements. Therefore, the Agency takes the position that the sole issue in question is whether CORCO's surface impoundments are "land disposal" facilities subject to 40 U.S.C. § 6925(e)(2) and therefore have lost their interim status by operation of law.

Discussion

The Agency takes the position that although CORCO stated in its Part A application that it operates surface impoundments for disposal of 2,476,000 pounds of hazardous wastes annually, it now argues that it does not operate a land disposal facility. It is, nevertheless, EPA's position that a surface impoundment used for disposal of hazardous waste is, unquestionably, a land disposal facility under RCRA. It is one of CORCO's positions that the lagoons are not land disposal facilities under the Act or the regulations and, therefore, they fall within the purview of that portion of the recent amendments to RCRA which refer to other units and therefore do not lose interim status until much later.

The Agency suggests that Congress could hardly have been clearer that it considered the surface impoundment to be a "land disposal" facility. In support of this argument the Agency cites the statutory language of RCRA wherein Congress declared that: "To avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes." Citing 42 U.S.C. § 6901(b)(7) the Agency further argues that the definition of land disposal and RCRA explicitly includes surface impoundments. In § 6924, which establishes the substantive standards applicable to treatment, storage and disposal facilities, the term "land disposal" is defined to include "any placement of---hazardous wastes in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave." (See 42 U.S.C. § 6924(k)). The Agency suggests that these two sections make clear the plain and uncontrovertible Congressional intent that surface impoundments be considered a form of land disposal.

The Agency addresses CORCO's arguments when they attempted to distinguish the definition found in § 6924 by pointing out that it is limited on its face to that section while the loss of interim status provision occurs in § 6925. The Agency argues that there is no indication that Congress intended to use the same term differently in the same two sections when it contemporaneously amended that section in 1984 and the two sections are, in fact, inseparable in operation. They also argue that § 6901 of the Act, which also defines land disposal to include surface impoundments, applies by its terms to the entire Act. They say then that to exclude surface impoundments from the loss of interim status provisions would eliminate precisely those types of land disposal facilities identified by Congress to be of the greatest concern.

In addition, the Agency argues that its policy guidelines on the new RCRA amendments appearing in 50 F.R. 38946, 38947, in September 1985, includes surface impoundments in the definition of land disposal facilities. They conclude that even there were any ambiguity in the terms of RCRA, the interpretations of EPA and the Commonwealth of Puerto Rico should be relied upon to resolve it.

In its brief, CORCO attempts to support its position that it is not a land disposal facility by suggesting that Congress meant to include in the term "land disposal facilities" only those facilities in which there is permanent waste disposal. CORCO apparently relies on the regulatory definition of "disposal facility" in 40 C.F.R. § 260.10 promulgated on May 19, 1980 which defines "disposal facilities" to include only those parts of a facility in which wastes will remain after closure. The Agency's reply to this argument is that CORCO's reliance on the regulatory definition stated above is mis-placed since Congress added, in 1984, the broader statutory definition of "disposal" to include the placing of "any solid or hazardous waste in or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment... ." The Agency argues that this definition clearly includes current or short term disposal activities as well as permanent disposal. The Agency further suggests that Congress did not limit itself to the narrow regulatory definition of disposal facility in using the term "land disposal in RCRA is clear from its own explicit definition of "land disposal in § 6924 in § 6901(b)(7). They suggest that Congress clearly intended the definition of land disposal to be expansive when it amended the statute in 1984.

The Agency further argues that the appropriateness of a broad construction of the phrase "land disposal" in § 6925(e)(2) is also clear from the requirements made critical to retention of interim status under those provisions

involving groundwater monitoring and financial responsibility. Under the regulations, these requirements apply to facilities which are "disposal facilities" in the broader statutory sense. The Agency argues that the broader application of these regulations reflects the fact that any placement of hazardous wastes in or on land at such facilities which may pose substantial hazard to human health and the environment due to migration of wastes during the periods of operation and closure, even if no hazardous waste remains after closure. They suggest that a "temporarily shut down refinery" as CORCO describes its current facility, at which hazardous wastes have been placed on the land and at which wastes currently remain presents the exactly this type of hazard. The Agency concludes its argument on this point by saying that in 1984 when Congress amended RCRA, it decided that surface impoundments were a land disposal facility which had to comply with the loss of interim status statute and since CORCO failed to comply with those regulations by filing its completed Part B application it lost interim status by operation of law and that its past and continued operation of its surface impoundments without a permit is illegal.

CORCO presents several arguments in opposition to the Agency's interpretation; one of which being that no hazardous waste in any significant quantities ever reach these lagoons and that EPA's attempt to define them as regulated units can only be viable by application of the so-called "mixture rule". CORCO argues that if the mixture rule is applied to its hydrocarbon recovery process, it will not be able to operate the wastewater treatment system under its present NPDES permit, and that operating the wastewater treatment plant as a RCRA regulated unit would add a significant if not disabling cost to the operations of CORCO. Throughout its supporting memoranda and briefs, CORCO continues to suggest that compliance with RCRA, in the way that the Agency

suggests is proper, would present costs to it which it would not be able to bear given its financial situation. At the outset, let me suggest that it is my opinion that the monetary or financial problems of CORCO are irrelevant to the ultimate decision in this case. It is also clear that both the bankruptcy courts and the Federal district courts have ruled that the bankruptcy law does not preclude the bringing of this action by EPA and it's ultimate opinion in one case was that "now is the time for CORCO to comply with the law." Although I am not materially bound by either of these courts determination as to whether in fact RCRA does apply to the facilities in question I am bound by its decision that the financial resources of CORCO do not present any constraints upon me in terms deciding the issues currently before me in the cross motions for summary determination.

As indicated in its initial brief, CORCO identifies two primary issues which it feels are necessary for resolution. Their initial brief, however, does not address the allegation in the Complaint concerning the two tanks which now contain some undetermined amount of slop oil emulsion solids, a RCRA listed waste, K049. As discussed above, the Agency as one of its counts in the Complaint allege that the storage of that waste in the tanks is improper inasmuch as the Part A application originally filed by CORCO did not address this storage for the reason, that the slop oil was reprocessed through the Visbreaker unit for the creation of additional petroleum products. However, the Agency contends that in 1982 when the refinery operations were shut down and the slop oil emulsion sludges were no longer being processed through the Visbreaker unit, the Respondent CORCO had a legal obligation to file an Amended Part A to include those tanks as hazardous storage facilities.

In its reply brief, CORCO addresses this issue for the first time by saying that since the refinery was not operating, it could not reprocess the slop oil emission solids and was forces to store it until October 1984 when

it was able to sell the inventory as blended oil to Marine Supply and Fuel, Inc. of Houston, Texas and that EPA was advised of this action. CORCO then goes to argue that even if the slop oil emulsion solids inventory of 1982 was a RCRA regulated "hazardous waste" the mere fact that CORCO may have stored this particular inventory for more than the 90-day accumulation time, a generator is allowed to store hazardous waste without a storage permit does not, in and of itself, make the storage tanks RCRA regulated units subject to closure requirements. CORCO further argues that no where in RCRA nor in its regulations does there appear any indication that storage under these circumstances make the unit subject to Part 165 Interim Status Standards (40 C.F.R. § 256.1, et. seq.). CORCO argues that storage could constitute a technical violation and at most could be subject to corrective action if EPA could establish that hazardous constituents have been released from the tanks to the environment.

The Agency's response to these arguments are that the September 12, 1984 EPA inspection revealed that CORCO stored the above-mentioned waste in two storage tanks. The Agency states that the sole issue is whether the substance in the tanks is a hazardous waste or raw material. They go on to argue that there is no dispute that the slop oil emulsion is formed when the emulsion layer was allowed to form in the tanks at the facility. The formation of the emulsion layer followed the cessation of operations in 1982. The Agency repeats its contention that the solids are a hazardous waste pursuant to 40 C.F.R. § 261.32 and that CORCO was required to amend its Part A to include storage in tanks of wastes number K049 when the waste was created in 1982.

CORCO's argument that the material is really a raw material rather than a hazardous waste is misplaced since it is only a raw material when the refining operation was ongoing and the slop oil emulsion solids were, in fact, reprocessed through the Visbreaker unit. However, the refinery was shut down

in 1982 and the hazardous waste was stored in those tanks for a period of at least two years from 1982 to 1984 and during that period the Respondent had a legal obligation to amend its Part A application to reflect this additional management of hazardous waste. Since the Agency contends that the slop oil emulsion solids are without question a listed hazardous waste that the failure of CORCO to amend its Part A application constitutes a violation of § 3005 of RCRA, 40 U.S.C § 6925 as a matter of law.

Conclusions

In regard to the tanks in which the slop oil emulsion solids are stored, there appears, in my mind, to be no question that such storage does constitute the management of a hazardous waste as contemplated by the law and the regulations. CORCO argues that unless EPA can show that in some fashion these materials have been released from the unit to the environment they are not subject to the statute or the regulations. My reading of the applicable law finds no support for this contention in that the storage of a hazardous waste in any fashion is a management technique which must be identified in a Part A application. Whether or not the hazardous wastes ultimately are released, or have the potential to be released to the environment, is not a criteria which has any applicability to this phase of the regulations. I am, therefore, of the opinion that the two tanks which contained, as of 1984, listed hazardous wastes were regulated units and the failure of CORCO to amend its Part A application to reflect this change in operation constitutes a violation of the Act as alleged in the Complaint.

Of the several lagoons identified above, there are only three of concern in this matter, i.e., the oil lagoon, the aeration and oxidation lagoons. As to the oil lagoon, the Respondent does not deny that that lagoon received hazardous wastes and is, therefore, a RCRA regulated unit. That leaves for

discussion the characteristics and nature of the aeration and oxidation lagoons, which during the time of the Respondent's full operation, were part of its wastewater treatment system operated pursuant to an NPDES permit. As to these latter two lagoons, the Respondent argues that: (1) no hazardous wastes of any significant quantities or quality were ever sent to these lagoons and, in any event, the "mixture rule" cited by the Agency has no applicability to these lagoons, and (2) one series of sampling activity done by the Agency revealed no hazardous wastes in excess of the EP toxicity concentrations described in the regulations. Additionally, CORCO's reference to 40 C.F.R. § 256.1, and following seems to be misplaced inasmuch as that section deals exclusively with the creation of a state plan be submitted to the EPA for approval and has no apparent relevance to this proceeding.

As to the other two lagoons, CORCO argues that the sampling performed by EPA on March 14, 1984 revealed that sludge from the aeration lagoon was less than EP toxic levels. The Agency suggests that CORCO's reliance on these sampling results is misplaced for several reasons. First, EPA sampling was not intended to confirm nor deny the validity of the mixture rule, but to assess the contaminant content of the sludge. Second, although the sludge was not EP toxic it did show high concentrations of organics, a finding that was confirmed by later sampling. Thirdly, if CORCO wanted to establish its waste stream was not hazardous it needed to sample and analyze its <u>waste stream</u>. EPA sampled the aeration lagoon <u>sludge</u>, not the waste stream itself.

The Agency additionally argues that the recent sampling conducted as part of an EPA preliminary assessment/site investigation indicates extensive contamination at the refinery wastewater treatment system and the oil lagoon. This recent testing revealed that sediments from the aeration lagoon contained constituents such as ethyl benzene, xylene, pyrene, chrysene, toulene, methylene chloride and acetone, as well as chromium, copper, mercury, nickel

and selenium. Therefore, the Agency argues, that even though the aeration lagoon is lined, the condition of the liner is unknown so that migration of the contaminants through the liner is possible; releases by virtue of surface water are also possible.

Results of sediment samples from the oxidation lagoon reveal the presence of phenanthrene and acetone, and elevanted levels or barrium, copper, lead and mercury, and acetone, and elevated levels of barium, copper, lead and mercury. The Agency argues that the unlined oxidation lagoon may well be releasing these constituents into the groundwater, but CORCO's failure to install the required groundwater monitoring equipment has prevented the Agency from determining if there is any immediate threat to human health and the environment. As to this lagoon, the Agency also argues that release through surface water is also a possibility.

Analysis of sludge samples taken at opposite ends of the oil lagoon reveal the presence of organic contaminants and elevated levels of heavy metals. Soil samples taken downgradient of the oil lagoon contain some of the same organic constituents and since the oil lagoon is unlined it too can be the source of releases to the groundwater. The presence of some of the same compounds in the downgradient soil sample in the oil lagoon indicate that migration has already occurred. Again, the Agency argues that CORCO's failure to conduct any groundwater monitoring program whatsoever has prevented the Agency from evaluating the extent of contaminate migration.

Since the Agency's primary argument has to do with the application of the mixture rule which involves whether or not hazardous wastes are in fact being discharged to the aeration and oxidation lagoon are determined by an anlysis of the waste stream itself and the application of the above said rule, the later analysis done by EPA merely confirms the presence of hazardous wastes in the above-mentioned lagoons and to that extent is merely cumulative of the EPA's analysis of the RCRA regulated status of these two lagoons.

process. These byproducts and sludges are sometimes hazardous (i.e., API separator sludge and DAF Float from petroleum refining, both listed hazardous wastes, are sometimes recycled in this way), and if so would be classified as hazardous waste under the Agency's existing rules because they are used to produce fuels. The primary smelting industries also frequently recover additional metal values from sludges and byproducts generated in the primary smelting process.

The majority held that "...we are persuaded that by regulating in-process secondary materials, EPA has acted in contravention of Congress' intent." Slip op. at 35. See also id. at n. 26 ("we decide that EPA exceeded its statutory authority in regulating in-process secondary materials"). The majority reasoned that by defining solid waste by using the phrase "other discarded material," Congress intended that only secondary materials that were in some sense thrown away, abandoned, or disposed of could be solid wastes. The majority also indicated that certain types of recycling activities remained within the Agency's authority, either because they involved a form of discarding (id. at n. 14) (describing used oil recycling activities), or some type of disposal (id. at 29 and n. 20).

The majority was indicating that on-going manufacturing operations where recycling of secondary materials involves principally a continued extraction of material values contained

CORCO responds to this argument by saying that EPA interprets that returning a dissolved air flotation float (K048) into the API separator for recovery in the form of sludge and/or skimmed oil to be collected in the slop oil tanks for reprocessing as raw material in the Visbreaker unit triggers the application of the "mixture" rule. CORCO then goes on to suggest that the Agency reaches this conclusion using an arguable interpretation of technical rules without having any factual evidence in support therefore not withstanding the fact that the only EPA hazardous waste testing revealed that the metals concentration were less than EP toxic levels; thus, showing no evidence of RCRA waste in the lagoons. CORCO argues that this is of particular importance since the hazardous constituents which make the dissolved air flotation (K048) by definition a listed waste, are hexavalent chromium and lead which are two metals for which the EPA ran toxicity tests in the aforesaid sampling inspection.

CORCO further argues that the regulatory rationale for promulgating the "mixture" rule should be considered when interpreting and determining its application to wastewater treatment operations. The inclusion of the mixture rule was driven by EPA's concerns that without this rule some members of the regulated community might choose to dilute hazardous waste in order to avoid regulation. This provision was adopted to prevent generators from evading RCRA Subtitle C requirements simply by co-mingling listed hazardous wastes with non-hazardous solid wastes. Citing the Court's attention to 45 F.R. 33095 (May 19, 1980), CORCO argues that this rationale has no application to the facts presently before the Court.

After describing again the way in which its hazardous wastewater treatment facility operates, CORCO suggests that the float return to the API separator constitutes a small percentage of the total volume of water inflow handled by the wastewater treatment system.

CORCO argues that the regulatory rationale was further clarified with the amendments promulgated on November 17, 1981. The EPA explained the mixture rule as follows:

> "Based on the foregoing evidence, EPA believes there is a justified need for amending the mixture rule in § 261.3(a)(2)(ii) to restrict this rule as it applies to wastewater mixtures, so as to avoid Subtitle C regulation of wastewater mixtures that do not pose a substantial threat to human health or the environment. In doing this, however, the Agency must ensure that modification of the mixture rule will not allow or encourage generators to discharge large quantities of listed hazardous wastes into wastewater treatment systems, to circumvent proper management of these listed wastes. Today's amendement is designed to meet these purposes by limiting the mixture rule so that, with respect to wastewater mixtures, it does not apply to non-hazardous wastewaters that receive small quantities of listed hazardous wastes which are not principal wastewater streams, and which are reasonably and efficiently managed by being discharged into a plant's wastewater treatment system. EPA believes that the small quantities of listed hazardous wastes allowed by today's amendment in exempted wastewater mxtures will be present in such low concentrations that they do not pose a substantial hazard to human health or the environment, and furthermore, often will be treated in the plant's wastewater treatment system." See 46 Fed. Reg. 56582, 56588 November 17, 1981)."

CORCO then says that although the November 17, 1981 amendment stopped short of describing the CORCO hydrocarbon reclaiming/reprocessing practice, the rationale behind the amendment shows why the mixture rule should not be applied to this case.

In support of its argument that the mixture rule does not apply to its facility, CORCO refers the Court's attention to a December 7, 1984 guidance to assist regional permit officials in determining the status of refinery treatment ponds vis-a-vis the mixture rule. A Headquarters' memorandum by J. H. Skinner provides as follows:

> "...The mixture rule is relevant only in those cases where previously deposited sludge is scoured, resuspended, and then carried out of the unit with the wastewater. If the Region can make a case for scouring from a separator,

> the mixture rule is applicable and the wastewater becomes a hazardous waste until delisted or discharged to a stream subject to regulation under the Clean Water Act. (Emphasis added).
>
> "The burden of proof in the demonstration of scouring is upon the Agency. Such an argument, although technically complex, can be made based on well established hydrodynamic principles..."

CORCO further argues that the legislative history of the mixture rule and EPA guidance on this matter namely a December 7, 1985 and August 23, 1985 Headquarters' memoranda once again authored by J. H. Skinner embody a de minimis principal implicit in the RCRA framework that operates to avoid regulations of mixtures of environmentally insignificant quantities of hazardous wastes with solid wastes. CORCO then goes on to argue that the application of the de minimus rule would exclude the application of the mixture rule to its facility since the rules must conform to the "substantial" threat criteria in the statute.

In response to the general arguments put forth by CORCO as to the inapplicability of the mixture rule to its procedure, the Agency argues that CORCO has attempted to mislead the Court by failing to accurately characterize the rationale behind the mixture rule. (Citing Respondent's memorandum at pp. 15-17.) A proper reading of the mixture rule and its regulatory history confirms that CORCO's wastewater treatment plant is precisely the type of process that the mixture rule is intended to address according to EPA's position. EPA then goes on to say that the mixture rule was not part of the December 28, 1978 proposed regulations, but was added in the final version to specifically respond to inquiries from the regulated community as to whether mixtures of hazardous and non-hazardous wastes would be subject to regulation. The Agency then argues that the application of the mixture rule to CORCO's wastewater treatment is clear. They say that CORCO admits in its memorandum that a RCRA listed hazardous waste, dissolved air flotation float - K048, is

returned, without any chemical or physical treatment to render it non-hazardous, to the API separator where it is co-mingled with effluent. (Citing Respondents memorandum at pg. 9.) The mixture rule compels the legal conclusion that the resultant waste stream flowing to CORCO's lagoons as hazardous. The Agency says that by contending that the mixture rule is inapplicable to its process, CORCO has attempted to slip through a regulatory loophole of its own creation.

The Agency argues that CORCO attempts to support its argument by quoting language out of context from EPA advisory memoranda which are clearly inapplicable to CORCO's process. The Agency specifically refers to the August 1985 and December 7, 1984 guidance documents which they suggest are totally inapplicable to CORCO's operations since they deal with an entirely different treatment method and factual situation. Once again, the EPA contends that the particular design feature which makes the application of the mixture rule appropriate to CORCO's process is that untreated K048 is recirculated back into the wastewater stream. CORCO's wastewater treatment lagoons receive this hazardous wastes and are thus RCRA regulated units.

The Agency also presents the notion that this administrative action is not the proper forum in which to challenge the mixture rule in that CORCO has had several opportunities to seek relief from said rule, either by submitting comments to the Agency on their proposed rule or to have sought judicial review of the rule pursuant to § 706 of RCRA. The Agency points out that CORCO could have petitioned (and still can) the Agency to exclude its waste stream from regulation pursuant to 40 C.F.R. § 260.22. The Agency suggests that CORCO's failure to avail itself of the various challenges and waiver provisions contained in the law renders its arguments about the validity of the mixture rule inappropriate.

With the cooperation of the Region IV program staff, I was able to obtain copies of the memoranda referred to by counsel for the Respondent having to do with the application of the mixture rule. Counsel for the Agency, as well as others, are reminded that the Judges of this Agency are normally not recipients of these memoranda and to the extent they form a basis for some conclusion which they seek the Court to reach, they need to provide copies thereof to the Court for its perusal. My reading of the above-mentioned memoranda suggests that the Agency interpretation of the mixture rule in this matter is correct due primarily to the way in which CORCO has designed its wastewater treatment system. The reference to the phenomenon referred to in one memo as "scouring" is not applicable to the facts in this situation since the Daf float "hazardous listed waste K048" is itself returned to the API unit and is a listed waste and is mixed therewith with the wastewater of the facility and thus any effluent from that separator is, by operation of the mixture rule, a hazardous waste and therefore any unit that receives this waste is a RCRA regulated facility.

CORCO also argues that the two lagoons in question, being the aeration and the oxidation lagoons, are not surface land treatment facilities as defined by the law and the regulations but fall into the third category of facilities known as "other facilities" and they therefore argue that the two lagoons would not lose their interim status, under the law, until November 1988.

For its part the Agency argues strenuously that the language of the Act and the 1985 amendments thereto make it clear that a land disposal facility includes surface impoundments and that any other reading of the law would result in an absurd situation wherein the very type of facilities which the Congress as identified as being of greatest concern would not be subject to loss of interim status under the Act. In support of its argument, the Agency

cites the Court's attention to Vineland Chemical Co. v. EPA, 80010 F.2d. 402 (3rd Cir. 1987). In that case, the Court held that "in 1984, Congress amended RCRA to provide for termination of interim status for land disposal facilities, a classification which includes surface impoundments such as Vichems." Citing of 50 F.R. 38946 and 38947 issued in September 15, 1985. Based on my reading of the law, its 1984 amendments, and the regulations promulgated by the Agency pursuant thereto, I am of the opinion that the aeration and oxidation lagoons are, in fact, land disposal facilities inasmuch as they are clearly surface impoundments.

Having concluded that the mixture rule applies in this case and that the effluents ultimately discharged to these two lagoons are under the circumstances in this case, hazardous wastes by application of the mixture rule. The two lagoons are land disposal facilities, as defined by the Act, and are therefore RCRA regulated units under the law.

Earlier the Court noted, as to the oil lagoon,that EPA contended CORCO does not challenge EPA's position that is a land disposal facility. Apparently, the Agency reached this conclusion by examining the Part A application filed by CORCO wherein it stated that 2,476,000 pounds of hazardous wastes annually are disposed of in the oil lagoon. CORCO takes the position that that Part A application was merely a "protective" filing and it represented in their opinion a description of what might transpire in the future and that they were not therefore describing the activities relative to the oil lagoon as it is actually operated. However, no where in its brief does CORCO deny that hazardous wastes were disposed of in the oil lagoon. They argue however that they never owned the oil lagoon but merely leased the property upon which it sits from an outside owner until December 1984 at which time CORCO did not extend the lease agreement. Upon suspension of refining operations

in March 1982 CORCO discontinued the use of the oil lagoon. CORCO then argues that since the § 3005 permit requirements and 40 C.F.R. §§ 265.112 and 265.118 only apply to owners and operators of hazardous waste treatment facilities they are not responsible under the law since they do not currently own or operate the facility.

While it may be true that CORCO no longer owns or operates the oil lagoon during the period in question from the beginning of its operation as a refinery until 1984 when it allowed the land upon which the oil lagoon sits to expire, it did operate it and such facility was granted interim status under the appropriate statutes and regulations cited above. The fact that they no longer own the [illegible] upon which the oil lagoon sits is for purposes of this proceeding irrelevant since CORCO does have the responsibility for managing the site as required by the law and regulations including the submission of closure and post-closure plans for said oil lagoon.

In the recent case of A. Y. McDonald Industries, Inc., RCRA (3008) Appeal No. 86-2, RCRA Docket No. 85-H-0002, the Administrator in a footnote appearing on page 40 of his Final Decision stated that:

> "For the reasons set forth by the Presiding Officer (Initial Decision at 19-20), I affirm his decision to require McDonald to implement its closure plan even though the site was sold in 1982 to IDOT (Idaho Department of Transportation). Such relief is authorized under the broad authority conferred by RCRA, 42 U.S.C. § 6928(a) to require compliance by 'any person (who) has violated or in in violation of any (RCRA) requirement.' Cf. United States v. Price, 523 F. Supp. 1055, 1072-73 (D.N.J. 1981) (sale of landfill in 1979 does not preclude injunctive relief directed at former owner under RCRA §7003 imminent hazard authority) aff'd, 688 F.2d 204 (3d Cir. 1982)."

Based on the above-cited authority, I am of the opinion that CORCO has responsibility to comply with the language of the compliance order as set forth in the Amended Complaint and if the present owners will not cooperate

in allowing CORCO to take the necessary steps to bring it into compliance with the aforementioned order, then the Agency may give consideration to seeking its remedy from the present owners of the oil lagoon.

ORDER[1]

Pursuant to the Solid Waste Disposal Act, as amended, §3008, 42 U.S.C 6928, the following order is entered into against Respondent, Commonwealth Oil Refining Company, Inc.:

1. Respondent shall henceforth not treat, store or dispose of any hazardous wastes without first obtaining a permit from EPA.

2. Respondent shall ha. .hirty (30) calendar days to submit a closure plan for its land disposal facilities and slop oil tank pursuant to the requirements of 40 C.F.R. §265.112.

3. Respondent shall have thirty (30) calendar days to submit a post-closure plan for its land disposal facilities pursuant to the requirements of 40 C.F.R. §265.118.

DATED: August 13, 1987

Thomas B. Yost
Administrative Law Judge

[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).