UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

REGIONAL HEARING CLERK
NOV 06 1987
REGION VII

IN THE MATTER OF: LANDFILL SERVICE CORPORATION, RESPONDENT	RCRA Docket Number VII-86-H-0005

RESOURCE CONSERVATION AND RECOVERY ACT -

1. Civil penalties proposed to be assessed against the Respondent, in the total sum of $130,560 for violations of regulations set forth in 40 CFR Part 265, Subpart F, were found to be in accordance with the United States Environmental Protection Agency Final Penalty Policy, dated May 8, 1984, and therefore appropriate, where no special circumstances justify an increase or decrease.

RESOURCE CONSERVATION AND RECOVERY ACT -

2. 42 USC §6978(a)(3) provides that, in assessing a civil penalty, the Administrator shall take into account the seriousness of the violation and any good-faith efforts to comply with applicable requirements.

RESOURCE CONSERVATION AND RECOVERY ACT -

3. Economic Benefits or savings realized by Respondent from its non-compliance consisted of costs avoided by Respondent plus the time value of such avoided costs.

APPEARANCES

For Complainant: Anne Rowland, Esquire
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United States Environmental Protection Agency
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Kansas City, Kansas 66101

For Respondent: Thomas J. Immel, Esquire
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INITIAL DECISION

Marvin E. Jones, Administrative Law Judge

On March 3, 1987, the undersigned granted Complainant's Motion for an Accelerated Decision and issued an Interlocutory Order, pursuant to 40 CFR 22.20 (b)(2), finding that Respondent, Landfill Service Corporation (hereinafter "LSC" or "Respondent") violated 42 USC §6928 and 6930 and regulations, promulgated pursuant to said statutes, as alleged in subject Complaint filed on February 12, 1986. Specifically, Respondent violated 40 CFR 265.93(c)(2) in that it failed to immediately obtain additional ground-water samples from downgradient wells, and analyses of said samples, where a significant difference was detected in the concentration of hazardous waste and hazardous waste constituents from its faciliity. I further found that Respondent violated 40 CFR 265.93 (d)(1), in that it failed to timely obtain analyses and provide written notice to the Regional Administrator - within seven days of the date of such confirmation - that it had confirmed that a significant increase of hazardous waste was being discharged from its facility which may be affecting ground-water quality. Violation of 40 CFR 265.93(d)(2), (3) and (4) was found because Respondent failed to develop, submit and implement a ground-water assessment plan at subject facility. Said Interlocutory Order is hereby incorporated herein by reference.

Said findings were grounded on Respondent's admissions contained in its Answer and in a stipulated Statement of Facts executed and filed by the parties, circa November 10, 1986.

My said Interlocutory Order contemplated that a hearing would proceed for the sole purpose of determining what, if any, civil penalties should appropriately be assessed against the Respondent for the violations so found.

By agreement of Counsel, subject hearing was continued from June 24, 1987, until August 26, 1987. On said date, said hearing was convened at 10 a.m. in Kansas City, Missouri, to hear evidence on the remaining issue: whether civil penalties should be assessed against Respondent and, if so, the appropriate amount of such penalties.

The United States Environmental Protection Agency (hereinafter "the Agency" or "EPA") proposes and seeks penalties totaling $130,560 for ground-water monitoring violations, as follows:

Count I - Failure to comply with 40 CFR 265.93(c)(2) when comparisons for downgradient wells under 265.93(b) showed statistically significant increases (or pH decrease) in parameters so tested: $9,500;

Count II - Failure to comply with Section 265.93(d)(1) in that Respondent did not provide requisite written notice to the Regional Administrator within seven days that its subject facility may be affecting ground-water quality: $9,500;

Count III - Failure to comply with Section 265.93(d)(2), (3) and (4) in that Respondent did not within 15 days submit to the Regional Administrator a specific ground-water assessment plan, as detailed in Section 265.93(d)(3), and timely implement such plan to determine, at a minimum, the rate of migration and concentrations of the hazardous waste of constituents in the ground-water: . . . . . $111,560.

Said last amount includes economic benefits allegedly realized by Respondent from its failure to comply with applicable regulations.

Section 3008(a)(3) of RCRA, 42 USC §6928(a)(3) provides, in pertinent part, that, in assessing a civil penalty, the Administrator shall take into account the seriousness of the violation and any good-faith efforts to comply with applicable requirements. Complainant, in arriving at the penalties here proposed, utilized a final RCRA Civil Penalty Policy, issued by EPA on May 8, 1984 (Penalty Policy or Guidelines, Complainant [hereinafter "C"] Exhibit [hereinafter "Ex"] 4A), which directs that (1) a gravity-based penalty be determined for a particular violation; (2) any economic benefit of Respondent's non-compliance be calculated where appropriate, and (3) the penalty be adjusted for any special circumstances shown by the record. The two factors considered in determining the gravity-based penalty are (a) potential for harm, and (b) extent of deviation from the statutory or regulatory requirement. Said factors constitute the seriousness of a violation and are incorporated into a penalty matrix from which a gravity-based penalty is chosen. If Respondent has derived significant savings by its failure to comply with RCRA requirements, the amount of economic benefit so derived may be calculated and added to the gravity-based penalty. After determining the penalty, including economic benefit, where appropriate, it may be increased or decreased to reflect particular circumstances upon consideration of the following factors:

1. Good-faith efforts to comply or lack of good faith;
2. Degree of willfulness and/or negligence;
3. History of non-compliance;
4. Ability to pay, or
5. Other unique factors (C Ex 4A, at 3-4).

In arriving at an appropriate amount of the civil penalties to be assessed, I am required to consider said guidelines; however, the assessment of a penalty different from that proposed pursuant to said guidelines may be made where specific reasons for any increase of decrease is stated in my Initial Decision (40 CFR 22.27(b)).

Complainant's witness Donald Sandifer proposed that a penalty in the amount of $9500 be assessed for the violation charged in Count I, finding that "potential for harm" was "moderate" and that "extent of deviation" was "major". He found the extent of deviation was considered to be major because the notification advising a statistically significant increase in pertinent parameters was delayed for over six months instead of being reported immediately. Such delay was characterized as extending to "at least the next sampling period". Respondent disposes of at least 37 wastes considered to be hazardous or toxic (Stipulation 3); under the Iowa State Sanitary Disposal Project Permit, LSC was required to install shallow wells and deep wells. The "shallow wells" monitored ground-water in loess, alluvium and glacial till less than 25 feet below grade (C Ex 31, page 1). Contamination in those wells evidenced that the landfill was leaching or the trenches were leaking (R Ex 35, p. 1) and thereby triggered the necessity to determine if action was required to prevent contamination of drinking water supplies. The deep wells were set in the Cedar Valley Aquifer ("CVA") which is a drinking water supply serving approximately 100 Iowa cities (C Ex 42, p. 3).

I agree that the penalty proposed on Count I, in the amount of $9500, is appropriate. The potential for harm is moderate, the extent of deviation is major and the mid-point of the matrix cell accords with the guidance documents. On this record, no adjustments are indicated to increase or decrease said amount.

I further find that the $9500 penalty proposed for the violation set forth in Count II of the Complaint is appropriate. Respondent's failure to comply with the requirement to notify the Agency within 15 days after its determination of a significant increase in ground-water parameters had a significant adverse impact on the RCRA program. It was submitted that the potential for environmental harm was present but that "it wasn't something that would immediately cause harm or contact with hazardous waste" (Transcript [hereinafter "TR"] 17). The extent of deviation was major, as said notice was not given within 15 days as required, but several months afterward. I agree that said appraisal is appropriate and that a penalty of $9500 should and will be assessed for the violation found on Count II of subject Complaint, and no adjustments to said amount are indicated in the record (TR 19), where good faith, willfulness and history of non-compliance were considered.

I further find that the civil penalty proposed for the violation set forth in Count III of the Complaint is appropriate. Respondent violated 40 CFR 265.93(d)(3) and (4) which provides that, upon finding a significant increase in subject parameters indicating that Respondent's facility may be affecting ground-water, it must submit and implement a ground-water quality assessment plan which will, at a minimum, determine the rate and extent of migration and the concentrations of hazardous waste and hazardous waste constituents in the ground-water. I find that the penalty of $22,500 proposed by Complainant is appropriate, for the reason that the potential for harm is "major" because, upon determining that the facility "may be affecting ground-water", it is essential that Respondent make the further determination required by said regulation (TR 21) to protect public health and the environment. As stated hereinabove, the aquifer that subject facility overlies is a major

source of drinking water for a number of communities in Iowa (TR 22). The extent of deviation is also "major", as the ground-water quality assessment plan was neither submitted nor implemented. The matrix cell provides for a penalty of from $20,000 to $25,000, and selection of the mid-point amount of $22,500 was appropriate and will be here assessed. Subject Complaint further proposes that said last civil penalty amount be increased $89,060 because Respondent benefited in at least that amount by its non-compliance. For reasons hereinafter set forth, I agree that said amount of $89,060 represents the amount of money Respondent saved by not complying with the subject ground-water quality assessment regulations. Calculations and a worksheet on Economic Benefits were received in evidence as part of Complainant's Exhibit 003 and sponsored by witness Millard L. Stone, who worked for EPA, Region VII, as a hydrogeologist in its RCRA branch from August, 1984, until February, 1986. Prior to that time, he received a B.S. degree in geology from the University of Alabama, took graduate work at the University of Minnesota and has worked for more than 13 years for his present employer, the U.S. Army Corps of Engineers (TR 56). Mr. Stone concluded that for Respondent to have been able to determine the rate and extent of migration of hazardous waste, from Respondent's facility, and the concentrations of same, it necessitated the installation of 18 wells, being two rows, each consisting of nine wells. This was calculated from the use of a 1200-feet dimension assumed from the area of the facility being 160 acres, roughly 1250 feet square (TR 151). The other dimension, 240 feet, was calculated using monitoring well data that showed increases in pH and specific conductants in 1977 (TR 61). Up to 1985, eight years had elapsed. Horizontal flow velocity in the shallow overburden

aquifer was discerned from Respondent's Part B Application to be 30 feet per year (TR 118). From this it was concluded that the extent of contaminant plume beyond the downgradient limit of the management area was 240 feet (30 feet per year times eight years). Using grids of 150 feet by 150 feet resulted in two rows, each consisting of nine wells, or a total of 18 wells, to make the requisite determination. Based upon his experience in drilling, he estimated a cost of $20 per foot (or $1000 per well) in drilling wells 50 feet deep. He considered this was a conservative cost estimate, on the low end of the scale (TR 58, 151). The intermittent stream on the facility site will take a percentage of ground-water, under certain conditions, but all ground-water does not leave the site by way of drainage, although some component, or percentage of it, does (TR 154). For this reason, the 18 wells were the minimum number that Respondent required to make the determination necessary to implement subject ground-water quality assessment plan. The calculations were based upon wells that should have been installed in 1983. The cost of sampling and analyses was estimated at $950 per quarter, 1/ being $200 per sample for each Inorganic Scan and $750 per sample for each Organic Scan. The cost avoided for sampling and analyses for eight quarters (two quarters in 1983, four quarters in 1984 and two quarters in 1985) would total $17,100 (18 x $950) per quarter for the 18 wells. Avoided costs are computed as "after-income tax" amounts by multiplying said amount by 54%, thus recognizing the 46% tax rate in effect in 1983, 1984 and 1985. Thus, in 1983, the worksheet (C Ex 003) shows total avoided costs of $52,200 (adding the $18,000 cost of 18 wells to sampling and analyses costs, for two quarters, totaling $34,200). The net avoided cost is 54% of said total or $28,188. The time value of the 1983 avoided cost contemplated 9% interest or an added amount of $2536.92.

1/ Said cost was estimated by Respondent consultant Michael Rapps, on March 24, 1982, to average $800 per sample; therefore, I find the 1985 cost estimate is reasonable (see R Ex 10, p. 2).

In this manner, the Economic Benefit which Respondent realized for the years 1983, 1984 and 1985 was computed to be the total sum of $89,060. On the basis of the above, I hereby assess a civil penalty, for the violation found as set forth in Count III of the Complaint, in the total amount of $111,560. The total sum assessed for the violations described in Counts I, II and III is $130,560.

DISCUSSION

Respondent chose to call as its only witness, Michael Rapps of M. Rapps and Associates. The witness advised Bruce Henning of the Iowa Department of Environmental Quality ("DEQ") by memorandum, dated July 25, 1983, that, on January 6, 1983, wells Nos. 2, 3 and 8 were found to show a statistically significant increase in total organic halogens ("TOX") and that later testing, on April 19, 1983, showed a statistically significant increase in three specific parameters in Respondent's wells Nos. 2, 3, 6 and 8. In said memorandum, he questioned the validity of statistical testing of groundwater "that is in an inherently non-steady state condition". Upon this basis, he then stated: " . . . we are recommending that statistical analysis not be utilized for the the shallow wells." He questioned the validity of such testing and further stated that "LSC's Subpart F Sampling and Analysis Plan does not reflect statistical testing for the shallow wells" (TR 78; C Ex 13, pp. 1-3).

The following year on April 26, 1984, Mr. Rapp wrote the Iowa DEQ (Attention: Rod Vlieger) advising that LSC:

> "is in the process of installing . . . wells in the in the Cedar Valley Aquifer (CVA) (which) will be suited to monitoring via the statistical testing requirements of Subpart F. Unfortunately, installation is not yet complete and . . . background statistics from the (CVA) will not be complete for at least one year subsequent to installation. In the meantime, the only wells for which . . . monitoring data exist are the shallow wells (which carry water levels which are only a few feet beneath the ground surface."

The letter further stated that "the shallow wells" . . . (were) highly susceptible to a number of activities unrelated to the landfill, and that "this is not to say that they are without value" (emphasis supplied) (C Ex 22, p. 1).

The ground-water monitoring plan submitted dealt "only with the Cedar Valley Aquifer" (C Ex 22, p. 2). This was contrary not only to regulatory requirements, but also to the understanding previously reached by Respondent and Iowa.

The Inspection Report, dated April 16, 1984, noted that a permit Special Provision required that monitoring wells 2 and 3 were to be replaced, shallow ground-water wells 9 and 10 were to be installed, and deep ground-water monitoring wells 4 and 5 were to be installed when weather conditions permitted, but no later than April 1, 1984. At the time of the inspection, no wells had been installed. The Inspection Report further stated that a discussion with Rod Vlieger alluded to a request (C Ex 26) for an extension until 90 days from the April 1, 1984, deadline; Mr. Vlieger concluded that Respondent had until May 15, 1984, to install the six wells, that no extension from that date would be granted and that failure to have said wells so installed by May 15, 1984, would result in enforcement action (C Ex 23). The conclusion reached referenced a commitment by LSC's Bill Heithoff that said wells could and would be installed by April 1, 1984, weather permitting (C Ex 25; C Ex 27).

A letter, dated November 19, 1982, to Mr. Peterson of LSC from Bruce Henning of the Iowa DEQ (R Ex 18, p. 6) explained the requirement for additional wells at greater depth:

> "Monitoring Comments
>
> 1. Because excavation depths at this landfill have increased significantly we no longer feel that monitoring only the shallow groundwater at this site is sufficient.

> The deepest excavations at this site are well below the shallow groundwater and within 17 feet of the high groundwater table of the deep aquifer. Therefore this Department is requiring submittal of a detailed deep aquifer groundwater monitoring plan . . . by January 17, 1983. This plan will be reviewed by IDEQ, EPA and Iowa Geological Survey. Upon approval . . . the plan must be implemented immediately."

It should further be noted that page 7, paragraph 3 of said letter, dated November 19, 1872 (R Ex 18), also advised that all parts of subject landfill that have received hazardous wastes are considered part of the hazardous waste landfill; that the shallow groundwater monitoring plan must be revised to provide shallow ground-water monitoring for the entire landfill in accordance with 40 CFR 265.90 - 265.94, be submitted by January 17, 1983, and implemented immediately upon approval.

It becomes clear that the position of Respondent reflected by the memorandum, dated July 25, 1983, to the Iowa DEQ seriously conflicts with and violates the requirements set forth and agreed to by Respondent in 1982. No statistical work, or retesting, was done by Respondent in 1984 or 1985 (TR 107).

Mr. Rapp testified (TR 111) that the statistical-significance testing was for four constituents, e.g., pH, specific conductants, Total Organic Carbon ("TOC") and Total Organic Halogens ("TOX"). He further stated that, in his opinion, Wells Nos. 2, 3 and 6 were not down-gradient of any waste deposits (TR 112), and that tests taken were not "meaningful". It is clear, on this record, that analyses, to be "meaningful", must test parameters of constituents which are not susceptible to activities not related to the landfill (TR 115). Further, the regulations, 40 CFR Part 265, Subpart F, expressly provide that Respondent has the responsiblity for the installation, operation

and maintenance of a ground-water monitoring system consisting of wells the number, location and depths of which must detect "any statistically significant amounts of hazardous waste . . . that migrate from the waste management area . . . " (§265.90 - 265.91).

Where, as here, 37 toxic or hazardous wastes are present on the facility and the belief exists that the parameters selected for testing are unrelated to the activities of the facility, the use of a different parameter, not influenced by off-facility sources, is indicated. Such action by the Respondent was and is contemplated under the regulations here pertinent as well as the authoritative advice received from the Iowa DEQ and EPA, Region VII (R Ex 7, 8, 9 and 10). Subject regulations are remedial in nature and are intended, where the public is so deeply affected, to be strictly construed and broadly interpreted. (Cattlemen's Investment Co. v. Fears, 343 F. Supp. 1248 (1972), citing Tcherepin v. Knight, 389 US 332 (1967.))

I find that Iowa performed its statutory duty of determining if Respondent's ground-water monitoring was adequate and sufficient to protect public health and the environment; however, I reject Respondent's suggestion that well placement was dictated by the Iowa DEQ. Respondent, in exploring means of installing the system required, was advised of the mounting costs of well installation and for sampling and analysis (see R Ex 8, dated January 27, 1982; R Ex 10, dated March 24, 1982, both letters from Michael Rapps), and it is apparent that their failure to install adequate wells and obtain samples and analyses deferred or avoided costs substantial in amount.

I conclude that subject violations occurred as a result of Respondent's determined effort to justify avoidance of costs necessarily attendant to its facility's operation. I reject Respondent's argument that the Iowa DEQ acted

as the agent of EPA until July, 1985, when it "turned back" the RCRA program to EPA. Up until that time, the RCRA program was administered by the State of Iowa DEQ. EPA's position was one of oversight in that said program was to be administered by the state on conditions contained in its application seeking such authority including the requirement that its program provide adequate enforcement of compliance (42 USC 6926(b); TR 27).

All contentions, arguments or Motions by the parties, or either of them, not specifically hereinabove addressed, are hereby overruled and denied.

Upon consideration of the record and the proposed findings and conclusions submitted by the parties, I recommend entry of the following

ORDER 2/

Pursuant to Section 3008 of the Resource Conservation and Recovery Act, 42 USC §6928, the following Order is entered against Respondent LANDFILL SERVICE CORPORATION:

1. A civil penalty in the amount of $9,500 is assessed against said Respondent on Count I of subject Complaint;

2. A civil penalty in the amount of $9,500 is assessed against said Respondent on Count II of subject Complaint;

3. A civil penalty in the amount of $111,560 is assessed against said Respondent on Count III of subject Complaint.

2/ Unless an appeal is taken pursuant to the Rules of Practice, 40 CFR 22.30, or the Administrator elects to review this decision sua sponte, the Initial Decision shall become the Final Order of the Administrator (40 CFR 22.27(c)).

4. Payment of the total amount of $130,560 shall be made within sixty (60) days after receipt of the Final Order, 40 CFR 22.31(b), by submitting a Certified or Cashiers Check payable to the Treasurer, United States of America, mailed to:

EPA - Region 7
(Regional Hearing Clerk)
P.O. Box 360748M
Pittsburgh, PA 15251.

DATED: November 5, 1987

Marvin E. Jones
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded to Ms. Linda McKenzie, Regional Hearing Clerk, Office of Regional Counsel, United States Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101, the Original of the foregoing INITIAL DECISION of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk (A-110), EPA Headquarters, Washington, D.C., who shall forward a copy of said Initial Decision to the Administrator.

DATE: November 5, 1987

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ALJ

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REGION VII

IN THE MATTER OF)
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LANDFILL SERVICE CORPORATION) Docket No. VII-[illegible]
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) CERTIFICATE OF SERVICE
)
Respondent)

In accordance with Section 22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ... (45 Fed. Reg., 24360-24373, April 9, 1980), I hereby certify that the original of the foregoing Initial Decision issued by Honorable Marvin E. Jones along with the entire record of this proceeding was served on the Hearing Clerk (A-110), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 by certified mail, return receipt requested; that a copy was hand-delivered to Counsel for Complainant, Anne Rowland, Office of Regional Counsel, Environmental Protection Agency, Region 7, 726 Minnesota Avenue, Kansas City, Kansas 66101; that a copy was served by certified mail, return receipt requested on Respondent's attorney, Thomas J. Immel, Imrel, Zelle, Ogren, McClain & Germeraad, 1118 South Sixth Street, Springfield, Illinois 62703, and Richard S. Fry, Shuttleworth and Ingersoll Post Office Box 2107, Cedar Rapids, Iowa 52406.

If no appeals are made (within 20 days after service of this Decision), and the Administrator does not elect to review it, then 45 days after receipt this will become the Final Decision of the Agency (45 F.R. Section 22.27(c), and Section 22.30).

Dated in Kansas City, Kansas this 9 day of November 1987.

/s/
Linda K. McKenzie
Regional Hearing Clerk
Region VII

cc: Honorable Marvin E. Jones
Administrative Law Judge
Environmental Protection Agency
726 Minnesota Avenue
Kansas City, Kansas 66101