87 MAR 18 P2:13

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Lufkin Division, Cooper Industries, Inc.,	)	Docket No. RCRA-86-06-R
	)	
	)	
Respondent	)	

1. The operator of a surface impoundment used to store hazardous waste cannot withdraw its Part B application without express consent of the permitting authority.

2. The operator of a surface impoundment used to store hazardous waste who had filed a Part B Permit Application prior to November 8, 1984, was not relieved of its obligation to file exposure information on August 8, 1985, by the fact that the State, which was authorized to issue permits, had not responded to the operator's request to withdraw its Part B application.

3. Oral notification to an appropriate state employee of the EPA's intention to bring an action given prior to the date the complaint was served was sufficient prior notice under RCRA.

4. A respondent cannot gamble on a questionable construction of the statute or regulations with respect to when it must submit exposure information and go scot-free if its construction is rejected.

Appearances:

For Complainant:

Reuben T. Bussey, Jr., Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, GA 20265

For Respondent:

Dale E. Stephenson, Esquire
Squire, Sanders & Dempsey
1800 Huntington Building
Cleveland, OH 44115

in waste piles, surface impoundments, land treatment facilities and landfills). As of this date, North Carolina had primary responsibility regarding Part B Permit Applications under State regulations equivalent to 40 C.F.R. Part 264. (Stipulation, Tr. 6).

4. On April 16, 1984, the North Carolina Division of Health Services (NC DHS) sent Lufkin a letter, (1) advising that the EPA "has granted the State of North Carolina and and Hazardous Waste Management Branch Interim Authorization for Phase II Components A, B and C to operate the State's Hazardous Waste Management Program in lieu of the Federal Program under RCRA," and (2) issuing "a formal request for Part B of your application for a hazardous waste facility permit" within 180 days. (Stipulation, Tr. 7; Respondent's Exh. 10).

5. On October 16, 1984, Lufkin submitted its completed Part B application to NC DHS. NC DHS acknowledged receipt of the Part B application in an October 17, 1984, letter, while the EPA acknowledge receipt of the application on October 22, 1984. (Stipulation, Tr. 7).

6. On November 8, 1984, while Lufkin's Part B Permit Application was still pending before NC DHS, the Hazardous and Solid Waste Amendments of 1984 ("HSWA") to RCRA were enacted (Pub. L. 98-616, 98 Stat. 3221). One of the requirements added by the amendments was that owners and operators of surface impoundments for which an application for a permit had been submitted prior to November 8, 1984, must submit by August 8, 1985, information reasonably ascertainable by the owner or operator on the potential for the public to be exposed to hazardous wastes or hazardous constitutents through releases related to the unit (hereafter referred to as "exposure information"). RCRA, Section 6939a, as added by HSWA, Title II, Section 247(a), 98 Stat. 3265.

headquarters level for Lufkin's compliance with environmental regulations. Caton told Maddox that the exposure information was due. (Tr. 184, 208).

14. At Richard Maddox's instruction, Caton telephone Thomas Karnowski. Karnowksi admitted that he had received Lufkin's letter of April 2, 1985, and said that he needed something to replace the Part B application such as a Closure Plan. (Tr. 185).

15. On August 13, 1985, Caton and John Dickinson of EPA had a telephone conversation during which Lufkin's submission of exposure information was discussed. 4/ Caton told Dickinson that Lufkin had decided that it did not need to file the exposure information because Lufkin was planning a "clean" closure. 5/ Dickenson disagreed. According to Dickinson's memorandum of the conversation, he told Caton that Lufkin had agreed at the June 1985, meeting that exposure information for the surface impoundment was due on August 8, 1985, because Lufkin had submitted a Part B application and because there was evidence of groundwater contamination. There is no evidence that Lufkin actually made such agreement at the meeting, and it was Lufkin's silence at the meeting that led Dickinson to believe that Lufkin had agreed to file the exposure information by August 8. 6/ (Stipulation, Tr. 8; Tr. 56, 33-34, 190-91; Complainant's Exh. 5).

4/ It is clear that the reference in the Stipulation of Facts at Tr. 8 to 42 U.S.C. 6940(a) is incorrect and that Section 6939a dealing with the submission of exposure information was what was intended.

5/ By "clean" closure Lufkin meant physically removing all hazardous waste from the surface impoundment. (Tr. 173). In Lufkin's opinion, no post-closure permit was required to accomplish a clean closure. (Tr. 157, 171-72, 203-04).

6/ No mention again was made of Lufkin's request to NC DHS to withdraw its Part B application and Dickinson was unaware that such request had been made. (Tr. 33-34,42-43, 55, 191; Complainant's Exh. 6.)

16. As a result of Dickinson's telephone conversation with Caton, the EPA's Waste Management Division sent a Notice of Violation to Lufkin which was received by Lufkin on August 23, 1985. The Notice requested that the exposure information be submitted within 15 days of receipt of the letter, and warned that a failure to submit the information may result in the issuance of an administrative order pursuant to RCRA, Section 3008(a), and the assessment of a civil penalty. (Complainant's Exh. 4; Answer, Attachment A, p. 4.)

17. Lufkin's intended response was that since the State had not told it otherwise, Lufkin could assume that its request to withdraw its Part B application had been granted, and that the exposure information was not due until November 8, 1985. 7/ This is shown in a draft of a letter that Lufkin prepared around September 20, 1985 to send to the EPA but owing to some oversight was probably never sent, and there is no record of the EPA ever having received it. (Respondent's Exhs. 6, 7; Tr. 60, 180, 193, 213.)

18. On or about September 18, 1985, Lufkin received a second notice of violation for failure to submit exposure information. Lufkin assumed that its letter of September 20th, to the EPA had been sent and was a sufficient response to the notice of violation, so no specific reply to this notice was made. (Respondent's Exh. 7; Tr. 194-95.)

19. On October 17, 1985, John Dickinson called Caton and inquired about the exposure information due from Lufkin. Caton said that Lufkin's Part B

7/ Pursuant to RCRA, Section 3005(e), as amended by HWSA, 42 U.S.C. 6925(e), a facility operating under interim status at the time of the enactment of HWSA which had not by then applied for a final permit determination had to apply for a permit by November 8, 1985, or lose interim status. See also 50 Fed. Reg. 38946 (Sept. 25, 1985).

application had been withdrawn by the State. Dickinson immediately called Tom Karnowski who confirmed only that Lufkin had requested withdrawal of its Part B application in April 1985. He denied that the State had granted Lufkin's request. Dickinson then called Caton again who admitted that Lufkin had not received a response to Lufkin's April 1985 letter. He also told Dickinson that Lufkin had responded to the notice of violation in its letter of September 20th to the EPA. (Complainant's Exh. 6; Tr. 42-43.)

20. On November 1, 1985, Lufkin's representatives met with Dr. William Hamner from NC DHS to seek guidance on closing the surface impoundment and on filing the exposure information and meeting the other requirements of HWSA. Lufkin, still assuming that its Part B application had been withdrawn, came prepared to argue that according to the EPA's policy statement dated September 16, 1985, 50 Fed. Reg. 38946 (September 25, 1985), Lufkin had 15 days after November 8, 1985, to file a closure plan, with a postclosure permit application to be thereafter submitted if requested by the State. Following discussion with Dr. Hamner and after some telephone calls to Dickinson of the EPA, it was agreed that Lufkin could not clean close the facility, and by November 8, would submit to the State a closure plan, request modification of the previously filed operating Part B application to a postclosure Part B application and submit a status report on its groundwater quality assessment program. Lufkin would also submit by the same date to the EPA a certification of compliance with interim status groundwater monitoring and financial responsibility requirements and the required exposure information. (Tr. 162-64, 167-68, 172; Respondent's Exhs. 2, 9.)

21. On November 6, 1985, Lufkin submitted all the information to the EPA and to NC DHS pursuant to the understanding reached at the November 1, 1985, meeting, including the exposure information and health assessment. (Stipulation, Tr. 7, Lufkin Exhs. 2 and 9.)

22. The State of North Carolina was notified of the EPA's intent to initiate this action prior to the filing of this action. (Tr. 10.)

Discussion, Conclusions and Penalty

Since Lufkin had submitted its Part B application on October 16, 1984, there is no question but that under the literal wording of HWSA Lufkin was required to submit exposure information by August 8, 1985. Lufkin contends, however, that it was relieved of this obligation by withdrawing its Part B application. I find that argument to be premised on a very questionable interpretation of RCRA and the regulations.

"Interim Status" means no more than what is conveyed by the words themselves, namely, an intermediate stage in the permitting process to allow the state (or the EPA in an unauthorized state) sufficient time to issue final permits to all hazardous waste facilities. A facility has no right to stay in interim status and must complete the permitting process and file its Part B application when it is requested to do so. If it does not, it looses interim status. 8/ That interim status was intended to be provisional and replaced as soon as possible by a final permit in the case of a facility like a surface impoundment was made clear by HWSA.

8/ See 40 C.F.R. 270.10(e)(5). North Carolina has adopted with few modifications 40 C.F.R. Parts 260-271. See N.C. Admin. Code, Title 10, Subchapter 10F. Citations, therefore, will be to the Federal regulation except where the North Carolina counterpart varies.

little foundation in fact. 11/ In short, Lufkin picked the solution most convenient to it but without any real foundation in the statute. Contrary to what Lufkin contends, it should have been clear from the statute that its solution was not consistent with the statutory permitting provisions. 12/

Lufkin nevertheless argues that the State misled it into believing that its request to withdraw its Part B application and return to interim status was approved, because the State never responded to it. As already noted, neither the statute nor the regulations give any grounds for making a request to withdraw a Part B application. 13/ Nor has Lufkin cited any statutory or regulatory provision or precedent that would support its assumption that the State's silence was tantamount to granting the request.

11/ Fdg. 7, supra.

12/ It should be noted that filing a Part B application did not preclude Lufkin from going ahead and closing the facility in accordance with the interim status requirements. See 40 C.F.R. 265.110-120. Lufkin, however, in the expectations that it could close clean waited until after its November 1, 1985, meeting with State to submit a closure plan. Fdgs. 20 and 21, supra. A closure plan Lufkin had submitted in June 1984, apparently would not have satisfied the closure and post-closure requirements. (Tr. 260-61.)

13/ Lufkin relies on the EPA's notice of implementation and enforcement policy on the HWSA amendments applicable to land disposal facilities, 50 Fed. Reg. 38946 (September 25, 1985), as support for its position. The Notice deals solely with the amendment to Section 3005(e) requiring all land disposal facilities in interim status at the date of the enactment of HWSA to apply for a final permit and certify compliance with groundwater monitoring and financial responsibility requirements by November 8, 1985, or loose interim status. Nothing in the Notice suggests that it was intended to give persons like Lufkin who had already submitted a Part B application a three month extension for deciding whether to apply for a permit or terminate interim status. Indeed, it should have been clear to anyone reading the statute and the Notice that the intent of the amendment was to cut down on the time that a facility could stay in interim status without applying for a final permit determination.

To the contrary, ordinary prudence should have cautioned Lufkin against relying on the State's silence for approval, since the exposure information had to be filed by August 8, 1985, if the request to withdraw the permit was not granted. When Caton specifically mentioned Lufkin's request in his call to Karnowski of NC DHS after the June 20, 1985, Karnowski's response, that he needed something to replace the Part B, such as a closure plan, should have alerted Lufkin if it was not aware of this earlier that it was highly questionable whether the State had consented to withdrawing the Part B application. 14/ Nor can Lufkin point to any action by the State or by the EPA thereafter that could have misled Lufkin into believing that its Part B application had been withdrawn.

Lufkin claims that it was agreed at the November 1, 1985, meeting that Lufkin would not be penalized if its exposure information was submitted by November 8, 1985. The meeting was with NC DHS which had authority only to deal with Lufkin's pending Part B application. Dr. Hamner, the State representative found it necessary to call Dickinson of the EPA as to the proper procedure, and in particular whether a notice of deficiency should be issued with respect to the pending Part B application making Lufkin subject to a penalty if it could not comply within 30 days. 15/

14/ See Fdg. 14.

15/ Tr. 222-23, 235-36; Complainant's Exh. 18.

Dickinson did tell Dr. Hamner that the EPA was going to bring a penalty action against Lufkin for failure to file its exposure information on time, but he strenously denies that he authorized Dr. Hamner to discuss settlement of the matter with Lufkin. Dr. Hamner denies that the EPA's assessment of a penalty was part of his negotiations with Lufkin. Their versions of what actually was negotiated is the more credible than Lufkin's. 16/ Lufkin's attempt to put a contrary interpretation of what occurred again seems to be the product of Lufkin's drawing conclusions favorable to it upon insufficient grounds for doing so.

I find, accordingly, that Lufkin violated 40 C.F.R. 270.10(J)(1) and (2) by failing to file the exposure information by August 8, 1985, as required. 17/

Lufkin also argues that the EPA failed to give the State prior notice of bringing this action. The complaint was dated October 31, 1985, but was not served until November 6, 1985. The pertinent statutory provision is RCRA, Section 3008)a)(2), 42 U.S.C. 6928(a)(2), which provides as follows:

16/ See 79-85, 220-24, 233-36, 240, 244-47. Dr. Hamner's notes of the meeting with Lufkin and his conversation with Dickinson (Complainant's Exh. 18) are entirely consistent with his and Dickinson's testimony. The first page summary appears to deal entirely with modifying the Part B application to a post-closure permit and completing the modified application. Since the State was also considering the assessment of a penalty, the reference to a penalty most logically is read as relating to a penalty by the State. Complainant's Exh. 18.

17/ Since there was no action by the State or by the EPA which could lead Lufkin into reasonably believing either that its Part B application had been withdrawn or that it would not be penalized for its delay in filing the expsoure information, Union Oil Company of California, Docket No. RCRA-09-84-0223 (January 14, 1985); BKK Corporation, Docket No. RCRA-IX-84-0012 (April 13, 1984) and Landfill, Inc., Docket No. RCRA-8562-R (September 16, 1986), cited by Lufkin are not in point.

> In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 3006, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

Since the State had not been authorized to administer the requirement under HWSA for submitting exposure information it is questionable whether that provision applies. In any event, the date on which the complaint (and compliance order) was issued or the action commenced is determined by the date of service, not the date the complaint was signed. Until the complaint is served it has no legal effect and no action has been started. Dickinson on November 1, 1985, told Dr. Hamner of NC DHS over the telephone during the course of Hamner's negotiations with Lufkin that the EPA intended to seek penalties for Lufkin's failure to submit exposure information. 18/ Dr. Hamner was a logical person to notify, since he was acting on behalf of the State in negotiating Lufkin's compliance. I find accordingly, that the notice given to Dr. Hamner satisfied the statutory requirements.

Finally, Lufkin argues that the proposed penalty of $10,000 is excessive. The EPA classified the violation under the RCRA Penalty Policy as one with a moderate potential for harm and constituting a major deviation from regulatory requirements. Penalties for a violation so classified ranged between $8,000 and $10,999. 19/

18/ Tr. 10.

19/ See Complainant's Exh. 7. See also, final RCRA Civil Penalty Policy dated May 8, 1984, official notice of which is taken.

The EPA does not deny its inability to determine what the potential hazards are. It's assignment of a moderate potential for harm is apparently based upon the significant adverse effects upon the RCRA regulatory program. What is involved, however, is a three month delay and no more. There is simply no evidence that Lufkin intended to defer the filing of the exposure information beyond November 8, 1985. As of that date, it appears to have fully complied with the requirement. Further, this was not a willful delay as argued by the EPA, but arises from Lufkin's misunderstanding that its request to withdraw gave it until November 8, 1985, to comply. Aside from this violation, Lufkin appears to have made good faith efforts to comply with RCRA. Lufkin, of course, cannot gamble on a questionable construction of the statute or regulations and expect to go scot-free if that construction is rejected. But the potential harm in the three month delay and the extent of deviation from regulatory requirements are more properly classified as minor in both cases. Accordingly, I find that the appropriate penalty is $2,000.

ORDER 20/

Pursuant to the Solid Waste Disposal Act, as amended, Section 3008, 42 U.S.C. 6928, and for the reasons stated above, a civil penalty of $2,000 is hereby assessed against Lufkin Division, Cooper Industries, Inc.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order by submitting a certified or cashier's check payable to the United States of America and mailed to:

EPA - IV
(Regional Hearing Clerk)
P.O. Box 100142
Atlanta, GA 30384

Gerald Harwood
Gerald Harwood
Chief Administrative Law Judge

DATED: March 18, 1987
Washington, D.C.

20/ 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 hiw own motion, the Initial Decision shall become the final order of the Administrator. See 40 C.F.R. 22.27(c).