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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

B & B Wood Treating &
Processing Co., Inc.

Docket No. RCRA-II-93-0306
Judge Greene

Respondent

Appearances:

For Complainant:

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Office of Regional Counsel
Region II -- EPA
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New York, New York 10278

For Respondent:

Edwin Gutierrez, Esquire
Gutierrez & Franco
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Condado, Puerto Rico, 00907

Before: J. F. Greene
Administrative Law Judge

Decided: October 25, 1994

ORDER GRANTING COMPLAINANT'S
MOTION FOR PARTIAL "ACCELERATED DECISION"

This matter arises under Section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6928 ("RCRA" or "the Act"). The June 29, 1993 complaint alleges various statutory and regulatory violations at Respondent's facility, B & B Wood Treating & Processing Co., Inc., in Cataño, Puerto Rico.¹ Complainant proposes a total civil penalty of \$220,825.²

In its answer to the complaint, Respondent admits many of the allegations, requests dismissal of the action, and requests a formal hearing.

¹ The allegations are summarized as follows:

- 1) Respondent failed to notify EPA of the generation of hazardous waste, in violation of Section 3010 of RCRA, 42 U.S.C. § 6930;
- 2) Respondent failed to obtain a proper written assessment of its drip pad, in violation of 40 C.F.R. § 265.441(a);
- 3) Respondent failed to have a curb or berm around its drip pad, in violation of 40 C.F.R. § 265.443(i); and
- 4) Respondent failed to document properly the cleaning of its drip pad, in violation of 40 C.F.R. § 265.443(i); and
- 5) Respondent failed to document properly that treated wood was properly held over the drip pad to allow drippage to cease, in violation of 40 C.F.R. § 265.443(k).

The complaint was based on information obtained during a September 14, 1992 inspection by a representative of the U.S. Environmental Protection Agency.

² Complaint at 9 (June 29, 1993).

The parties were unable to settle. On August 15, 1994, stipulations were filed with the Regional Hearing Clerk. On August 25, 1994, Complainant moved for partial "accelerated decision" based upon admissions by Respondent in the stipulations and in its answer to the complaint. Complainant contends that Respondent has admitted the necessary factual elements to establish Respondent's liability as alleged in the complaint. To date, this Court has received no papers in opposition, or otherwise in response, to Complainant's motion.

In a motion for summary determination, the question is whether the moving party: (1) has met its burden of establishing that there is no genuine issue as to any material fact; and (2) is entitled to judgment as to liability as a matter of law. The question is "whether the evidence presents a sufficient disagreement to require submission to [a trier of fact] or whether it is so one-sided that one party must prevail as a matter of law."³

Here, in reviewing Respondent's admissions in its answer and in the stipulations, it is clear that Complainant has established a prima facie case as to Respondent's liability for each of the five violations alleged in the complaint, and is entitled to judgment as to liability as a matter of law.

Count I alleges that Respondent failed to notify EPA of the generation of a hazardous waste, in violation of Section 3010 of

³ See Anderson v. Liberty Lobby, 477 U.S. 242, 251-252 (1986).

RCRA, 42 U.S.C. § 6930.⁴ Section 3010(a) of RCRA provides in pertinent part:

Not later than ninety days after promulgation of regulations under section 6921 of this title identifying by its characteristics or listing any substance as hazardous waste subject to this subchapter, any person generating or transporting such substance or owning or operating a facility for treatment, storage, or disposal of such substance shall file with the Administrator (or with States having authorized hazardous waste permit programs under section 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person.⁵

Respondent has admitted that it generated a listed hazardous waste as a result of its wood preserving operations.⁶ Respondent has further admitted that it failed to notify EPA of the generation of a listed hazardous waste.⁷ Accordingly, there is no issue of material fact as to Respondent's liability for Count I of the complaint, and Complainant is entitled to judgment as to such liability as a matter of law.⁸

⁴ Complaint, ¶¶ 23-31.

⁵ This provision was added by Pub. L. No. 94-580, Section 2, 90 Stat. 2812, in 1976, and was amended by Pub. L. 96-482, Section 15, 94 Stat. 2342, in 1980.

⁶ Stipulations, ¶¶ 20-22 (Aug. 15, 1994); Answer, ¶¶ 24-25.

⁷ Stipulations, ¶ 23.

⁸ As an affirmative defense to Count I, as well as Counts II-V, Respondent maintains that it did not realize that it was required to comply with federal law, and that its non-compliance was "[neither] willful nor knowledgeable." Answer at 7. However, "RCRA is a strict liability statute . . . and authorizes the imposition of a penalty even if the violation is unintended." In the Matter of: Humko Products, An operation of Kraft, Inc., RCRA Appeal No. 85-2, Final Decision (December 16, 1988).

Count II alleges that Respondent failed to obtain a proper written assessment of its drip pad, in violation of 40 C.F.R. § 265.441(a).⁹ At the time of the EPA inspection of Respondent's facility in September 1992, 40 C.F.R. § 265.441(a) required in relevant part as follows:

For each existing drip pad as defined in § 265.440 of this subpart, the owner or operator must evaluate the drip pad and determine that it meets all of the requirements of this subpart, except the requirements for liners and leak detection systems of § 265.443(b). No later than the effective date of this rule, the owner or operator must obtain and keep on file at the facility a written assessment of the drip pad, reviewed and certified by an independent, qualified registered professional engineer that attests to the results of the evaluation. . . . The evaluation must . . . document the extent to which the drip pad meets each of the design and operating standards of § 265.443 of this subpart, except the standards for liners and leak detection systems, specified in § 265.443(b) of this subpart. . . . (emphasis added).

Respondent has stipulated that at the time of the EPA inspection, its drip pad constituted an "existing drip pad,"¹⁰ and that it had not obtained a written assessment for the drip pad.¹¹ Accordingly, there is no issue of material fact as to

⁹ Complaint, ¶¶ 33-39.

¹⁰ In ¶ 24 of the stipulations, Respondent admitted that "[a]s of the date of the inspection, Respondent's drip pad constituted an existing drip pad (as defined in 40 C.F.R. § 265.440)." In addition, in its answer, Respondent stated that "it is hereby admitted that after reading the statute, it appears Respondent's drip pad constituted an existing drip pad." Answer, ¶ 34.

¹¹ Stipulations, ¶ 25 ("[a]s of the date of the inspection, Respondent had not obtained a written assessment of Respondent's drip pad, which assessment had to have been reviewed and certified by an independent, qualified registered professional engineer").

Count II, and Complainant is entitled to judgment as a matter of law.

Count III alleges Respondent's failure to comply with 40 C.F.R. § 265.443(a)(3),¹² which states that drip pads must "[h]ave a curb or berm around the perimeter." Respondent admitted in its answer and the stipulations that it did not have a curb or berm around the drip pad's perimeter as of the date of the inspection.¹³ Therefore, Respondent is found liable for Count III as alleged in the complaint.

Count IV alleges Respondent's failure to document properly the cleaning of the surface of its drip pad in violation of 40 C.F.R. § 265.443(i).¹⁴ At the time of the EPA inspection of Respondent's facility, this regulation required in pertinent part:

The drip pad surface must be cleaned thoroughly at least once every seven days such that accumulated residues of hazardous waste or other materials are removed. . . . The owner or operator must document the date and time of each cleaning and the cleaning procedure used in the facility's operating log.

While Respondent periodically cleaned its drip pad¹⁵ and maintained an operation log of the facility's activities,¹⁶

¹² Complaint, ¶¶ 41-47.

¹³ Stipulations, ¶¶ 26-27; Answer, ¶¶ 42-43.

¹⁴ Complaint, ¶¶ 49-57.

¹⁵ See Stipulations, ¶ 28; Answer, ¶ 50.

¹⁶ See Stipulations, ¶ 29; Answer, ¶ 51-52.

Respondent has admitted that at the time of the inspection, it had not documented the required information in the operating log.¹⁷ Accordingly, Respondent is found liable for Count IV as alleged in the complaint.

Count V alleges Respondent's failure to document that treated wood is held on the drip pad for a period of time sufficient to allow drippage to cease, in violation of 40 C.F.R. § 265.443(k).¹⁸ At the time of the EPA inspection of Respondent's facility, this regulation required in relevant part:

After being removed from the treatment vessel, treated wood from pressure and non-pressure processes must be held on the drip pad until drippage has ceased. The owner or operator must maintain records sufficient to document that all treated wood is held on the pad following treatment in accordance with this requirement.

Respondent has admitted that in the course of its wood preserving operations, it removes chemically treated wood from the treatment vessel and holds the wood on the drip pad until drippage has ceased.¹⁹ Respondent has further acknowledged that:

As of the date of the inspection, Respondent had not maintained records documenting that, as part of Respondent's wood preserving operations, the treated wood, after removal from the treatment vessel, is held

¹⁷ For admissions as to failure to document in the operating log the date and time of each cleaning of the surface of the drip pad, see ¶ 30 of the Stipulations, and ¶ 51 of the Answer. For admissions as to failure to document in the operating log the cleaning procedure used in the cleaning of the surface of the drip pad, see ¶ 31 of the Stipulations, and ¶ 52 of the Answer.

¹⁸ Complaint, ¶¶ 59-65.

¹⁹ Stipulations, ¶ 32; Answer, ¶ 60.

on Respondent's drip pad a sufficient length of time to allow drippage to cease.²⁰

Accordingly, as with Counts I-IV, there is no issue of material fact as to Count V, and Complainant is entitled to judgment with respect to liability as a matter of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is B & B Wood Treating & Processing Co., Inc.
2. At all times relevant to the complaint, Respondent has owned and operated the facility located at Desembarcadero Final Cataño Water Front, Cataño, Puerto Rico.
3. Respondent is a "person" as that term is defined Section 1004(15) of the RCRA, 42 U.S.C. § 6903(15), and in 40 C.F.R. § 260.10.
4. At all times relevant to the complaint, Respondent has been subject to the provisions of the Act and implementing regulations at 40 C.F.R. Part 265, Subpart W.
5. Respondent failed to notify EPA of the generation of a listed hazardous waste, in violation of Section 3010 of RCRA, 42 U.S.C. § 6930.
6. Respondent failed to obtain a proper written assessment of its drip pad, in violation of 40 C.F.R. § 265.441(a).
7. Respondent failed to have a curb or berm around its drip pad, in violation of 40 C.F.R. § 265.443(i).
8. Respondent failed to document properly the cleaning of its drip pad, in violation of 40 C.F.R. § 265.443(i).

²⁰ Stipulations, ¶ 33; Answer, ¶ 61.

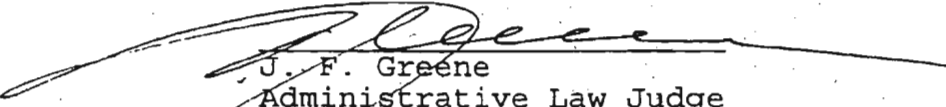
9. Respondent failed to document properly that treated wood was properly held over the drip pad to allow drippage to cease, in violation of 40 C.F.R. § 265.443(k).

10. Remaining to be determined is the amount of the civil penalty to be assessed for the violations found here.

ORDER

Accordingly, Complainant's Motion for Partial Accelerated Decision is hereby granted.


And it is FURTHER ORDERED that the parties shall confer for the purpose of attempting to settle the remaining issue herein, and shall report upon the status of their effort during the week ending November 25, 1994.


J. F. Greene
Administrative Law Judge

Dated: October 26, 1994

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL "ACCELERATED DECISION" was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on October 26, 1994.


Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF RESPONDENT: B & B Wood Treating & Processing Co., Inc.
DOCKET NUMBER: RCRA-II-93-0306

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