EC-G-2002-054

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DEC 12 1990

MEMORANDUM

SUBJECT: Individual Liability of Corporate Officers as Operators Under RCRA

FROM: Kathie Stein
Acting Associate Enforcement Counsel
for RCRA

Bruce M. Diamond
Director, Office of Waste Programs Enforcement

TO: John R. Barker
Regional Counsel, Region IV

Donald J. Guinyard
Acting Director,
Waste Management Division, Region IV

It has come to our attention that The Honorable Timothy J. Dowling, Administrative Judicial Officer, has issued his final decision in the Resource Conservation and Recovery Act ("RCRA") Section 3008(a) case, Southern Timber Products, Inc., and Brax Batson, (Appeal No. 89-2). Judge Dowling's decision overturned the findings of Chief Administrative Law Judge Gerald Harwood that Brax Batson was individually liable because of the responsible part he played in the violations of the rules regulating closure and post-closure care of surface impoundments at interim status facilities under RCRA. Judge Dowling, in footnote 49 of his decision, has invited the Region to move for reconsideration under 40 C.F.R. § 22.22 if the Region continues to believe that Mr. Batson should be held personally responsible for such post-closure care.

In the decision, Judge Dowling expressed concern that, during his research, he was unable to locate any specific guidance from the Agency that it has a policy of naming corporate officers in RCRA cases where the officer takes on the role of the operator. The reason for the absence of such specific guidance is that, as case law has developed under the various environmental statutes and regulations, the Agency has followed this practice of naming such corporate officers as operators where the facts and the case law supported this theory of liability.

In light of Judge Dowling's concern however, the purpose of this memorandum is to clarify what the national enforcement practice has been, to date, regarding the imposition of individual and personal liability on the officers of a corporate operator under RCRA § 3008(a), when theories for piercing the corporate veil are not necessarily relied upon. The case law is developing, and there are few cases that have reached the stage of a decision or that have not been settled prior to going to hearing. However, the following cases are illustrative of the Agency's approach to this issue.

The Agency frequently has sought to hold corporate officers liable as operators under RCRA § 3008 due to their personal participation in the corporate actions which violated RCRA. Some of the civil judicial cases where this practice has been followed include: U.S. v. Proteccione Tecnica Ecologica, Inc., et al. (Civ. Action No. 86-1698, U.S. Dist. Ct. D. P.R., complaint filed October 30, 1986); U.S. v. Bayonne Barrel and Drum Co., et al. (Civ. Action No. 87-786, U.S. Dist. Ct. D. N.J., complaint filed March 4, 1987); U.S. v. ILCO, Inc., (Civ. Action No. CV-85-H-823-S, U.S. Dist. Ct. N.D. Ala., complaint filed March 18, 1985); U.S. v. Escambia et al. (Civ. Action No. 88-30328-RV, N.D. Fla., complaint filed September 30, 1988); U.S. v. Sanders Lead et al. (Civ. Action No. 89-T-1123-N, U.S. Dist. Ct. M.D. Ala., amended complaint filed September 13, 1990); U.S. v. Conservation Chemical et al. (Civ. Action No. H 86-9, U.S. Dist. Ct. N.D. Ind., complaint filed January 6, 1986); U.S. v. Environmental Waste Control, Inc. et al. (Civ. Action No. S87-55, U.S. Dist. Ct. N.D. Ind., complaint filed February 2, 1987); U.S. v. Production Plated Plastics, Inc. et al, (File No. K87-138 CA, U.S. Dist. Ct. W.D. Mich, So. Div., complaint filed March 31, 1987) ; and U.S. v. Northway Industries, Inc. (Civ. Action No. 90-7-1-546, U.S. Dist. Ct. E.D. Mich., complaint filed October 19, 1990).

Several Regions have also filed administrative actions under RCRA § 3008 naming such corporate officers as individually liable operators. Some of these cases include: In the Matters of: Dana Corp., Victor Products Division and BRC Rubber Group (RCRA Docket Nos. VW-90-R-14 and VW-90-R-15, amended administrative complaint filed September 25, 1990); In Re: Ronald Coffman d.b.a. Coffman Body Shop and Estrada, Inc. (RCRA Docket No. VII-88-H-0014, administrative complaint filed March 31, 1988); and In Re: Triggs Trailer Corp. (RCRA Docket No. VII-88-H-0004, amended administrative complaint filed July 14, 1988).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

July 88

MEMORANDUM

SUBJECT: Owner and Operator Responsibility for Corrective Action

FROM: Steve Heare, Acting Director
RCRA Enforcement Division

Steve Leifer, Acting Associate Enforcement Counsel for Waste
Office of Enforcement and Compliance Monitoring

TO: Waste Management Division Directors,
Regions I-X

The purpose of this memorandum is to emphasize the importance of naming both the owner and operator as respondents to corrective action orders. The Agency is statutorily authorized, and pursuant to certain provisions required, to implement regulations applicable to both owners and operators of hazardous waste management facilities. In most cases the owner of a facility is also the operator, or the operator is the agent of the owner, operating the facility for the benefit of the owner. In either case, the liability of the owner is clear.

In some instances, however, the operator of a facility is not the employee or agent of the property owner and therefore not acting on behalf of the owner. In any event, you must assure access to the affected property, so that any corrective action required pursuant to sections 3008(h), 3013, or 7003, negotiated or issued unilaterally, will be completed. This assurance is obtained by making the owner and the operator jointly liable for completion of the work.

Also, the Agency's authority to assess penalties is limited to those persons named on the order. Section 3008(h)(2) states "... If any person named in an order fails to comply with the order, the Administrator may assess, and such person shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each day of noncompliance with the order."

While nothing in the statute precludes EPA from issuing separate orders to owners and operators of facilities, it is not as practical to do so. If a negotiated order is in effect at a facility, a subsequently issued order would have to contain provisions that would not conflict with any requirements in the existing order. Also, the issuance of the second order is likely to disrupt corrective action and it also places an unnecessary resource burden on the Region.

If you have any questions regarding this issue, please call Susan Hodges in the Office of Waste Programs Enforcement. She can be reached on 475-9315.

cc: RCRA Enforcement Branch Chiefs,
Regions I-X

RCRA Enforcement Section Chiefs,
Regions I-X

Hazardous Waste Branch Chiefs,
Regions I-X

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY RES

May 27, 1986

MEMORANDUM

SUBJECT: Drafting of initial complaints to name individuals as respondents

FROM: Lloyd S. Guerci, Director
RCRA Enforcement Division

TO: RCRA Enforcement Branch Chiefs, Regions I-X

Enclosed is a decision in an enforcement proceeding against J. V. Peters & Company (Appeal to Administrator No. 85-4, May 9, 1986) where the Region attempted to add parties after the hearing. The Region's attempt was rejected and the matter was remanded to the Region.

We expect that in a fair number of cases against closing land disposal facilities, the corporation will not have adequate assets to effectuate the necessary relief (or will have effectively transferred the assets in an attempt to hide them). At the time that the initial complaint or order is written, it is very important to consider naming individuals who participated in the regulated activity. A final order against a corporation with no assets is a hollow victory. It may prove difficult to add individuals as respondents after the initial proceedings are commenced.