Koppers Inc

General Information

ID	Branch	SIC	County	Basin	Start	End
876	Energy and Transportation	2491	Grenada	Yazoo River	11/09/1981	

Address

Physical Address (Primary)	Mailing Address
1 Koppers Drive Tie Plant, MS 38960	PO Box 160 Tie Plant, MS 38960

Telecommunications

Type	Address or Phone
Work phone number	(662) 226-4584, Ext. 11

Alternate / Historic AI Identifiers

Alt ID	Alt Name	Alt Type	Start Date	End Date
2804300012	Koppers Industries, Inc.	Air-AIRS AFS	10/12/2000	
096000012	Koppers Industries, Inc.	Air-Title V Fee Customer	03/11/1997	
096000012	Koppers Industries, Inc.	Air-Title V Operating	03/11/1997	03/01/2002
096000012	Koppers Industries, Inc.	Air-Title V Operating	01/13/2004	01/01/2009
MSR220005	Koppers Industries, Inc.	GP-Wood Treating	09/25/1992	
MSD007027543	Koppers Industries, Inc.	Hazardous Waste-EPA ID	08/27/1999	
HW8854301	Koppers Industries, Inc.	Hazardous Waste-TSD	06/28/1988	06/28/1998
HW8854301	Koppers Industries, Inc.	Hazardous Waste-TSD	11/10/1999	09/30/2009
876	Koppers Industries, Inc.	Historic Site Name	11/09/1981	12/11/2006
876	Koppers, Inc.	Official Site Name	12/11/2006	
MSP090300	Koppers Industries, Inc.	Water-Pretreatment	11/14/1995	11/13/2000
MSP090300	Koppers Industries, Inc.	Water-Pretreatment	09/18/2001	08/31/2006
MSU081080	Koppers Industries, Inc.	Water-SOP	11/09/1981	11/30/1985

Regulatory Programs

Program	SubProgram	Start Date	End Date
Air	Title V - major	06/01/1900	
Hazardous Waste	Large Quantity Generator	08/27/1999	
Hazardous Waste	TSD - Not Classified	06/28/1988	
Water	Baseline Stormwater	01/01/1900	
Water	PT CIU	11/14/1995	
	PT CIU - Timber Products		

Water	Processing (Subpart 429)	11/14/1995	
Water	PT SIU	11/14/1995	

Locational Data

Latitude	Longitude	Metadata	S / T / R	Map Links
33 ° 44 ' 3 .00 (033.734167)	89 ° 47 ' 8 .06 (089.785572)	**Point Desc:** PG- Plant Entrance (General). Data collected by Mike Hardy on 11/8/2005. Elevation 223 feet. Just inside entrance gate. **Method:** GPS Code (Psuedo Range) Standard Position (SA Off) **Datum:** NAD83 **Type:** MDEQ	Section: Township: Range:	SWIMS TerraServer Map It

12/20/2006 12:16:40 PM

Mississippi Department of Environmental Quality
Office of Pollution Control

I-sys 2000 Master Site Detail Report

Site Name: Koppers Industries Inc

PHYSICAL ADDRESS

LINE 1: Tie Plant Road
LINE 2:
LINE 3:
MUNICIPALITY: Tie Plant
STATE CODE: MS
ZIP CODE: 38960-

MAILING ADDRESS

LINE 1: PO Box 160
LINE 2:
LINE 3:
MUNICIPALITY: Tie Plant
STATE CODE: MS
ZIP CODE: 38960-

OTHER INFORMATION

MASTER ID: 000876
COUNTY: Grenada
REGION NRO
SIC 1: 2491
AIR TYPE: TITLE V
HW TYPE: TSD
SOLID TYPE:
WATER TYPE: INDUSTRIAL
BRANCH: Energy Branch
ECED CONTACT:
Collier, Melissa
BASIN:
Yazoo River Basin

AIR PROGRAMS ☑ SIP ☐ PSD ☐ NSPS ☐ NESHAPS ☐ MACT

Mississippi Department of Environmental Quality
Office of Pollution Control

Pemits

PROGRAM	PERMIT TYPE	PERMIT #	MDEQ PERMIT CONTACT	ACTIVE
AIR	TITLE V	096000012	Burchfield, David	YES
WATER	PRE-TREATMENT	MSP090300	Collins, Bryan	YES
HAZ. WASTE	TSD	HW8854301		NO
HAZ. WASTE	EPA ID	MSD007027543		NO
HAZ. WASTE	TSD	HW8854301	Stover, Wayne	YES
GENERAL	BASELINE	MSR22005		NO
WATER	SOP	MSU081080		NO
WATER	PRE-TREATMENT	MSP090300	Rao, Maya	NO

Compliance Actions

MEDIA	ACTIVITY TYPE	SCHEDULED	COMPLETED	INSPECTED B
HAZ WASTE				,
AIR	State Compliance Inspection	09/28/2001		Collier, Melissa
HAZ WASTE	Financial Record Review	01/18/2000	01/18/2000	Twitty, Russ
WATER	CMI - PRETREATMENT		11/16/1999	Whittington, Darryail
WATER	CEI - PRETREATMENT	09/29/2000		,
WATER	CEI - NPDES	09/29/2000		Twitty, Russ
HAZ WASTE	Operation and Maintenance Inspec	09/29/2000	09/13/2000	Stover, Wayne
AIR	State Compliance Inspection	09/29/2000		,
WATER	CEI - NPDES	03/02/1999	03/02/1999	Twitty, Russ
HAZ WASTE	Compliance Evaluation Inspection	03/02/1999	03/02/1999	Twitty, Russ
AIR	State Compliance Inspection	03/02/1999	03/02/1999	Twitty, Russ

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

American Wood Preservers Institute, and Koppers Company, Inc., Plaintiffs, v. United States Environmental Protection Agency, and Lee M. Thomas, Administrator, Defendants.	Civil Action No. 88-0770 Lamberth, J.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE PLAINTIFFS' SUPPLEMENT TO ITS MOTION FOR SUMMARY JUDGEMENT OR, IN THE ALTERNATIVE, MOTION TO DISMISS

INTRODUCTION

On October 18, 1988, plaintiffs American Wood Preservers Institute and Koppers Company, Inc. filed a "supplement" to their original motion for summary judgment. In the new brief, plaintiffs attempt to renew consideration of their original motion for summary judgment prior to the Court's decision regarding the jurisdictional issues[1] which undermine their belated attack on the listed hazardous waste K001. The Local Rules do not provide for the filing of supplemental briefs

[1]Defendants have demonstrated that the Court lacks subject matter jurisdiction because (1) plaintiffs' attack on the scope of the listed hazardous waste, K001, is foreclosed where it is beyond the statutory 90 day period allowed under the Resource Conservation and Recovery Act ("RCRA"), (2) the lawsuit was not filed in District of Columbia Court of Appeals, the exclusive forum for review as designated by RCRA, and (3) the Skinner memoranda do not constitute final agency action which is ripe for judicial review.

and where plaintiffs have failed to seek leave from this Court to do so, the brief is impermissible and should be stricken from the record.

If the Court should determine that it is appropriate to consider the new arguments asserted, defendants would submit that the Court lacks jurisdiction to determine the efficacy of plaintiffs' new claims. Plaintiffs allege in their new brief that they are harmed and seek immediate relief from the actions of various state agencies which have determined that spray irrigation fields should be regulated as land treatment units under the state regulatory schemes. None of these state agencies have been named as parties in the instant action nor have any claims been asserted against them in the complaint. Consequently, the Court is without personal jurisdiction over these agencies to adjudicate the issues raised by plaintiffs' supplemental brief.

Furthermore, the plaintiffs have failed to state a claim against EPA based upon the new allegations contained in their supplemental brief. Plaintiffs do not provide a scintilla of evidence which establishes a nexus between the actions taken by the state agencies in regulating spray irrigation fields and the Skinner memoranda circulated within EPA. States are free to adopt different, more stringent hazardous waste programs than the federal program. 42 U.S.C. § 6929. Consequently, the Court should strike the supplemental brief from the record. To the extent the complaint attempts to assert such issues, they should also be dismissed.

Defendants have moved to stay the proceedings pending the resolution of the jurisdictional issues of this case. If the Court should deny defendants' motion to dismiss and lift the stay, defendants renew their request that they be given an appropriate length of time to respond to these new claims along with the other issues raised in plaintiffs' motion for summary judgment.

I. Plaintiffs' Supplemental Brief Should Be Stricken From The Record.

Local Rule 108 for the United States District Court of the District of Columbia establishes the procedure to be followed in motion practice before the Court. It allows for the filing of a motion, a brief in opposition and a reply brief within a prescribed time period.

Rule 108 does not provide for the filing of a supplemental brief to a summary judgment motion. As a result, the permission of this Court must be sought prior to filing a brief which clearly was not contemplated by the Local Rules. Because plaintiffs have failed to request leave of Court to file a brief which falls beyond the scope of motion practice in the jurisdiction, the issues raised in the brief should be dismissed and the brief should be stricken from the record.

II. The Court Lacks Jurisdiction Over The Issues Raised In Plaintiffs' Supplemental Brief.

If the Court elects to consider the new arguments raised in plaintiffs' supplemental summary motion brief, the Court should dismiss these claims along with those previously

addressed in defendants' motion to dismiss. The supplemental brief contains numerous references to harms allegedly caused by state permitting and enforcement decisions regarding the generation, treatment or disposal of listed waste K001 in spray irrigation fields. To the extent the supplemental brief asserts claims for relief from these state actions, dismissal is warranted where plaintiffs have raised new issues which clearly fall beyond the jurisdiction of this Court.

In the supplemental brief, plaintiffs assert that EPA continues to harm them based upon its regulation of spray irrigation fields which treat K001, the process described in the Skinner memoranda. The "illegal course of conduct" which EPA has allegedly pursued involves decisions by the West Virginia Department of Natural Resources, the Illinois Environmental Protection Agency and the Mississippi Department of Natural Resources to regulate spray irrigation fields as land treatment units. See Supplemental Brief at 2-4. Plaintiffs asserts these new claims without joining any of these state agencies as parties to the action and without asserting these claims in the complaint.

A. This Court lacks jurisdiction over the identified states.

A fundamental requirement of our jurisprudential system is personal jurisdiction. "Before a federal court may adjudicate a controversy, it must possess jurisdiction over both the subject matter of the action and over the persons whose rights are to be affected by its determination." Federal Trade

Commission v. Compagnie De Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1318 (D.C. Cir. 1980) (citations omitted). Personal jurisdiction requires that a court may only adjudicate issues involving an individual when it has legal authority to do so. Id. at 1319. Due process requires that a court withhold the exercise of its adjudicative authority over a person until minimum contacts have been established in the forum and adequate notice along with an opportunity to be heard has been presented to the affected party. Id.

Plaintiffs allege that the regulation of spray irrigation fields by independent state agencies should be redressed by this Court. They have, however, failed to join the relevant state agencies as parties to this lawsuit or to raise the state claims in their complaint. The absence of personal jurisdiction over the state environmental agencies leaves this Court without the legal authority over a necessary party to render a complete decision. See, Sierra Club v. Leathers, 754 F.2d 952, 954 (11th Cir. 1985) (complete relief could not be granted without the joinder of South Carolina in federal action which sought to control outdoor advertisement within that state); Christmas v. Washington Metropolitan Area Transit Authority, 621 F.Supp. 355 (D.D.C. 1985) (the District of Columbia was an indispensable party and action was dismissed where court could not obtain jurisdiction). Therefore, the claims should be stricken from the record or dismissed.

B. States may regulate more strigently than EPA.

Even assuming that plaintiffs are able to amend their complaint, its questionable that this Court would be able to obtain personal jurisdiction over the relevant state agencies within this federal judicial district. RCRA allows states to impose standards within their own programs which are stricter than those imposed by EPA. See 42 U.S.C. § 6929. As a result, states may treat spray irrigation fields as land treatment units as long as such regulation does not conflict with the regulations adopted by EPA. Id. Any claims regarding additional requirements imposed by the states under their individual programs would have to be litigated within state administrative and judicial forums.

Clearly, plaintiffs are attempting to bootstrap the claims against independent state agencies to their attack on EPA to circumvent this jurisdictional defect. If successful, the strategy would allow them to hail fifty states and the numerous territories of the United States into this forum to challenge all administrative and enforcement decisions that are contrary to plaintiffs' view of the scope of the regulated waste K001. The Court should not tolerate this blatant attempt to avoid fundamental jurisdictional requirements and should strike the supplemental brief.

III. Plaintiffs' Supplemental Brief Fails To State A Claim Against EPA.

Plaintiffs state in the supplemental brief that the decisions made by each state agency with regard to the regulation

of spray irrigation fields "are based solely on the authority of U.S. EPA's illegal memoranda and its unsubstantiated 'theory'". Plaintiffs' Supplemental Brief at 2. The exhibits relied upon by plaintiff to bolster this assertion, however, are devoid of any reference whatsoever to the Skinner memoranda challenged by plaintiffs in this lawsuit. See Plaintiffs' Supplemental Brief, Attachments A-C.

The following actions were allegedly taken by the relevant state administrative agencies. The West Virginia Department of Natural Resources denied a hazardous waste permit to Koppers' Green Spring facility based upon its determination that the facility's spray irrigation field was a hazardous waste management unit located within a 100 year floodplain in violation of Section 12.1.7 of the West Virginia Hazardous Waste Management Regulations. Plaintiffs' Supplemental Brief, Attachment A. The Mississippi Department of Natural Resources issued an administrative order against Koppers for failing to submit an application for the spray irrigation field in its Grenada facility. Plaintiffs' Supplemental Brief, Attachement C. Illinois Environmental Protection Agency disapproved a closure plan for Koppers' spray irrigation field at its Carbondale facility due to the Agency's documentation of numerous deficiencies. Plaintiffs' Supplemental Brief, Attachment B. Illinois EPA's designation of Kopper's Carbondale spray irrigation field as a land treatment unit was presumably in reliance upon Kopper's admission of this fact in a consent decree

entered between Kopper's and EPA involving the same facility. See Defendants' Motion to Dismiss, Exhibit 3 at 4.

Plaintiffs would like the Court to infer that, because the state agencies reached the same conclusion as EPA regarding the scope of the K001 listing, they have necessarily relied upon the Skinner memoranda. The exhibits attached to their supplemental brief, however, do not reference the Skinner memoranda or set forth the basis for each state's determination that spray irrigation fields are land treatment units disposing of hazardous waste K001. Absent any showing by plaintiffs that the relevant state agencies have relied upon the Skinner memoranda, plaintiffs have failed establish the requisite nexus between the behavior of the state agencies and the issues of this case.[2]

Finally, any challenge to the propriety of these permitting decisions must be asserted in the appropriate state forum. The supplemental brief should, therefore, be stricken or, in the alternative, dismissed for failing to elucidate any claims against EPA.

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[2]To the extent that plaintiffs are using the state administrative and enforcement actions to establish harm and thus demonstrate that the Skinner memoranda are final agency action which are ripe for judicial review, they have failed. There has been no showing by plaintiffs that, absent the Skinner memoranda, the state administrative agencies would have interpreted their own regulations to exclude spray irrigation fields from compliance with each state's hazardous waste scheme. Consequently, the impact of the state regulatory actions on plaintiffs is irrelevant in accessing any hardship that may have resulted from the Skinner memoranda.

IV. Conclusion

For all the foregoing reasons, plaintiffs' supplement to its motion for summary judgment should be stricken from the record or dismissed for the lack of jurisdiction.

Respectfully submitted,

ROGER J. MARZULLA
Assistant Attorney General

Denise Ferguson-Southard

DENISE FERGUSON-SOUTHARD, Attorney
Land and Natural Resources Division
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 786-4778

ANNE M. RYAN
Office of General Counsel
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460
(202) 382-7703

OF COUNSEL:

CHRISTINA KANEEN
Assistant General Counsel
Office of General Counsel
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460
(202) 382-7706

CERTIFICATE OF SERVICE

I certify that copies of the foregoing **Defendants' Motion to Strike Plaintiffs' Supplement to Its Motion for Summary Judgment or, in the alternative, Motion to Dismiss and Supporting Memorandum of Law** have been mailed via first class mail, postage prepaid, this 31st day of October, 1988, to the following:

John F. Hall, Esq.
American Wood Preservers Institute
1945 Old Gallows Road
Vienna, Virginia 22180

Jill M. Blundon, Esq.
Billie S. Nolan, Esq.
Koppers Company, Inc.
1400 Koppers Building
Pittsburgh, PA 15219

David R. Berz
Stanley M. Spracker
Randy S. Chartash
WEIL, GOTSHAL & MANGES
1615 L Street, N.W.
Suite 700
Washington, D.C. 20036

Denise Ferguson-Southard

DENISE FERGUSON-SOUTHARD

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

OFFICE OF
GENERAL COUNSEL

November 15, 1988

Dave Bockelmann
Mississippi Dept. of Natural Resources
Bureau of Pollution Control
P.O. Box 10385
Jackson, Mississippi 39209

Dear Dave:

As we discussed, enclosed are copies of Koppers/AWPI's supplemental brief and EPA's response filed in the pending federal court action. Please contact me at (202) 382-7703 if there are any further developments in your proceedings against Koppers.

Thank you for your assistance on this matter.

Sincerely,

Anne M. Ryan
Attorney
Solid Waste Division
LE 132S

cc: D. Ferguson-Southard

Ferguson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Wood Preservers Institute, and Koppers Company, Inc., Plaintiffs, v. United States Environmental Protection Agency, and Lee M. Thomas, Administrator, Defendants.	Civil Action No. 88-0770 Lamberth, J.

SUPPLEMENT TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Koppers Company, Inc. ("Koppers") and the American Wood Preservers Institute ("AWPI"), submit the following to supplement and support their Motion for Summary Judgment filed with the Court on April 20, 1988. Since the filing of that motion, the United States Environmental Protection Agency ("U.S. EPA") and state environmental agencies have persisted in their efforts to regulate unlawfully spray irrigation fields at wood preserving companies. Koppers and AWPI member companies have been forced to defend additional enforcement proceedings and continue to face imposition of extensive design and performance requirements for hazardous waste management facilities for these fields, which do not manage hazardous waste. Relief from this Court is desperately needed to halt these agencies' illegal course of conduct.

90-7-1-442

All of these recent developments are based solely on the authority of U.S. EPA's illegal memoranda and its unsubstantiated "theory," which are the subject of this lawsuit. In short, U.S. EPA contends in its memoranda, which have not been subjected to public scrutiny, that the exclusive handling by spray irrigation fields of nonhazardous waste -- process wastewater -- triggers application of hazardous waste regulatory regime under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et seq. In 1980, however, EPA rejected regulating process wastewater as a RCRA hazardous waste. Until promulgation of a rule reversing this determination, EPA and state agencies have no authority to make these burdensome demands on wood preserving companies.

For example, in correspondence to Koppers dated September 19, 1988, the West Virginia Department of Natural Resources denied Koppers a hazardous waste permit to operate a spray irrigation field managing nonhazardous wastewater at its Green Spring, West Virginia facility.[1] See Attachment A. In its letter, the state contends that "the spray field is a hazardous waste management unit since the spraywater comes into contact

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1. While objecting to the state's assertion of jurisdiction over spray irrigation fields managing a nonhazardous waste, Koppers filed a permit application protectively to avoid provisions of RCRA requiring a facility without a permit application on file by November 8, 1985 to cease operation. Section 213(a)(2) of the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. 6925(e)(2).

with listed hazardous waste in the impoundments." Id. This statement repeats virtually verbatim the unsubstantiated "theory" developed by U.S. EPA on the regulatory status of spray fields and set forth in the memoranda at issue here. Further, the state's conclusion is directly at odds with U.S. EPA's determination in a 1980 rulemaking that process wastewater from wood preserving operations should not be regulated as a hazardous waste. Neither U.S. EPA nor the state has revoked or modified that prior rulemaking.

Similarly, in correspondence to Koppers dated September 8, 1988, the Illinois Environmental Protection Agency ("IEPA") disapproved of Koppers' closure plan for the spray irrigation field at its Carbondale, Illinois facility. See Attachment B. In so doing, however, IEPA however merely recites the unsupported assertion that the spray irrigation field -- which handles only nonhazardous wastewater -- is a hazardous waste management unit subject to full panoply of hazardous waste regulation. While IEPA relies on U.S. EPA's memoranda, the assertion is baseless.

Finally, this Bureau of Pollution Control of the Mississippi Department of Natural Resources issued an administrative order to Koppers on July 29, 1988 with respect to its Grenada, Mississippi facility and seeks to require Koppers to submit a hazardous waste permit application for the spray

irrigation field. See Attachment C. The order states that the spray irrigation field "treats . . . the listed hazardous waste K001 [bottom sediment sludge]" and is therefore subject to regulation as a hazardous waste management unit. Id. However, the spray irrigation field has never been used to treat, store or dispose of K001, or any other hazardous waste. Indeed, the only material discharged to the spray irrigation field was nonhazardous process wastewater. Koppers currently is contesting that order at great expense through an administrative hearing.

As is apparent from these recent developments, it is indisputable that the effect of U.S. EPA's illegal memoranda is binding and extremely prejudicial to Koppers and AWPI. Absent relief from this Court, Koppers and AWPI will continue to face the formidable enforcement authority of federal and state agencies or incur the enormous compliance costs associated with the hazardous waste regulatory program. In this case, however, U.S. EPA and the state agencies have no authority to behave so oppressively until promulgation of a rule under RCRA designating nonhazardous wastewater from wood preserving operations as a hazardous waste.

Plaintiffs filed their Motion for Summary Judgment on April 20, 1988. All briefing on the motion is complete.[2] The case is

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2. Defendants ignored this Court's Order of May 31, 1988, and (footnote continued)

ripe for final adjudication. Accordingly, plaintiffs respectfully urge the Court to grant their Motion for Summary Judgment and prohibit the U.S. EPA from continuing to rely on the illegal memoranda concerning spray irrigation fields at wood preserving operations.

Respectfully submitted,

Stanley M. Spracker, Bar #342303
Randy S. Chartash, Bar #360593
Weil, Gotshal & Manges
1615 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 682-7000

Counsel for Plaintiffs,
American Wood Preservers
Institute and Koppers
Company, Inc.

Of Counsel:
John F. Hall, Esq.
American Wood Preservers
Institute
1945 Old Gallows Road
Vienna, Virginia 22180

Jill M. Blundon, Esq.
Billie S. Nolan, Esq.
Koppers Company, Inc.
1400 Koppers Building
Pittsburgh, Pa. 15219

Dated: October 18, 1988

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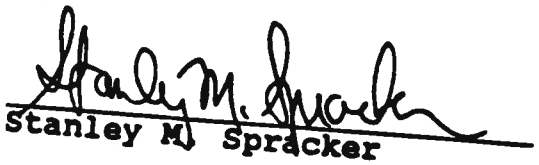
the Local Rules of this District by failing to respond to Plaintiff's Motion for Summary Judgment. Accordingly, the plaintiffs' motion is deemed conceded. Federal Local Court Rules of District of Columbia, Rule 108(b). Nonetheless, Koppers and AWPI contend that defendants have addressed all issues necessary to resolve plaintiffs' Motion for Summary Judgment in their Motion to Dismiss.

CERTIFICATE OF SERVICE

I hereby certify that, on the 18th of October 1988, a copy of the foregoing Supplement to Plaintiffs' Motion for Summary Judgment was mailed, first-class postage pre-paid to the following:

Denise Ferguson-Southard, Attorney
Eileen T. McDonough, Attorney
Land and Natural Resources Division
Environmental Defense Section
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986



Stanley M. Spracker

ATTACHMENT A

SEP 2 [illegible] 1988

STATE OF WEST VIRGINIA
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WASTE MANAGEMENT
1260 Greenbrier Street
Charleston, West Virginia 25311
(304) 348-5935

ARCH A. MOORE, JR.
Governor

RONALD R. POTESTA
Director

ROBERT K. PARSONS
Deputy Director

September 19, 1988

RECEIVED
SEP 27 1988
ENVIRONMENTAL
RESOURCES

Mr. J. J. Lawson
Koppers Company, Inc.
P.O. Box 89
Green Spring, West Virginia 26722

Re: Facility Name: Koppers Company, Inc.
EPA Identification Number: WVD003080959
Denial of Hazardous Waste Permit

Dear Mr. Lawson:

The West Virginia Department of Natural Resources, Division of Waste Managment (DWM) has made a final determination to deny a permit for storage and treatment of hazardous waste in the two existing surface impoundments, and treatment of hazardous waste in the existing land treatment unit (sprayfield).

As stated in our May 23, 1988 letter, the denial has been based on two main deficiencies. First, the two surface impoundments and the land treatment unit (sprayfield) are located within the 100-year flood plain and therefore do not meet the requirements of Section 12.1.7 of the West Virginia Hazardous Waste Management Regulations (HWMR). These units are not designed, constructed, operated and maintained to prevent washout of hazardous waste by a 100-year flood and you have not demonstrated to the Chief of DWM that procedures are in effect which will allow the safe removal of waste before floodwaters would reach these units. Second, the two surface impoundments are not installed with liners and thus do not meet the requirements of Section 3005 (j) of the Resource Conservation and Recovery Act (RCRA) as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA).

We have reviewed Mr. Kerschner's July 13, 1988 comments and disagree with comment two (2). DWM maintains that the sprayfield is a hazardous waste management unit since the spraywater comes in contact with listed hazardous waste in the impoundments. In order for it not to be a hazardous waste disposal facility, the decant water would need to be delisted.

The DWM is in agreement with comments number one (1), three (3) and four (4) and acknowledges that these units may be in use until November 8, 1988. However, it must be understood that this termination will be effective November 8, 1988 and at that time no further waste may be accepted at these units.

If you have any questions regarding this decision, please feel free to contact Kimberly Pauley of this office at (304) 348-5935.

Sincerely,

B. Douglas Steele, Ph.D.
Chief

BDS/KP:h

ATTACHMENT B

Illinois Environmental Protection Agency · P. O. Box 19276. Springfield. IL 62794-9276

217/782-6762

Date Received: June 13, 1988
Log #C-422

Refer to: 0778010002 -- Jackson County
Koppers
ILD000819946
RCRA-Closure

September 8, 1988

RECEIVED
SEP 12 1988
ENVIRONMENTAL RESOURCES

Koppers Company, Inc.
Attn: Mr. C. J. Mitchell, Plant Manager
P.O. Box 270
North Marion Street
Carbondale, Illinois 62901

Dear Mr. Mitchell:

The closure plan for the spray irrigation field (a land treatment unit (D81)) at the above-referenced facility which was submitted by Mr. David R. Kerschner of Keystone Environmental Resources, Inc. has been reviewed.

Due to the following deficiencies, the plan has been disapproved.

1. It is the Agency's position that the spray irrigation area at the Koppers facility in Carbondale, Illinois is a hazardous waste land treatment unit currently subject to the requirements of 35 IAC 725.

2. According to 35 IAC 725.110, land treatment units are disposal facilities if waste is to remain in place after closure. Therefore, in accordance with 35 IAC 725.210(b)(1), the requirements of 35 IAC 725.216-725.220 (which concern post-closure care) apply to the sprayfield, if waste is to remain in place. Guidance for the preparation of an interim status post-closure plan can be found in the enclosed document (Instructions for the Preparation of Closure Plans for Interim Status RCRA Hazardous Waste Facilities) and in guidance documents published by USEPA. A useful guidance document developed by USEPA is entitled Guidance on Hazardous Waste Land Treatment Closure/Post-Closure, 40 CFR 265.

   a. The time at which a post-closure plan for a unit must be submitted to the Agency (180 days prior to the date that closure is expected to begin) is the same as the time at which a closure plan is to be submitted. (See 35 IAC 725.218(e) and 725.212(d)(1)). Therefore, an interim status post-closure plan must accompany any interim status closure plan submitted for a land disposal facility.

b. 35 IAC 725.217(a)(1) requires post-closure care at hazardous waste disposal units for thirty (30) years after completion of closure. The post-closure care period may be shortened (during the interim status period) if done so in accordance with 35 IAC 725.217(a)(2) or 35 IAC 725.218(g).

3. The closure plan, as submitted, did not address the requirements of 35 IAC 725.380(a). Specifically, the plan must address the following objectives and indicate how they will be achieved.

   a. Control of the migration of hazardous waste and hazardous waste constituents from the treated area into the groundwater;

   b. Control of the release of contaminated runoff from the facility into surface water;

   c. Control of the release of airborne particulate contaminants caused by wind erosion;

   d. Compliance with 35 IAC 725.326 concerning the growth of food chain crops.

   The factors and methods which must be considered in addressing these objectives are specified in 35 IAC 725.380(b) and (c). The closure plan submitted is deficient in that it did not address these objectives, nor did it take into consideration the referenced factors and methods. In addition, 35 IAC 725.380(a) requires that a post-closure plan be developed in conjunction with this closure plan which addresses these same objectives.

4. Procedures to meet the requirements of 35 IAC 725.380(d) were not described.

5. According to 35 IAC 703.121(c), land treatment units that received wastes after July 26, 1982 or that certified closure after January 26, 1983 must obtain post-closure permits unless a closure by removal demonstration can be made as provided for under 35 IAC 703.159 and 703.160 (see Illinois Pollution Control Board Docket No. R87-39 for these adopted regulations). Thus, unless a closure by removal demonstration can be made for this land treatment unit, a post-closure permit will be required for this unit. The permit must address applicable 35 IAC 724 requirements regarding (1) groundwater monitoring, (2) unsaturated zone monitoring, (3) corrective action and (4) post-closure care.

6. The groundwater monitoring program to be carried out during the closure period was not described. A review of the current interim status groundwater monitoring program for the sprayfield indicates that the

following deficiencies exist in the program (as it relates to the closure requirements of 35 IAC 725):

a. The unit is currently in assessment, which indicates that the unit may be affecting the local groundwater quality. Thus, it may be difficult for Koppers to (1) demonstrate "clean closure", (2) justify a shortening of the post-closure period (as described in Item 2.b above), or (3) demonstrate closure by removal (as described in Item 5 above).

b. The system is inadequate to meet the groundwater assessment requirements of 35 IAC 725.193. Specifically, additional monitoring wells are necessary to accurately determine the rate of extent of contaminant migration.

c. An acceptable assessment program has yet to be submitted to the Agency.

d. The current wells are constructed of PVC. Given the nature of PVC in a creosote environment, these wells would not be able to maintain their structural integrity during the entire post-closure period.

e. All the current monitoring wells associated with the sprayfield are screened in the shallow silty clay beneath this unit. However, the results of assessment studies and the on-going remedial investigation at other parts of the facility indicate that contamination at this site is not limited to this shallow unit. Specifically, contamination has been found in zones lower than the one monitored at the sprayfield. In addition, two of the lower zones (the zones monitored by the B and D series of wells) are much more permeable than this shallow unit, and thus they provide an excellent pathway for horizontal contaminant migration. Therefore, additional wells must be installed to monitor the groundwater in deeper zones beneath the sprayfield.

f. All wells associated with the sprayfield monitoring program should be analyzed for the constituents listed in 35 IAC 724, Appendix I (as adopted by the Illinois Pollution Control Board on June 16, 1988 (Docket No. R87-39)).

7. DESCRIPTION OF THE FACILITY - The plan should describe the type of industry, Standard Industrial Code (SIC Code), products, location, size and other general, summarized information regarding the entire Koppers facility in Carbondale, Illinois. The plan must address and identify each hazardous waste management unit at the facility. According to Agency files four (4) surface impoundments, two (2) waste piles, one (1) land treatment area and one (1) container storage area are used for the

management of hazardous waste at this facility. Please note that a closure plan for the surface impoundments need not accompany any resubmittal, as the Agency has received and reviewed a closure plan for this unit under a separate action.

8. DESCRIPTION OF THE WASTE MANAGEMENT UNITS - Describe each hazardous waste management unit at the facility (identified in Item 7 above) and provide the process code and unit of measure code from the Part A (i.e., S01-1000 gal.). Include waste types for each unit (by standard chemical name and EPA Hazardous Waste No.), time period of use, dimensions, topography, soil types (as appropriate), and any other relevant matters. Identify these units by reference to line numbers on the Part A application. Plans for closure must address all units on the Part A application. If some of the unit(s) will not be closed until some date in the future, identify those units and their expected date of closure. A copy of the following documents should be included in the closure plan:

   - the original Part A application (EPA Forms 3510-1 and 3510-3);
   - any revised Part A with proof of approval by USEPA or IEPA.

9. MAP OF FACILITY - The location of the Koppers facility on a topographic or county map should be provided, plus a more detailed scaled map or diagram of the entire Koppers facility, with each hazardous waste management unit mentioned in Item 7 clearly located and identified. Map scale must be specified. The location of the facility must be provided with respect to township, range and section.

10. DETAILED DRAWING OF THE UNIT(S) - Submit a plan view of each of the units mentioned in Item 7, showing dimensions, appurtenant structures and relationship to other points or structures on the facility property, at a minimum. The scale of the drawing must be specified. (The map should be of scale one inch equal to no more than fifty feet.)

    a. The following deficiencies are noted regarding the detailed drawing of the sprayfield which was provided in the closure plan:

        1. The system used to transport wastewater from the impoundments to the spray field must be identified and described in drawings of the sprayfield. The distribution system present in the sprayfield must also be identified in these drawings.

        2. The boundaries of the spray irrigation field were not designated in Figure 1.

11. LIST OF HAZARDOUS WASTE - Provide a complete, detailed list of hazardous wastes (chemical name and EPA hazardous waste number) treated, stored or disposed of at each unit mentioned in Item 7. Trade names or common names should not be used when generic chemical names are available. Provide the maximum inventory of wastes treated, stored or disposed of at each unit.

12. SCHEDULE FOR CLOSURE - The owner/operator must complete all closure activities in accordance with the approved closure plan and within 180 days after receiving the final volume of wastes or 180 days after approval of the closure plan, if that is later. The proposed plan does not meet this requirement (see 35 IAC 725.213(b)).

    Closures requiring time periods longer than the above, including extensions after the closure plan approval, must be reviewed and approved by the IEPA. Such extensions can only be granted if it is demonstrated that the concerns set forth in 35 IAC 725.213(b)(1) and (2) are met.

13. SAMPLING PLAN AND ANALYTICAL METHODS - As specified in 35 IAC 725.380(c)(1), removal of contaminated soil is one method that can be used to meet the closure/post-closure objectives of 35 IAC 725.380(a). Although the closure plan does not specify soil removal, it appears as though Koppers feels that through biodegradation, no contaminated soil will remain at the sprayfield. To properly demonstrate that no contaminated soil remains in the area, a soil sampling and analysis must be developed. Section V.E of the plan describes the proposed procedures for making such a demonstration. However, a number of deficiencies exist in this proposal:

    a. All samples which are to be taken must be handled in accordance with 40 CFR, Part 261, Appendix III or the soil volatile sampling procedures which are included in the Agency's closure plan instructions (enclosed) as Attachment 7.

    b. Parameters to be analyzed. While the hazardous constituents associated with K001 wastes were proposed, several other constituents have also been detected in the groundwater at this facility, and there are also several more hazardous waste constituents in wastewaters from the wood preserving industry. Soil samples collected during closure must also be analyzed for these constituents.

    c. Location of samples (horizontal location and depth). Four samples for a three-acre area is insufficient. A grid system as described in the Agency's closure plan instructions should be established for sampling purposes.

d. Sampling methods and equipment. The length of sample extracted from the sampling tube which is sent to the laboratory for analysis must be minimized to allow for an accurate evaluation of any vertical contaminant migration. The actual thickness of sample analyzed must be based on the minimum amount of soil necessary to allow for the required chemical analysis of the sample.

e. Analytical methods. Test methods described in the latest edition of SW-846 must be followed.

f. Evidence must be provided that the laboratory conducting the analyses has a quality assurance/quality control plan which meets the requirements of SW-846.

g. A clear statement of the proposed "clean" level for soil. Page 2 of the closure plan states "Results [from the analysis of soil samples] will be evaluated to determine if K001 constituents are present at or above levels of human health or environmental concern." The procedures to be used in making this evaluation and the actual levels which will be used must be provided for review and comment.

14. DESCRIPTION OF EQUIPMENT CLEANING - Any equipment, including heavy earth-movers or smaller tools, should be scraped and washed to remove waste residues. The residues should be managed as hazardous waste, and this cleaning and management should be described in the closure plan.

    a. In addition to flushing the distribution lines and spray heads, the outside of the distribution system must be properly decontaminated. The rate at which flushing will take place must be described.

15. Attachment 6 of the enclosed closure plan guidance document must be used in certifying closure of the spray field. In addition, a closure documentation report as described in Pages 12 and 13 of this guidance document must accompany the certification of closure.

16. Provisions must be made to meet the requirements of 35 IAC 725.216 and 725.219.

17. The following deficiencies are noted in regards to the cost estimates provided on Page 4:

    a. Cost estimates must be provided for a thirty year (minimum) post-closure period;

    b. Unit costs associated with decontamination of the distribution system must be provided;

    c. Justification for all values used in computing the cost estimates must be provided (unit costs and amount of material/labor required). Please keep in mind that these estimates must be based on third-party costs;

d. Data evaluation and certification by an engineer would seem to require more than sixteen (16) hours for each activity.

Please note that the modified cost estimates should also take into account any modifications made to the closure plan.

18. As indicated in Items 7-11 above, closure plans for all the RCRA regulated units at this facility (identified in Item 7 above) must accompany the closure plan submitted for the spray irrigation field (see 35 IAC 725.212(b)(1)). Cost estimates for the activities associated with closure of these units must also be provided to ensure adequate financial assurance for closure of the facility has been provided by the owner/operator. Please note that this information is not needed for the surface impoundments, as a closure plan for these units was received under separate cover.

Pursuant to 35 IAC 725.212(d)(4), you must submit a complete, revised closure plan (one original and 3 copies) within thirty (30) days which adequately responds to the above noted comments. Failure to submit a revised plan within thirty (30) days of the date of your receipt of this letter will be considered non-compliance with the interim standards of 35 IAC, Part 725, Subpart G -- Closure and Post-closure and Subpart H -- Financial Requirements. For your convenience, the Agency is enclosing a document entitled Instructions for the Preparation of Closure Plans for Interim Status RCRA Hazardous Waste Facility which will provide the necessary guidance for developing a closure plan for the spray irrigation area.

Should you have any questions concerning this matter, please contact Jim Moore at 217/782-9875.

Very truly yours,

Lawrence W Eastep by JKM

Lawrence W. Eastep, P.E., Manager
Permit Section
Division of Land Pollution Control

LWE:JKM:rd2286j/84-90

Enclosure

cc: Marion Region
Division File
Andy Vollmer
David Kerschner
USEPA Region V -- Mary Murphy
Jim Moore
Compliance Section -- Cindy Davis
USEPA Region V -- Chuck Wilk
Enforcement

BEFORE THE MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES BUREAU OF POLLUTION CONTROL

IN THE MATTER OF	:	
MISSISSIPPI DEPARTMENT OF NATURAL RESOURCES,	:	
Complainant,	:	
v.	:	ORDER NO. 1440 88
KOPPERS COMPANY, INC., MS0007027543	:	
Respondent.	:	

SWORN PETITION REQUESTING A HEARING

Dean A. Calland, Esquire
Donald C. Bluedorn II, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel for Respondent,
Koppers Company, Inc.

BEFORE THE MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES BUREAU OF POLLUTION CONTROL

IN THE MATTER OF	:	
MISSISSIPPI DEPARTMENT OF NATURAL RESOURCES,	:	
Complainant,	:	
	:	
v.	:	ORDER NO. 1440 88
KOPPERS COMPANY, INC., MS0007027543	:	
Respondent.	:	

SWORN PETITION REQUESTING A HEARING

Koppers Company, Inc. ("Koppers"), by and through its undersigned attorneys Babst, Calland, Clements & Zomnir, P.C., hereby files this Sworn Petition Requesting A Hearing pursuant to Section 49-17-41 of the Mississippi Code Annotated (1972), and in support thereof states as follows:

1. Koppers owns and operates a wood preserving plant located in Grenada County, Mississippi. The wood preserving process involves the impregnation of wood with chemicals designed to protect it from the damaging effects of the elements and from attack by insects and microorganisms.

2. One of the wastestreams generated by wood preserving plants is "process wastewater" containing dissolved and suspended materials and constituents of creosote and/or pentachlorophenol in low concentrations. In most such plants, the final step of the wood treating process is the separation and recovery of wood treating solution from the process wastewater. The process wastewater is introduced into oil/water separators for initial screening, then through wastewater basins for final settling. As the process wastewater flows through the wastewater basin, suspended solids and bacteria settle on the bottom of the basin to form a layer of "bottom sediment sludge."

3. This bottom sediment sludge has been designated as the industry-specific hazardous waste K001 by the United States Environmental Protection Agency ("U.S. EPA") pursuant to the federal Resource Conservation and Recovery Act ("RCRA"). 40 C.F.R. § 261.32. The U.S. EPA considered listing the process wastewater as a hazardous waste, but decided not to do so because there is insufficient data to justify the listing. 45 Fed. Reg. 33084 (1980); 45 Fed. Reg. 74884, 74888 (1980). Thus, the bottom sediment sludge would be subject to the provisions of Sections 17-17-1 et seq. of the Mississippi Code Annotated (1972), but the process wastewater would not.

4. In the past, Koppers operated a process wastewater treatment system such as the one described above. After the process wastewater had passed through the oil/water separator and the wastewater basin, the treated nonhazardous water was then discharged onto a spray irrigation field for final disposition. No K001 or other RCRA hazardous waste was ever discharged onto the spray irrigation field. Indeed, it was a design impossibility for the K001 to ever reach the discharge point to the spray irrigation field.

5. On July 18, 1988, Koppers ceased operation of the wastewater basin and spray irrigation field. By July 29, 1988, all K001 had been removed from the wastewater basin and has been disposed of in accordance with all applicable laws, rules, and regulations. A closure plan has been submitted for the wastewater basin and the unit will be closed in accordance with the approved plan.

6. By cover letter dated July 29, 1988 and addressed to Keystone Environmental Resources, Inc., a subsidiary of Koppers, the Mississippi Department of Natural Resources Bureau of Pollution Control ("Bureau") issued to Koppers Administrative Order No. 1440 88 ("Order"), a true and correct copy of which is attached hereto as "Exhibit A." The Order and cover letter were received by Keystone Environmental Resources, Inc. on August 3, 1988.

7. The Order states that the spray irrigation field "treats . . . the listed hazardous waste K001" and is therefore subject to regulation as a hazardous waste management unit. The Order further requires Koppers to submit an updated Part A permit application for the spray irrigation field by August 7, 1988; to cease operation of the wastewater basin (surface impoundment) and spray irrigation field on or before August 8, 1988, unless a national variance to the "Land Ban Restrictions" is issued for K001; and, to submit a "Part B permit application for a post-closure permit" for the spray irrigation field on or before November 8, 1988.

8. At the time the Order was issued to Koppers, the spray irrigation field and wastewater basin had been completely removed from service. Moreover, the spray irrigation field had never been used to treat, store, or dispose of K001, or any other RCRA hazardous waste, and therefore was not a "hazardous waste management unit." Accordingly, the Order is improper and unlawful in several respects, including but not limited to the following:

a. Requirements 1 and 3 of the Order are improper and unlawful because the spray irrigation field does not require, and never has required, a RCRA hazardous waste permit;

b. Requirement 2 of the Order is improper and unlawful because the "Land Ban Restrictions" are not applicable to either the spray irrigation field or the wastewater basin. RCRA §§ 3004(d) & (k), 42 U.S.C.A. §§ 6924(d) & (k)(West Supp. 1988).

9. Requirement 2 of the Order is improper and unlawful because the "Land Ban Restrictions" have been stayed by the United States Court of Appeals for the District of Columbia Circuit. A true and correct copy of the Petition for Review challenging the restrictions and the court order staying the restrictions are attached hereto as "Exhibit B."

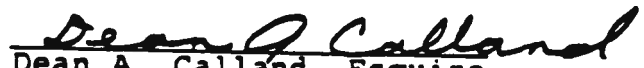
10. The "Land Ban Restrictions" upon which the Order is based were not yet promulgated at the time the Order was issued and, to date, have not been published in the Federal Register. For this reason among others, issuance of the Order deprives Koppers of its constitutional right to due process and affects an unconstitutional taking of private property.

11. The Bureau does not have the authority to issue orders requiring compliance with the "Land Ban Restrictions."

12. Operation of the spray irrigation field and wastewater basin never posed a danger to the environment or to human health, safety, or welfare. Neither the K001 bottom sediment sludge nor any other RCRA hazardous waste was ever discharged to the field. The only material discharged to the spray irrigation field was the treated nonhazardous process wastewater. The spray irrigation field and wastewater basin were operated for years with the Bureau's knowledge and tacit approval. Indeed, the Bureau acknowledged that "neither the surface impoundment nor the spray field appear to be the source of groundwater contamination at the Koppers Grenada Plant." Letter from J. Hardage to C. Markle, February 10, 1987.

WHEREFORE, Koppers respectfully requests that the Commission hold a hearing on the Order and issue a final order of determination consistent with the above discussion.

Respectfully submitted,



Dean A. Calland, Esquire
Donald C. Bluedorn II, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel for Respondent,
Koppers Company, Inc.

Dated: August 16, 1988

BEFORE THE MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES BUREAU OF POLLUTION CONTROL

IN THE MATTER OF	:	
MISSISSIPPI DEPARTMENT OF NATURAL RESOURCES,	:	
Complainant,	:	
v.	:	ORDER NO. 1440 88
KOPPERS COMPANY, INC., MS0007027543	:	
Respondent.	:	

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :

COUNTY OF ALLEGHENY :

Before me, the undersigned authority, personally appeared DEAN A. CALLAND, Esquire, who, after being duly sworn by me according to law, deposed and said as follows:

1. I am a shareholder in the professional legal corporation of Babst, Calland, Clements & Zomnir, A Professional Corporation, and represent Koppers Company, Inc. in the above-captioned matter.

2. The facts contained in the foregoing Sworn Petition Requesting A Hearing are true and correct to the best of my knowledge, information, and belief and are based upon reliable sources.

3. I am providing this Verification on behalf of Koppers Company, Inc. because the individuals with personal knowledge of the facts are outside the jurisdiction or are otherwise unavailable within the time allowed for filing the Petition.

Dean A. Calland
DEAN A. CALLAND

Sworn to and subscribed
before me this 16th day
of August, 1988.

Christine A Orlini
Notary Public

My Commission Expires: 3-6-89

EXHIBIT "A"

MISSISSIPPI DEPARTMENT OF NATURAL RESOURCES
Bureau of Pollution Control
P. O. Box 10385
Jackson, Mississippi 39209
(601) 961-5171

July 29, 1988

CERTIFIED MAIL NO. P 125 261 162

Mr. Robert J. Anderson
Keystone Environmental
Resources, Inc.
436 Seventh Ave., Suite 1940
Pittsburgh, Pennsylvania 15219

Dear Mr. Anderson:

Enclosed is Administrative Order No. 1440-88, which has been issued by the Mississippi Department of Natural Resources as a result of certain environmental problems regarding Koppers Company, Inc., Tie Plant, Mississippi. Your cooperation in carrying out the provisions of this order is encouraged.

As you know, appeals can be taken in accordance with State law.

If you have any questions in this matter, please contact Mr. Dave Bockelmann at telephone #601/961-5171.

Sincerely,

Charles H. Chisolm
Bureau Director

CHC:mh

Enclosure

BEFORE THE MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES
BUREAU OF POLLUTION CONTROL

IN THE MATTER OF:

MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES

COMPLAINANT

VS. ORDER NO. 1440 88

KOPPERS COMPANY, INC.
MS0007027543

RESPONDENT

ADMINISTRATIVE ORDER

Under the authority of Section 49-2-13, Mississippi Code of 1972, the above styled cause came on this date for consideration and the Executive Director, having heard and considered the same, finds as follows:

1.

The Respondent, Koppers Company, Inc., located in Tie Plant, Grenada County, Mississippi, owns and operates a wood preserving plant which generates and subsequently manages hazardous waste, and, as such, is subject to the provisions of laws of this State governing the treatment, storage, and disposal of hazardous waste, the same appearing as Section 17-17-1, et. seq., and the rules and regulations of the Mississippi Commission on Natural Resources.

2.

Respondent operates a spray irrigation field at its Tie Plant facility which contains and treats, by biodegradation, the listed hazardous waste K001, and, as such, the spray irrigation field is a hazardous waste management unit subject to regulation under those applicable parts of the Mississippi Hazardous Waste Management Regulations (MHWMR).

Part 270 of the Mississippi Hazardous Waste Management Regulations requires that all hazardous waste management units be included in Part A of the facility's permit application.

4.

Respondent has not included the spray irrigation field in Part A of its permit application.

5.

Land Ban Restrictions (40 CFR Part 268; MHWMR Part 268) for the first third scheduled wastes, which include the listed hazardous waste K001, have been proposed and are scheduled to become effective on August 8, 1988. If the Land Ban Restrictions are promulgated as proposed and if a national capacity variance is not granted for K001 wastes, then the land disposal of K001 wastes will be prohibited after August 8, 1988 without pretreatment by incineration or equivalent technology to specific standards.

6.

Premises considered, the Executive Director finds that Respondent is in apparent violation of Part 270 of the Mississippi Hazardous Waste Management Regulations and must submit an updated Part A application which includes the spray irrigation field and a complete Part B post-closure permit application for the spray irrigation field.

IT IS, THEREFORE, ORDERED that the Respondent, shall comply with the following schedule:

1. On or before August 7, 1988, Respondent must submit an updated Part A application which includes the spray irrigation field.

2. If proposed Land Ban Restrictions for the first third scheduled wastes are promulgated as regulations and a national capacity variance is not granted for the listed hazardous waste K001, then Respondent must cease operation of Respondent's surface impoundment and spray irrigation field on or before August 8, 1988. If a national capacity variance is granted for the listed hazardous waste K001 then Respondent must cease operation of the spray

irrigation field and surface impoundment on or before November 8, 1988.

3. On or before November 8, 1988, Respondent must submit a complete Part B application for a post-closure permit for the spray irrigation field.

IT IS FURTHER ORDERED AND ADJUDGED that Respondent, if aggrieved by this Order, shall file a sworn petition with this Commission in a timely manner as provided by Section 49-17-41, Mississippi Code Annotated (1972), in which Respondent shall set forth the grounds and reasons for said complaint and shall ask for a hearing thereon.

SO ORDERED, this the 26th day of July, 1988, by the Executive Director of the Mississippi Department of Natural Resources.

MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES

BY: J. I. Palmer, Jr.
J. I. PALMER, JR.
EXECUTIVE DIRECTOR

EXHIBIT "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHEMICAL WASTE MANAGEMENT, INC., Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No.

PETITION FOR REVIEW

Chemical Waste Management, Inc. hereby petitions this Court, pursuant to section 7006 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6976, and Rule 15 of the Federal Rules of Appellate Procedure, for review of the final rule promulgated by the United States Environmental Protection Agency ("EPA") entitled "Land Disposal Restrictions for First Third Scheduled Wastes." These regulations were signed by the EPA Administrator on August 8, 1988.

Respectfully submitted,

J. Brian Molloy

J. Brian Molloy
Mary F. Edgar
James P. Rathvon
Douglas H. Green
PIPER & MARBURY
1200 19th Street, N.W.
Suite 800
Washington, D.C. 20036
(202)861-3900

Attorneys for Petitioner

Of Counsel:

Joan S. Bernstein
Roger C. Zehntner
Philip L. Comella
CHEMICAL WASTE MANAGEMENT, INC.
3003 Butterfield Road
Oak Brook, Illinois 60521
(312)218-1500

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1581 September Term, 1987

Chemical Waste Management, Inc.,

Petitioner

v.

United States Environmental Protection Agency,

Respondent

BEFORE: Buckley and Santelle, Circuit Judges

ORDER

Upon consideration of petitioner's motion for stay pending review, it is

ORDERED on the court's own motion that respondent's order under review in this action be stayed pending further order of the court. This stay will give the court sufficient opportunity to consider petitioner's motion for stay pending appeal. See D.C. Circuit Handbook of Practice and Internal Procedures 39 (1987). It is

FURTHER ORDERED that respondent file a response to the motion for stay by 4:00 p.m., Friday, August 12, 1988, and petitioner file its reply, if any, by 4:00 p.m., Monday, August 15, 1988. The parties are directed to hand deliver and hand serve their pleadings.

Per Curiam

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Sworn Petition Requesting A Hearing was served by first class U.S. Mail, postage prepaid, this 16th day of August, 1988, upon J. I. Palmer, Jr., Executive Director, Mississippi Department of Natural Resources, Bureau of Pollution Control, P.O. Box 10385, Jackson, Mississippi 39209.

BABST, CALLAND, CLEMENTS & ZOMNIR, P.C.

By: Dean J. Calland

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

IN RE	)	
	)	RCRA-84-16-R
BROWN WOOD PRESERVING CO., INC.	)	
	)	
Respondent	)	

CERTIFICATION OF SERVICE

In accordance with § 22.27(a) of the Consolidated Rules of Practice (40 C.F.R. Part 22), I hereby certify that the original of the Initial Decision by Hon. Thomas B. Yost was served on the Hearing Clerk (A-110), U.S. Environmental Protection Agency, 401 "M" Street, S.W., Washington, D.C. 20460, along with the official Agency record and file of this proceeding (service by certified mail return receipt requested); and that true and correct copies of the foregoing Initial Decision were served on the parties as follows: Andrea E. Zelman, Esquire, U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, Atlanta, Georgia 30365 (service by hand-delivery); Thomas H. Brown, Sirote, Permutt, Friend, Friedman, Held & Apolinsky, P.C., Post Office Box 55727, Birmingham, Alabama 35255; David R. Berg, Esquire, Stanley M. Spracker, Esquire, Carmen M. Shepard, Esquire, Weil, Gotshal & Manges, 1101 Fourteenth Street, N.W., Washington, D.C. 20005; and Walter G. Talarek, Esquire, American Wood Preservers Institute, Tysons International Building, Suite 405, 1945 Old Gallows Road, Vienna, Virginia 22180 (service by certified mail return receipt requested).

Dated in Atlanta, Georgia this 30th day of May 1986.

Sandra A. Beck
Regional Hearing Clerk

July 9, 1986

Robert James
404-347-2864

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN RE	
BROWN WOOD PRESERVING COMPANY, INC.	RCRA 84-16-R
Respondent.	BRIEF OF APPELLANT

I. INTRODUCTION

This is an appeal from an Initial Decision of the Administrative Law Judge ("ALJ") dated May 30, 1986 in the above-referenced matter. In the decision, the ALJ dismissed the Complaint and Compliance Order issued to Respondent, Brown Wood Preserving Co., Inc. ("Brown Wood") by Appellant, U.S. Environmental Protection Agency, Region IV ("EPA"), pursuant to Section 3008 of the Resource Conservation and Recovery Act ("RCRA"), as amended, 42 U.S.C. §6928. As will be set forth in more detail herein, Appellant asserts that the ALJ incorrectly interpreted regulatory language so as to improperly determine the regulatory status of the Brown Wood facility.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether the ALJ improperly interpreted the regulatory definition of a "tank".

B. Whether the ALJ improperly interpreted language contained in the regulatory definition of "sludge".

III. STATEMENT OF THE NATURE OF THE CASE AND FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

A. Relevant Facts

The Respondent Brown Wood Preserving Company, Inc. ("Brown Wood") owns and operates a wood treatment plant in Brownville, Alabama, utilizing creosote in its treatment process. In the 1970's, in an attempt to comply with the Clean Water Act, Brown Wood developed a system for the treatment of the process water used in its wood preserving process. That system includes settling and flocculation tanks, followed by sandbed filtration, a holding pond, and finally a spray irrigation field. It is the regulatory status of the last three units - the filter, pond and field-which are at issue in this proceeding.

On August 11, 1980, Brown Wood submitted to EPA a Notification of Hazardous Waste Activity as required by Section 3010 of RCRA, 42 U.S.C. §6930. In its notification, Brown Wood stated that it did or would generate hazardous waste listed at 40 C.F.R. §261.32 as "K001-bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol." (EPA Ex. 1-A) On November 18, 1980, Brown Wood submitted to EPA, and amended on January 29, 1981, a Part A permit application as required by Section 3005 of RCRA, 42 U.S.C. §6925. In its permit application Brown Wood stated that it did or would treat, store, or dispose of hazardous wastes. Specifically, Brown Wood stated that it did or would dispose of its K001 sludge by land application. (EPA Ex. 1, Ex. 10) On June 11, 1981, the Vice-President of Brown Wood re[illegible]mined the definitions for treating, storing, or disposing of hazardous waste and informed EPA that the

company wished to add that activity to its original Notification. (EPA Ex. 2, Tr. 352)

Pursuant to Section 3006(c) of RCRA, 42 U.S.C. §6926(c), the State of Alabama was granted Phase I Interim Authorization on February 21, 1981, and became authorized to enforce its Hazardous Management Regulations of 1978, as amended. Thus, the State regulations referred to above were applicable to Respondent in lieu of the comparable federal requirements. However, on August 1, 1984, Alabama was denied Final Authorization for its hazardous management program, and Phase I of its interim authorization reverted to EPA. Therefore, after that date Brown Wood became subject to dual regulation by EPA and the State of Alabama Department of Environmental Management ("ADEM").

B. Nature of the Case

Appellant refers the Administrator to the discussion on pages 2-3 of the Initial Decision for a statement as to the nature of the case. In short, Appellant, in its original and Amended Complaint and Compliance Order, charged Brown Wood with violations of RCRA interim status standards for owners and operators of hazardous waste treatment, storage, and disposal ("TSD") facilities, including the failure to have a groundwater monitoring program, closure plans, and the failure to demonstrate compliance with the appropriate financial responsibility requirements.

Brown Wood, in its Answer and at the hearing held on this matter, argued that it did not treat, store, or dispose of hazardous waste, and was therefore not subject to the interim status standards

applicable to TSD facilities. Specifically, Brown Wood argued that the treatment of process water in its holding pond and on its spray irrigation field did not generate K001 sludge. Further, Brown Wood argued that a sandbed filter with four wooden sides and a clay bottom met the regulatory definition of a "tank," and that Brown Wood therefore was not in violation of the RCRA regulations when it operated such a unit without groundwater monitoring, and when it closed the unit without a closure or post-closure plan. The ALJ, in his Initial Decision, agreed with those assertions and, therefore, dismissed the EPA Complaint.

IV. ARGUMENTS

A. THE ALJ INCORRECTLY INTERPRETED THE REGULATORY DEFINITION OF A TANK BY CONCLUDING THAT BROWN WOOD'S SANDBED FILTER MET THAT DEFINITION.

At pages 16-18 of his Initial Decision, the ALJ discussed a wooden sandbed filter previously utilized by Brown Wood, and determined that the unit met the definition of a "tank" as set forth at 40 C.F.R. §260.10. A hazardous waste management unit which meets the definition of a tank is exempt from compliance with certain interim status standards, including the requirement of groundwater monitoring. See, e.g. 40 C.F.R. §265, Subparts F and J. The regulatory definition provides:

> "Tank" means a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthen materials (e.g. wood, concrete, steel, plastic) which provide structural support.
> 40 C.F.R. §260.10

Appellant, at the hearing in this matter and in its briefs, maintained that the terms "provide structural support" require that the

constructed unit be able to support itself absent surrounding earthen materials. In fact, EPA has consistently interpreted the definition in this manner and in fact has so informed the regulated community. See, e.g. 49 Fed. Reg. 44719 (November 8, 1984) which provides:

> In applying this definition, the Agency has provided guidance that a unit is to be evaluated as if it were freestanding and filled to its design capacity with the material it is intended to hold. If the walls or shell of the unit alone provide sufficient structural support to maintain the structural integrity of the unit under these conditions, the unit is considered to be a tank. Alternatively, if the unit is not capable of retaining its structural integrity without supporting earthen materials, it is considered to be a surface impoundment.

The ALJ, at page 17 of his Initial Decision, asserts that "Obviously, the Agency's position on this matter is at odds with the written definition of a tank as it appears in the regulations...". In fact, the contrary is obvious, as the Agency's position is consistent with the regulatory language. The ALJ and Respondent attached great significance to the portion of the definition requiring a tank to be constructed of "primarily non-earthen materials." The position of the ALJ and Respondent implies that as long as the unit is so constructed, it is a tank. This position ignores the fact that the regulations require that those non-earthen materials must, pursuant to the definition, provide structural support. Thus, a unit which is reliant upon surrounding earthen materials for its

structural support is not, by definition, a tank.1/

Appellant's position is likewise consistent with that of the State regulatory agency in this matter, the Alabama Department of Environmental Management (ADEM), which notified Brown Wood as early as September 28, 1982, that its sand filter beds did not meet the regulatory definition of a tank. See e.g., Resp Ex. 11, in which an ADEM representative notified Brown Wood that "[s]ince the sand filtration units are not "tanks" as defined by the regulations, they would require groundwater monitoring as surface impoundments." In fact, it was at the suggestion of ADEM that Brown Wood concreted its filter beds for the specific purpose of meeting the regulatory definition. See Resp. Ex. 13, 21, 22, and 30. It is interesting to note that it was not until after Brown Wood had taken such action and then learned that the regulatory agencies considered it liable for failing to comply with certain interim status standards before the unit was altered so as to be exempt from such requirements, that Brown Wood began to argue that the previous unit had met the definition of a tank.

In addition, Appellant feels compelled to protest the ALJ's dismissal as irrelevant the fact that Brown Wood's previous filter bed was not in fact containing its accumulation of hazardous waste, as

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1/. It is incorrect to state, as the ALJ does at page 17, that "all of the witnesses agreed that the wood sides of the original sand filter do provide structural support." In fact, the EPA witness testified that they did not agree with that position. See, e.g. Tr. 254. Rather, the EPA witnesses maintained that the wooden sides of the Brown Wood unit were dependent upon surrounding earthen materials for their support. Id.

a tank by definition must be designed to do. See Initial Decision, p. 17. The ALJ correctly asserts that even tanks consisting of steel will on occasion leak; however, such a possibility does not relieve an owner/operator of the responsibility to design a tank with the purpose of containing its waste. It is not, as the ALJ states at page 17 of the Initial Decision, the Agency's position that a filter with a clay bottom cannot, under any circumstances, be considered a tank. Rather, it is the Agency's position that there is a factual issue as to whether the bottom of the Brown Wood filter was actually part of a constructed unit designed to contain waste or was, in the alternative, merely a natural topographic depression, man-made excavation or diked area in the natural clay at the site. The latter interpretation would suggest that the unit more closely met the definition of a surface impoundment as set forth at 40 C.F.R. §260.10, which was the assertion of both ADEM and EPA. The evidence demonstrating that the unit at the Brown Wood site was in fact leaching contaminants into the environment supports the position of the agencies that the unit should be treated as a surface impoundment, thus subjecting it to the requirements designed to minimize just such damage from such units.

Further, the ALJ attaches significance to the fact that the Brown Wood sandbed filter was specifically designed so as to allow wastewater to drain from that unit into a holding pond, and suggests that such a process renders "ludicrous" the Agency's contention that it is relevant that the may not have been containing its waste. Again, Appellant must agree with the ALJ's assertion.

Respondent has asserted that its filter was designed with a collection manifold at the bottom, from which wastewater flows into a holding pond. Appellant fails to recognize how this would impair the Agency's position. There is an obvious and distinct difference between wastewater filtering into a collection manifold; and contaminal leaching into the groundwater. While both may be occurring at the same unit, the latter occurrence would still suggest that the unit was not properly designed so as to contain its waste.

Appellant urges the Administrator to modify or set aside the conclusion of the ALJ that the original wood-sided sand filter utilized by Brown Wood as part of its treatment system met the definition of a "tank" as set forth in the regulations. Further, Appellant asks that the Administrator remand this matter to the ALJ for a determination, or exercise his own discretion to make a determination as to the appropriateness of the civil penalty assessed for Brown Wood's failure to comply with requirements applicable to that unit.

B. THE ALJ INCORRECTLY INTERPRETED THE MEANING AND EFFECT OF LANGUAGE CONTAINED IN THE REGULATORY DEFINITION OF SLUDGE.

The ALJ determined that Appellant did not satisty its burden of proof in demonstrating by a preponderence of the evidence that RCRA and its regulations are applicable to the holding pond and spray irrigation field in use at the Brown Wood facility. The ALJ, in the Initial Decision, expressed a number of reasons for this conclusion without a clear exposition as to which reason was controlling. One such reason was his determination that those units were exempt from RCRA regulation because of language in the

definition of "sludge" excluding from that definition "treated effluent from a wastewater treatment plant." (See pp. 19-20 and 36 of the Initial Decision).

As will be set forth below, the effect of the ALJ's interpretation of that language would be to prohibit RCRA from regulating hazardous waste management units which it was clearly intended to regulate. Although it does not appear to be the basis for the outcome of the Initial Decision in this matter, the ALJ's interpretation of the definition of sludge could have a determinative effect on other Agency proceedings. Further, neither party to the instant proceeding argued that the language quoted above had any relevance to the outcome of the case. As a result, neither party provided testimony or briefs on this point. Thus, the ALJ decided a matter which was not properly before him and deprived the parties of an opportunity to testify to and brief this important issue which could have a significant impact on many actions taken by the Agency. For these reasons, Appellant urges the Administrator to set aside the ALJ's findings and conclusions with regard to this matter so as to prevent a detrimental precedential effect. If the Administrator chooses to modify the findings and conclusions regarding this matter, Appellant urges that he adopt the findings and conclusions set forth by the Agency in the discussion below.

At pages 19-20 of the Initial Decision, the ALJ discusses the regulatory definition of "sludge" and its relevance to the wastewater treatment system at the Brown Wood facility. 40 C.F.R. §260.10 provides:

> "Sludge" means any solid semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility exclusive of the treated effluent from a wastewater treatment plant.

The ALJ focused on the latter clause of the definition regarding the exclusion for treated effluent from a wastewater treatment plant, and determined that the wastewater leaving the tank at the Brown Wood facility[2/] is entitled to such an exclusion. Appellant must disagree, as that determination was based on erroneous interpretations of the regulatory language and contradicts the language and intent of RCRA and its regulations.

The ALJ errs first by determining that in the absence of a regulatory definition for a "wastewater treatment plant," the appropriate point of reference is the definition of a "wastewater treatment unit." Such a comparison is not supported by the plain meaning of the words to which the ALJ refers, or by other statutory or regulatory language.

Initially, the words "plant" and "unit" are not ordinarily considered to be interchangeable in meaning. The regulations themselves describe a wastewater treatment unit as a <u>part of</u> a wastewater treatment facility, and a facility is defined to include all contiguous land, structures, and other appurtenances as well as improve-

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2/. The ALJ found that the wooden sand bed filter in use at the Brown Wood facility until 1984 was a "tank." Appellant disagrees with that determination, but agrees that the concrete filter currently in use at the facility meets the regulatory definition of a tank.

ments on the land, used for treating, storing, or disposing of hazardc waste. While it is correct to state, as the ALJ did at page 19 of the Initial Decision, that the regulations do not provide a definition of a wastewater treatment plant, the common, ordinary meaning of the word "plant" suggests that it is more closely analogous to a wastewater treatment facility than a wastewater treatment unit.

It is a fundamental canon of statutory construction that unless words are otherwise defined, they will be interpreted as taking their ordinary, contemporary, common meaning. Perrin v. United States, 444 U.S. 37, 42 (1979). Webster's New World Dictionary of the American Language (2d. College ed. 1972) defines "plant" as "...4. the tools, machinery, buildings, grounds, etc. of a factory or business..." As noted above, this definition more closely resembles the regulatory definition of a facility than that of a wastewater treatment unit.

More significantly, the ALJ erred in his interpretation of the term "treated effluent" and in his determination that the wastewater exiting the tank at the Brown Wood facility was in fact treated effluent excluded from the definition of sludge. This conclusion was a result of his determination that the tank at the Brown Wood facility was a wastewater treatment unit. A careful analysis of the relevant statutory and regulatory language suggests that such a determination does not support the ALJ's resulting conclusion.

The Agency, at 40 C.F.R. §265.1(c)(10), excluded from the interim status standards those units meeting the regulatory definition of a wastewater treatment unit. 40 C.F.R. §260.10 provides:

> "Wastewater treatment unit" means a device which:
>
> (1) Is part of a wastewater treatment facility which is subject to regulation under either section 402 or Section 307(b) of the Clean Water Act; and
> (2) Receives and treats or stores an influent wastewater which is a hazardous waste as defined in §261.3 of this chapter, or generates and accumulates a wastewater treatment sludge which is a hazardous waste as defined in §261.3 of this chapter; and
> (3) Meets the definition of a tank in §260.10 of this chapter.

As noted above, the ALJ found, at pages 19-20 of the Initial Decision, that once wood preserving process wastewater has been treated in such a unit, it becomes treated effluent; and held further that any material produced during subsequent wastewater treatment is excluded from the definition of a sludge by the exclusion for "treated effluent from a wastewater treatment plant." That conclusion would in effect prohibit RCRA from regulating any subsequent treatment, storage, or disposal units whenever the wastewater which they received had been treated in such a tank prior to being discharged to those later units. This result is clearly contrary to relevant statutory and regulatory language which suggests that a wastewater is not a "treated effluent" until it is discharged to navigable waters and thus subject to Clean Water Act jurisdiction, and that any treatment, storage or disposal of the wastewater occurring prior to the point at which it falls within the provinces of the Clean Water Act will be subject to regulation under RCRA.

For example, Sectic 04(27) of RCRA, 42 U.S.C. §6903(27), and 40 C.F.R. §261.4(a) excluc m the definition of solid waste (thus exempting them from the RCRA regulation) industrial waste water

discharges that are point source discharges subject to regulation under Section 402 of the Clean Water Act, as amended. The comment to the regulatory provision states:

> This exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment.
>
> Comment, 40 C.F.R. §261.4(a).

In a passage in the May 19, 1980, RCRA rulemaking, in which EPA addressed the applicability of RCRA at NPDES Treatment Train Facilities the Agency stated:

> ...EPA...construes the exclusion for point sources to apply only to actual discharges into navigable waters, not to industrial wastewaters upstream from the point of discharge.
>
> * * *
>
> ...EPA has decided to rely on [the Clean Water Act programs] to regulate the discharge of wastewater effluents (which may be hazardous) to navigable waters.
>
> * * *
>
> It must be recognized, however, that this use of Clean Water Act programs to regulate hazardous wastes only extends as far as the jurisdiction and goals of those programs.
>
> * * *
>
> ...[A]ny impoundment containing a hazardous waste is covered by these regulations, particularly with regard to their effect on air and groundwater, until the hazardous waste in the impoundment comes within [Clean Water Act] jurisdiction.
>
> 45 Fed. Reg. 33172 (May 19, 1980).

The language cited above suggests that the exclusion which the ALJ found relevant was in fact intended to apply only to wastewater effluents once they have been treated to the point at which they can be discharged to navigable waters.3/ In contrast, the Brown Wood treatment process was designed to include additional wastewater treatment after the wastewater left the tank, thus the wastewater leaving the tank was not in fact a treated effluent ready to be discharged to navigable waters. While that wastewater continued through treatment in the pond and on the spray irrigation field, it was not yet within the jurisdiction of the Clean Water Act; rather it was subject to the jurisdiction of RCRA if it generated, contained, or was a hazardous waste. This is logical in light of the environmental objectives pertaining to the treatment, storage, or disposal of such wastes which Congress addressed through RCRA rather than the Clean Water Act.

This matter was further clarified in the rulemaking published at 45 Fed. Reg. 76074 (November 17, 1980) in which the Agency specifically discussed its decision to exempt from certain RCRA requirements those units meeting the 40 C.F.R. §260.10 definition of wastewater treatment unit. There the Agency stated:

> The regulatory controls imposed on wastewater treatment facilities under the NPDES

3/ This conclusion is supported by the fact that the definitions applicable to the National Pollutant Discharge Elimination System (NPDES) suggest that effluent is synonymous with point source discharge. See, e.g. 40 C.F.R. §122.2, at which "effluent limitations" is defined as restrictions imposed on point source discharges into waters or the United States.

> and pretreatment programs of the Clean Water Act focus on control of effluent discharges into surface waters or Publically Owned Treatment Works (POTW)-not on potential environmental releases to the land, groundwater or atmosphere.
> 45 Fed. Reg. 76077

The Agency stated with respect to the exclusion which it was promulgating:

> It also covers...[wastewater treatment tanks] ....in industrial wastewater treatment systems which (1)produce a treated wastewater effluent which is discharged into surface waters or into a POTW sewer system and therefore is subject to the NPDES or pretreatment requirements of the Clean Water Act or (2)produce no treated wastewater effluent as a direct result of such requirements. This definition is not intended to include surface impoundments. Nor is it intended to include wastewater treatment units which are not subject to regulation under the Clean Water Act, including systems that are not required to obtain an NPDES permit because they do not discharge a treated effluent.
> 45 Fed. Reg. 76078

This language, as well as the other statutory and regulatory provisions analyzed above, suggests that RCRA regulation is intended for the treatment, storage or disposal of hazardous wastewaters up until the point at which they are actually discharged under the jurisdiction of the Clean Water Act.

The language cited above suggests a very clear and consistent delineation between those units intended to be regulated by RCRA, and those to be regulated by the Clean Water Act; and suggests further that at facilities subject to the jurisdiction of both, one Act will regulate where the other does not. To the extent that the ALJ's language in the Initial Decision regarding the "treated effluent from a wastewater treatment plant" exclusion in

the definition of sludge would prohibit RCRA regulation at treatment storage or disposal units outside of the jurisdiction of the Clean Water Act, Appellant urges the Administrator to reject that portion of the Initial Decision and thus prohibit a detrimental precedential effect.

VI. CONCLUSION

As set forth in the arguments above, the ALJ incorrectly interpreted regulatory language so as to reach erroneous determinations regarding the regulatory status of certain units at the Brown Wood facility. With regard to the wooden sandbed filter, Appellant urges the Administrator to reject the conclusion of the ALJ that the unit was a "tank", and to allow for assessment of an appropriate penalty for Brown Wood's failure to comply with the standards applicable to the unit. With respect to the ALJ's findings and conclusions regarding the relevance of language contained in the definition of sludge, Appellant urges the Administrator to set aside those findings and conclusions because the applicability of that language to the facts at hand was not a matter before him and was not fully developed, through either testimony or briefs, for decision. Alternatively, Appellant urges the Administrator to adopt the findings and conclusions regarding this matter set forth herein by Appellant.

Respectfully submitted,

Dated: July 9, 1986

Andrea E. Zelman

ANDREA E. ZELMAN
Assistant Regional Counsel

CERTIFICATE OF SERVICE

I hereby certify that the originals of the foregoing NOTICE OF APPEAL AND BRIEF OF APPELLANT were filed with the Judicial Officer, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 and that true and correct copies were served by certified mail. return receipt requested, to:

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Honorable Thomas B. Yost
Administrative Law Judge
345 Courtland St., N.E.
Atlanta, GA 30365

Dated this 9th day of July 1986.

Janice E. Riley

JANICE E. RILEY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Wood Preservers Institute, and Koppers Company, Inc., Plaintiffs, v. United States Environmental Protection Agency, and Lee M. Thomas, Administrator, Defendants.	Civil Action No. 88-0770 Lamberth, J.

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56, Fed. R. Civ. P., plaintiffs American Wood Preservers Institute ("AWPI") and Koppers Co., Inc. ("Koppers") move for summary judgment on the grounds that there exists no genuine issue as to any material fact and that AWPI and Koppers are entitled to judgment as a matter of law.

In support of this motion and in accordance with Local Rules 108(a) and (h), AWPI and Koppers submit the

attached Statement of Material Facts to which there is no genuine issue and memorandum of points and authorities.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Wood Preservers Institute and Koppers Company, Inc., Plaintiffs v. United States Environmental Protection Agency, and Lee M. Thomas, Administrator, Defendants.	Civil Action No. 88-0770 Lamberth, J.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 108(h), Plaintiffs American Wood Preservers Institute ("AWPI") and Koppers Company, Inc. ("Koppers"), hereby submit the following statement of material facts as to which there is no genuine issue in support of their motion for summary judgment:

1. Pursuant to the requirements of Section 3001 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6921, including the conduct of a notice-and-comment rulemaking proceeding, EPA has listed as a hazardous waste K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.

2. EPA stated in its Listing Background Document that the basis for designating bottom sediment sludge as hazardous was the high concentrations of phenolic compounds and polynuclear aromatic components of creosote present in such sludge.

3. EPA and/or the states in which AWPI members' wood treating facilities, including Koppers, are located regulate wastewater treatment surface impoundments as hazardous waste units because they store K001 bottom sediment sludge. Accordingly, Koppers and other companies engaged in wood preserving have complied with RCRA's permitting requirements in connection with the surface impoundments and are operating these surface impoundments either pursuant to a RCRA permit or under interim status.

4. Although EPA initially considered listing wastewater from wood preserving as a hazardous waste at the time it listed K001 bottom sediment sludge, it explicitly declined to do so. See 45 Fed. Reg. 33,084 (1980); 45 Fed. Reg. 74,884, 74,888 (1980).

5. The decision not to list process wastewater is consistent both with data submitted to EPA during the rulemaking proceeding and with subsequent sampling performed by AWPI member companies and Koppers which demonstrate that

the concentration of hazardous constituents in process wastewater is orders of magnitude below concentrations of constituents in K001 bottom sediment sludge.

6. EPA is in the process of developing a proposed rule designating additional wastes from wood preserving operations as hazardous under RCRA. See 52 Fed. Reg. 14,854, 14,897 (1987).

7. In February 1985, lacking sufficient information and in anticipation of the proposed rulemaking, EPA distributed to Koppers and other members of the wood preserving industry a questionnaire designed to elicit information about the characteristics of process wastewater and other wastes from wood preserving. Also in early 1985, EPA conducted site sampling at the facilities of several of AWPI's member companies, including Koppers' Florence, South Carolina facility, to increase the available information about process wastewater and other unregulated wastes from wood preserving.

8. Neither EPA, nor the states in which AWPI member companies' facilities, including Koppers, are located, attempted to regulate spray fields managing process wastewater under RCRA until 1984.

9. On November 23, 1984, EPA issued a memorandum that, for the first time, in effect designated process wastewater from wood preserving operations as a hazardous waste under RCRA. See Attachment A of the Verified Complaint. The memorandum stated that any facility managing wastewater from wood preserving operations, including spray fields, was subject to the permitting requirements of section 3005 of RCRA, 42 U.S.C. § 6925.

10. The memorandum asserted without any supporting data that biological action on spray fields similar to that occurring in surface impoundments could generate K001 bottom sediment sludge at such fields.

11. The memorandum conceded that not all spray fields would necessarily generate K001 bottom sediment sludge and that the owner or operator of any spray field should therefore be afforded the opportunity to demonstrate that no K001 bottom sediment sludge is present in the unit. The memorandum provided no protocol for demonstrating the absence of K001 bottom sediment sludge or criteria for judging such a demonstration.

12. The November 1984 memorandum was neither published in the Federal Register nor subjected to public comment.

13. On July 17, 1985, EPA issued a second internal memorandum which concluded that spray irrigation fields managing or which have managed wastewater automatically were subject to RCRA regulation. See Attachment B of the Verified Complaint.

14. This memorandum was based on the identical theory relied upon in the November 1984 memorandum.

15. The July 1985 memorandum was neither published in the Federal Register nor subjected to public comment.

16. Furthermore, EPA did not provide the industry with any notice whatsoever of either of the two internal memoranda.

17. EPA continues to adhere to the view that the memoranda are binding on it and on industry. On January 17, 1986, for example, J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, wrote to AWPI that the 1984 memorandum "will necessarily remain in effect." See Attachment C of the Verified Complaint.

18. Upon issuance of the November 1984 and July 1985 memoranda, EPA and the states began to enforce vigorously the regulation of spray fields managing process wastewater from wood preserving facilities as set forth in the memorandum.

19. On the exclusive authority of these memoranda, EPA wrote Koppers' facilities in Florence, South Carolina and Dolomite, Alabama to demand that Koppers undertake the RCRA permit process with respect to the spray fields managing process wastewater located at those facilities. On May 22, 1985, for example, EPA wrote to Koppers that unless it complied with RCRA permit standards with respect to the spray field at its Dolomite, Alabama facility, Koppers would be required to close the field in accordance with applicable RCRA regulations set forth at 40 C.F.R. §§ 265.110-265.120, 265.280.

20. EPA wrote to AWPI member companies to make similar demands.

21. Relying exclusively on the EPA memoranda, the States of South Carolina and Illinois asserted that Koppers' spray fields managing process wastewater located in Florence, South Carolina and Carbondale, Illinois were hazardous waste management facilities regulated under RCRA. These state agencies demanded submission of RCRA permit applications for Koppers' facilities.

22. Also relying exclusively on the memoranda, several other states have asserted that spray fields managing process wastewater operated by AWPI member companies were hazardous waste management facilities, and thus have required submission of RCRA permit applications.

23. AWPI and its member companies, including Koppers, vigorously disputed the assertions of EPA and the states that spray fields managing or which have managed process wastewater are hazardous waste management units requiring RCRA permitting.

24. Nonetheless, in light of the uncertainty surrounding the regulatory status of spray fields managing process wastewater and the November 8, 1985, statutory deadline for submitting Part B applications for land disposal facilities, Koppers was compelled to file protective Part B applications for its spray fields managing process wastewater from wood preserving facilities. In each case, Koppers objected to EPA's attempted assertion of jurisdiction to regulate spray fields based solely on the unpublished memoranda.

25. Since the November 8, 1985 deadline for submission of RCRA permit applications, EPA has continued to process RCRA permit applications for spray fields managing or which have managed nonhazardous process wastewater. In

processing permit applications, the Agency demands submission of supplemental studies, performance of additional monitoring and analytical work, and accumulation of other technical data to support issuance of an operating permit.

26. EPA has asserted that the failure to comply with these demands would lead to the revocation of interim status, thereby requiring cessation of operations of the spray field. For example, on April 10, 1986, EPA wrote Koppers stating that it had lost interim status for its Montgomery, Pennsylvania spray irrigation field and that Koppers was therefore required to cease operation and submit a plan for closure of the field pursuant to RCRA.

27. Koppers is currently incurring total costs of approximately $1 million dollars to maintain compliance with RCRA interim status standards for its spray fields as required by the EPA internal memoranda.

28. AWPI member companies have filed protective Part A or Part B applications, including closure permits, for their spray fields managing or which have managed process wastewater. They are incurring similar substantial costs associated with compliance with RCRA requirements, including closure requirements.

29. Koppers estimates that the cost of compiling a Part B permit application for a spray field and for bringing a spray field into compliance with RCRA's requirements for hazardous waste management units, including closure requirements, is approximately $1 million dollars per spray field. Thus, the cost to Koppers of bringing all its fields into RCRA compliance could exceed $10 million dollars.

30. AWPI member companies also would be required to incur similar expenses to obtain permits, including closure permits, pursuant to RCRA.

31. In addition to imposing substantial compliance costs upon the wood preserving industry, EPA has aggressively pursued the theory embodied in the internal memoranda in administrative enforcement actions brought pursuant to section 3008 of RCRA, 42 U.S.C. § 6928. For example, EPA has brought an enforcement action with respect to the spray field operated by Koppers in Florence, South Carolina. EPA has also brought enforcement actions with respect to spray fields operated by other AWPI member companies, including Brown Wood Preserving Company.

32. In some of these enforcement actions, EPA sought civil penalties from companies for failure to comply with the memoranda. In other cases, the Agency has sought only prospective relief in the form of submission of a RCRA

permit application on the grounds that the regulatory status of these fields was uncertain until 1984. Nonetheless, in In re Brown Wood Preserving Co., No. RCRA-84-16-R, EPA contended at the hearing that the spray field managing nonhazardous wastewater was subject to RCRA regulation since 1981.

33. In the Brown Wood case, an EPA Administrative Law Judge declared the November 23, 1984 and July 17, 1985 memoranda illegal for failure of EPA to comply with the rulemaking requirements of RCRA and the APA. He further prohibited enforcement of the memoranda and the theory articulated therein until EPA complied with the rulemaking procedures of RCRA and the APA. In re Brown Wood Preserving Co., No. RCRA-84-16-R, slip op. (EPA May 30, 1986) (opinion of ALJ Yost). That case has been appealed to the EPA Administrator. Although briefing was completed in July 1986, the Administrator has not yet issued an opinion.

34. In addition, EPA contends that even if the memoranda are held to be illegal in these enforcement proceedings, facility owners and operators, including parties to the enforcement proceedings, remain under an independent obligation to comply with the RCRA permitting process for spray irrigation fields managing or which have managed nonhazardous wastewater. Failure to comply with the RCRA

permitting requirements could result in the termination of interim status, thereby requiring these facilities to cease operations and close pursuant to RCRA.

35. Furthermore, in accordance with RCRA regulations and in response to the uncertainty generated by EPA's memoranda, AWPI filed a petition with EPA on January 10, 1985, seeking reconsideration of the decision to classify spray irrigation fields managing nonhazardous materials as hazardous waste management facilities. The EPA has failed to act on this petition. In 1986, AWPI further requested a meeting with senior officials in the Office of Solid Waste to discuss the regulatory status of spray irrigation fields in the context of EPA's forthcoming rulemaking on the regulation of additional wastes from wood preserving operations. The Agency rejected any such meeting. Therefore, the only way in which AWPI and Koppers can achieve relief from EPA's illegal regulatory action is through this lawsuit for declaratory and injunctive relief.

36. If Koppers is required to maintain compliance with RCRA requirements for hazardous waste management units for its spray fields on the basis of EPA's internal memoranda, Koppers will be forced to shut down one or more of

its plants which currently operate spray fields in the absence of alternative disposal options for its process wastewater.

37. AWPI member companies may also be required to shut down one or more of their plants if they are required to come into compliance with RCRA standards, including closure standards, on the basis of EPA's internal memoranda.

38. If Koppers and/or other of AWPI's member companies fail to comply with EPA's internal memoranda by obtaining a Part B permit, they risk EPA enforcement actions, including imposition of substantial penalties or issuance of an order requiring them to cease operating those spray fields and close pursuant to RCRA. As noted above, EPA has already brought enforcement actions against several facilities operated by AWPI member companies, including Koppers' facility in Florence, South Carolina.

39. If Koppers or any other AWPI member company fails to comply with the RCRA permit process, EPA may deny that company's permit application and order it to cease operations of the spray field. 40 C.F.R. § 270.73(b). Indeed, EPA has specifically warned Koppers that "failure to supplement and complete its Part B Permit Application will

inevitably result in a permit denial and an order to cease operation." See EPA letter to Jordan Dern (Feb. 6, 1987) (Attachment D to the Verified Complaint).

40. On February 26, 1988, AWPI and Koppers gave notice to EPA of their intention to bring this action as required by RCRA § 7002(c), 42 U.S.C. § 6972(c) in the form prescribed by the Agency at 40 C.F.R. Part 254.

Respectfully submitted,

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Randy S. Chartash, Bar #360593
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(202) 682-7105

Counsel for Plaintiffs,
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Institute and Koppers
Company, Inc.

Of Counsel:
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American Wood Preservers
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1945 Old Gallows Road
Vienna, Virginia 22180

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Billie S. Nolan, Esq.
Koppers Company, Inc.
1400 Koppers Building
Pittsburgh, PA 15219

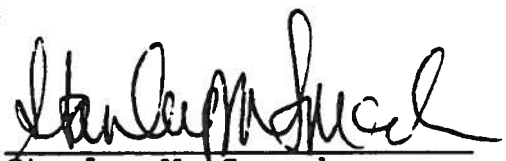
Dated: April 20, 1988

CERTIFICATE OF SERVICE

I hereby certify that, on the 20th of April, 1988, a copy of the foregoing Motion for Summary Judgment, Memorandum in Support of Plaintiffs' Motion for Summary Judgment, and Statement of Undisputed Material Facts was mailed, first-class postage pre-paid, to the following:

Lawrence J. Jensen
Office of General Counsel
United State Environmental
Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Edwin Meese, III
Attorney General of the United States
U.S. Department of Justice
10th and Pennsylvania Avenue, N.W.
Washington, D.C. 20535



Stanley M. Spracker

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Wood Preservers Institute, and Koppers Company, Inc., Plaintiffs, v. United States Environmental Protection Agency, and Lee M. Thomas, Administrator, Defendants.	Civil Action No. 88-0770 Lamberth, J.

ORDER

Upon review of Plaintiffs' American Wood Preservers Institute and Koppers Company, Inc. Motion for Summary Judgment and Memorandum in Support Thereof, the Opposition to the Motion filed by the United States Environmental Protection Agency, and the entire record in this proceeding, it is

ORDERED, ADJUDGED, AND DECREED as follows:

A. Defendants United States Environmental Protection Agency and Lee M. Thomas have violated section 3001(b) of RCRA, 42 U.S.C. § 6921(b);

B. Defendants have violated section 4 of the APA, 5 U.S.C. § 553;

C. The EPA internal memoranda of November 23, 1984 and July 17, 1985 constitute an illegal rule and are void and unenforceable;

D. Defendants and all persons acting in concert with defendants, including their agents, servants, and employees, are permanently enjoined from:

(i) Continuing to enforce in administrative proceedings, judicial proceedings, or through the RCRA permitting process, the EPA internal memoranda dated November 23, 1984 and July 17, 1985, and the theory articulated therein unless and until EPA promulgates a final non-appealable rule pursuant to the requirements of RCRA and the APA designating process wastewater as a hazardous waste under RCRA;

(ii) Continuing to process any Part B RCRA permit applications for spray irrigation fields managing or which have managed nonhazardous wastewater unless and until EPA promulgates a final non-appealable rule pursuant to the requirements of RCRA and the APA designating process wastewater as a hazardous waste under RCRA;

(iii) Taking any additional steps to regulate spray fields managing or which have managed process wastewater as hazardous waste management facilities under

RCRA unless and until EPA promulgates a final non-appealable rule designating such process wastewater as a RCRA hazardous waste;

E. Defendants are required to advise formally all EPA Regional offices and all relevant state regulatory bodies that the November 23, 1984 and July 17, 1985 internal EPA memoranda that conclude that spray fields managing or which have managed process wastewater are regulated under RCRA as hazardous waste management facilities and the theory articulated therein are void and unenforceable;

F. Defendants are required to pay to plaintiffs the reasonable attorney fees, costs, disbursements and expenses incurred by them in pursuing this action, pursuant to RCRA § 7002(e), 42 U.S.C. § 6972(e).

DONE in chambers in Washington, D.C. this ____ day of ____, 1988.

UNITED STATES DISTRICT JUDGE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN RE:	)	
	)	RCRA 84-16-R
BROWN WOOD PRESERVING COMPANY, INC.	)	
	)	NOTICE OF APPEAL
Respondent.	)	
	)	

COMES NOW the United States Environmental Protection Agency (EPA), and notifies all interested parties of its appeal of rulings contained in the Initial Decision in the above-referenced matter, as explained in the accompanying appellate brief.

Pursuant to 40 C.F.R. §22.30, Appellant sets forth the following alternative findings of fact, alternative conclusions regarding issues of law or discretion and a proposed order.

ALTERNATIVE FINDINGS OF FACT*

1. Brown Wood, until approximately 1984, treated, stored or disposed of hazardous waste in a sandbed filter which was a surface impoundment as defined at 40 C.F.R. §260.10.

2. With respect to the sandbed filter, Appellant hereby incorporates the Findings of Fact set forth as numbers 1-12 in Complaina Findings of Fact, Conclusions of Law and Order (filed April 7, 1986).

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* Appellant is somewhat handicapped by the fact that the ALJ, in nis Initial Decision, failed to delineate which portions of the language contained therein were findings of fact, which were conclusions of law and which were merely discussions thereof. In order to propose alternative findings or conclusions, Appellant must make assumptions as to just what findings the ALJ made and what conclusions he reached; and to the extent that those assumptions are incorrect, Appellant apol gizes for any mistakes or mischaracterizations.

ALTERNATIVE CONCLUSIONS OF LAW

1. Brown Wood, by failing to manage its former sand filter bed in accordance with the management standards appropriate to such units, violated several provisions of 40 C.F.R. Part 265, including Subparts B,C,D E,F,G,H and K.

2. With respect to the wooden sandbed filter, Appellant hereb incorporates the Conclusions of Law set forth as numbers 1-15, 17 an 18 in Complainant's Findings of Fact, Conclusions of Law, and Order (filed April 7, 1986).

3. The language contained in the definition of sludge found at 40 C.F.R. §260.10, in which treated effluent from a wastewater treatment plant is excluded from that regulatory definition does not prohibit RCRA regulation of treatment, storage or disposal of hazardous wastes occurring subsequent to treatment in a wastewater treatment unit.

4. A penalty of _____ is appropriate in light of the seriousness of the violations and any good faith efforts made by Brown Wood to comply.

ORDER

Pursuant to Section 3008 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6928, the following order is entered against Respondent, Brown Wood Preserving Company, Incorporated:

(a) A civil pena[illegible]s assessed against the Respondent for violations of RCRA as described herein.

(b) Payment of the full amount of the civil penalty shall be made within sixty (60) days after receipt of this Final Order. Payment shall be made by forwarding a cashier's check or certified check in the amount of _____ ___, payable to the Treasurer United States of America, to the following address:

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

So Ordered.

Dated:

_____
Ronald L. McCallum
Chief Judicial Officer

May 30,

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	RCRA-84-16-R
BROWN WOOD PRESERVING CO., INC.	)	
	)	
Respondent	)	

1. Resource Conservation and Recovery Act - The EPA is bound by the clear language of its own regulations and may not, for any purpose, add to or embelish the definitions contained therein to suit its own ideas of what the regulations mean.

2. Resource Conservation and Recovery Act - Definitions - A device buried in the ground consisting of four (4) wooden sides and a clay bottom, under the facts in this case, is a "tank" as defined in 40 C.F.R. § 260.10.

3. Resource Conservation and Recovery Act - Effect of Internal Memoranda - The use of unpublished internal memoranda to support an enforcement action against a facility owner regarding units, which had previously been considered unregulated, is improper and in violation of the provisions of the Administrative Procedures Act.

4. Resource Conservation and Recovery Act - Burden of Proof - Where the Agency has not proven the allegations in the complaint by a preponderance of the evidence, the complaint must be dismissed.

Appearances:

Andrea E. Zelman, Esquire
For Complainant, U.S. Environmental Protection Agency
Atlanta, Georgia

Thomas H. Brown, Esquire
Sirote, Permutt, Friend, Friedman, Held & Apolinsky
For Respondent, Brown Wood Preserving Company, Inc.
Birmingham, Alabama

INITIAL DECISION

This is a proceeding brought pursuant to Section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 ("RCRA" or "The Act"), 42 U.S.C. § 6928. Section 3008 of RCRA provided[1] in pertinent part:

> (a) Compliance Orders-(1)...[W]henever on the basis of and information the Administrator determines that any person is in violation of any requirements of this subchapter, the Administrator may issue an order requiring compliance immediately or within a specified time period....
>
> (c) ...Any order issued under this section may... assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.
>
> (g) ...Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

On March 31, 1984, the U.S. Environmental Protection Agency, Region IV ("EPA") issued a Complaint, Compliance Order, Consent Agreement, and Notice of the Right to Request a Hearing charging the Respondent, Brown Wood Preserving Company, Inc. ("Brown Wood"), with violation of certain requirements of RCRA. Specifically, the Complaint charged Brown Wood with violations relating

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[1] Any references to RCRA are to the Act as it was in effect in March of 1984 when the original Complaint and Compliance Order was issued to Respondent. In November 1984, Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984), ("HSWA") which significantly amended RCRA. One change brought about by HSWA was a revsion and reorganization of Section 3008, 42 U.S.C. § 6928. Thus, the authority to assess penalties which is cited in the text below as it was formerly found at §§ 3008 (c) and (g) can now be found at §§ 3008(a)(1), (3) and (g). See 42 U.S.C. § 6901 et seq. (1984).

to financial responsibility requirements found in the RCRA interim status standards for owners and operators of hazardous waste treatment, storage, and disposal facilities, 40 C.F.R. Part 265, Subpart H. On March 29, 1985, Complainant moved to amend that Complaint to include additional violations of RCRA requirements. That motion was granted on April 24, 1985. The Amended Complaint and Compliance Order ("The Order") alleged violation of additional requirements of the interim status standards, including the failure to have a groundwater monitoring program in accordance with 40 C.F.R. Part 265, Subpart F, and an adequate closure plan in conformance with 40 C.F.R. Part 265, Subpart G. The Order included a schedule which set forth dates by which Brown Wood was to comply with the specific provisions of which it was in violation. In addition, The Order proposed the assessment of a civil penalty in the amount of $24,000 (twenty-four thousand dollars). The Order also proposed stipulated penalties for Brown Wood's noncompliance with the schedule set forth in the Order.

Brown Wood filed an Answer in which it denied that it treats, stores or disposes of hazardous waste, and therefore denied that it was or should be subject to the interim status standards applicable to such hazardous waste management facilities. Following the opportunity for the parties to settle informally, an exchange of information was ordered. The parties exchanged lists of witnesses expected to be called, proposed exhibits, and additional information regarding this matter. On January 29-30, 1986, a Hearing on the matter was held in Atlanta, Georgia.

Following the availability of the Hearing transcript, the parties filed and exchanged initial submissions of findings of fact, conclusions of law, briefs in support thereof, and [illegible]s. The American Wood Preservers Institute ("AWPI"), an industry [illegible]n, moved for leave to file an amicus brief. The parties filed no opposition and the motion was granted.

In rendering this Initial Decision, I have carefully considered all of the information in the record. Any proposed findings of fact or conclusions of law inconsistent with this decision are rejected.

Factual Background

The Respondent, Brown Wood Preserving Company, Inc., is a creosote wood treatment plant located in Brownville, Alabama. In the 1970's in association with the State of Alabama Water Improvement Commission and in compliance with the Clean Water Act, Brown Wood established a system for the treatment of the process water generated in connection with its wood preserving process.

The system consists of collection pits and sumps that collect the process water; it is then pumped into two large settling tanks where the creosote sinks to the bottom and is recycled. The process water is then routed to two open horizontal tanks, where additional settling takes place and the creosote is recycled. The water is then entered into two quick-mixer tanks, where flocculation takes place. The water and the resulting floc is then pumped onto a hill into a sandbed filter where the floc is filtered out as K001 bottom sediment sludge. The process water then progresses through sand into a collection manifold at the bottom of the filter, and flows into a holding pond. The water is then pumped onto a spray irrigation field where additional wastewater treatment occurs and any overflow or underflow from this operation is returned to the holding pond.

The above-described treatment for the wood preserving process water follows specifically the state-of-the-art methodology established by EPA under the Clean Water Act in order for the Respondent to meet the requirements of that Act and to receive an NPDES permit.

In 1980, pursuant to the requirements of RCRA, Mr. Heath, the part-owner of Brown Wood filed a notification under The Act which indicated that they were a generator of hazardous waste K001 (bottom sediment sludge from the wood preserving industry). In that notification, Mr. Heath indicated that the facility was only a generator of such sludge and not a treator, storer or disposer thereof.

In November 1980, Mr. Heath filed the facilities Part A application and on this form indicated "Yes" to the question: "Does or will this facility treat, store or dispose of hazardous waste?" Mr. Heath checked that box because at that time the facility had a future intention to disk plow the K001 sludge generated in its filter beds into the earth rather than having it taken off site for disposal in a licensed solid waste disposal facility. Since that time, Brown Wood has decided not to dispose of its hazardous waste in that fashion but rather to have it shipped off site for licensed disposal. From the outset, Brown Wood never considered itself to be a TSD facility and did not consider either the holding pond or the spray field, or the sand filter bed to be regulated units under RCRA.

When the Respondent filed its original Part A application, it identified the owner of the facility as being the City of Tuscaloosa, since that City was the legal owner of that facility, inasmuch as it issued revenue bonds to finance the facility and as such holds title to the property. EPA subsequently advised the Respondent that this was not a proper designation and an amended Part A application was then filed showing that Brown Wood was the owner and operator of the facility. Subsequently, a follow-up notification and request for information was sent to the Respondent, and all others similarly situated, by EPA asking them to clarify whether or not they were a TSD facility or

owned a TSD facility. Brown Wood thinking that there was still some question about the actual ownership of the facility marked the box that they were a TSD facility.

With that background there now transpires a rather Byzantine series of notifications and interpretations by EPA and the State of Alabama as to the nature of the Respondent's facility and to what extent the various portions of its treatment regime are governed by RCRA and its associated regulations.

At several times between 1980 and the present, the Respondent asked that its Part A application be withdrawn since it did not consider itself to be a regulated facility. The Respondent's rationale for this assertion was that they only generate K001 sludge and that they do so in the sand filter which is a rectangular structure set in the ground with wooden sides and a clay bottom. They took the position that inasmuch as this structure met the definition in the regulations of a "tank", they were, therefore, not subject to regulation under RCRA. They also asserted, on numerous occasions, to both the State of Alabama and the EPA that they were exempt from regulation inasmuch as they were a small quantity generator as that term is defined in the regulations. These requests were met with statements to the effect that since you are a regulated facility you can not withdraw your Part A application and as to the small quantity generator argument, the governmental entities advised that inasmuch as no supporting data was forthcoming which would substantiate this claim, they could not make any ruling thereon. The record does not reveal that any governmental agency ever advised the Respondent just exactly what sort of information was required in order for them to demonstrate that they were, in fact, a small quantity generator. The regulations seem to suggest that one may become a small quantity generator by merely making the

assertion that it falls into that category and that if somewhere in the future it is determined that they are not, then they must suffer the consequences for their mistake in interpretation.

In any event, while all this was transpiring, the requirements for financial responsibility became due under the regulations and notifications were sent to the Respondent telling it that it needed to provide proof of insurance and financial responsibility to the State of Alabama. The Respondent continued to argue that it was not governed by the provisions of RCRA for the reasons above-stated and these pleas were met with more requests for the financial responsibility documentation.

Somewhere in this time frame, the State of Alabama was relieved of its authorization to administer certain portions of the RCRA program and EPA came into the picture. The Agency then filed its first Complaint which proposed to assess a penalty of $5,000 (five thousand dollars) for the failure of the facility to come forth with the necessary financial and insurance documentation. An Answer was filed which essentially denied that they were governed by RCRA and various settlement conferences between EPA, the Respondent and peripherally the State of Alabama were held. Shortly after one of the major settlement meetings, the Agency moved to amend its Complaint to add the additional violations which it had discovered subsequent to the issuance of the first Complaint. The motion was allowed and the new Complaint was issued which now charged the Respondent with violating not only the financial responsibility aspects of the regulations but also the failure to have in place groundwater monitoring systems for the three regulated units and other administrative and internal documentation which the regulations require that such a facility have in place.

The record reveals that at no time did the Respondent, nor the wood processing industry generally, understand that the spray fields which were installed pursuant to the Clean Water Act and, in some cases, the storage ponds as well were regulated units under RCRA. This state of affairs was not clearly enunciated to the Respondent until or shortly before the bringing of this action. In order to fully understand the Agency's rationale in regard to this facility, as well as others in the wood preserving industry, a review of certain internal memoranda is required.

Apparently as early as May or June of 1983, the State of Alabama, which at that time had the authority to administer RCRA in that State, had some questions about the applicability of RCRA to certain facilities in the wood treating industry. This concern was communicated to Region IV EPA and by letter dated March 13, 1984, Mr. James H. Scarbrough, Chief, Residual Management Branch, wrote a letter to Mr. Bernard Cox, Chief of the Industrial and Hazardous Waste Section of the Alabama Department of Environmental Management (hereinafter "ADEM"). This letter contained two scenarios which in essence described two different treatment systems at two separate facilities and then answered questions relative to the application of RCRA to them. The first scenario describes essentially what is found at the Brown Wood facility with the exception that the scenario suggests that there is both creosote and pentachlorophenol treatment of the wood involved. The record in this case suggests that at all relevant times Brown Wood never used pentachlorophenol as a treatment method but only used creosote. The first question addressed by Mr. Scarbrough was: "Is the wastewater which drains from the filter beds a listed hazardous waste because it comes from the treatment of a listed hazardous waste?" Mr. Scarbr[illegible] answer was: "Yes, the water is a regulated hazardous waste" and [illegible]ed this opinion on the definition of a

hazardous waste which includes a leachate. He suggests that since leachate is defined in 40 C.F.R. § 260.10 as "any liquid, including any suspended components in the liquid that has percolated through or drained from hazardous waste" that therefore the water which drains through the sand bed filter and the K001 sludge contained therein must of necessity be a leachate and as such is therefore a listed hazardous waste.

The next question is: "Would the spray field be subject to RCRA if the water is hazardous even though it is regulated by the Water Division which requires reporting to them?" The answer is: "Yes, since the water from the sludge filter beds would be regulated as a hazardous waste, as explained above, any subsequent treatment, storage or disposal of the water would be subject to the regulation by RCRA. The spray field would be a form of land treatment subject to regulation under Subpart M of Section 265." He further states that regulation under another State program would not exempt a land treatment facility from regulation by the RCRA program.

The third question asked is: "Assuming the water is not hazardous would just the filter beds be regulated because the bottom is clay due the sludge accumulation." The answer was that: "Regardless of the status of the water, the unit where the sludge is accumulated is a regulated unit under Subparts I through L or Q depending on the type of construction. He suggests that the sand-gravel beds would probably be regulated under Subpart Q. He also stated that the holding pond would be a regulated surface impoundment under Subpart K and that delisting might be appropriate in some cases for the water of the sand filters.

Although I can understand why the filter beds might be a regulated unit, assuming as Mr. Scarbrough did that the water is not hazardous, one can not understand his reasoning that the holding pond would be a regulated surface

unit under Subpart K because it would not, under the scenario described, contain any hazardous waste.

In any event, this letter from Mr. Scarbrough to the Alabama official which stated that the spray fields, holding ponds and sand pits would all be regulated units was based essentially, at least as to the holding pond or the spray field, on the notion that the water which is discharged from the sand filter is a hazardous waste. It should be noted that this interpretation is contrary to previous decisions by EPA not to consider the wastewater from such facility to be a hazardous waste and it was specifically excluded from regulation under the Federal Register listing which established K001 as a hazardous waste in the first place.

Since the industry and other persons continued to protest this interpretation, concurrence on this issue was requested by Mr. Scarbrough by memorandum dated May 21, 1984. This memorandum was not admitted as an exhibit in the case, but because it provides an essential part of the chronological scenario which gave rise to the admission of follow-up memorandums, it will be made an exhibit in this case as Court's Exhibit No. 1. This memorandum essentially sets forth Region IV's interpretation of its rationale that the holding ponds and spray fields are regulated units and asks concurrence by Headquarters, EPA. In this May 21st memorandum, Mr. Scarbrough states as follows: "The listing K001 includes any sludge formed from wood preserving process waste that uses creosote and/or pentachlorophenol, regardless of where the sludge is formed. If a sludge is formed in the bottom or sides of a surface impoundment, or a sand filter or on a spray field of a land treatment unit, it is K001 sludge. The surface impoundment, the sand filter and the spray filter unit would be subject to all hazardous waste permitting regulations." (Emphasis supplied.) He then goes on to state that

in the case of the sand filter, the water that drains from the filter is a hazardous waste. He then proceeds to repeat his rationale for that conclusion on the basis that the water is a leachate and, therefore, a hazardous waste. The reason the Court sought this memorandum and included it as an exhibit, in addition to the reasons immediately above stated, is that the reply to this memorandum from Mr. John Skinner, Director of the Office of Solid Waste in Washington, D.C., contains language which suggests that there is an assumption in the request that sludge is generated in the pond and the spray field. The memorandum from Mr. Scarbrough to Washington, D.C. seeking concurrence states as a condition of his hypothesis that a sludge is formed both in the surface impoundment and the spray field.

The memorandum in reply to this request for concurrence, which is Respondent's Exhibit No. 36 dated 25 July 1984, states that contrary to Mr. Scarbrough's previous opinion on the subject, the wastewater from the oil water separature tanks and chemical flocculation tanks are not classified as listed hazardous waste, after the listed hazardous wastewater treatment sludges have settled out, even though some flocculated materials is carried along with effluent stream. He goes on to state that when the Agency listed wastewater treatment sludges from wood preserving processes it differentiated between the sludges which settle out from successive treatments of process wastewaters and the wastewater stream itself. He therefore concluded that the wastewater effluents from the two tanks would be subject to regulations only if they met one or more of the characteristics of a hazardous waste as set forth in the regulations. There is no suggestion in this record or elsewhere that the wastewater emanating from the various treatment processes employed by Brown Wood meet any of the "characteristics" as set forth in the regulations.

Mr. Skinner's memo then goes on to state that, although the wastewater emanating from the sand filter is not a hazardous waste, both the sand filter and the holding ponds would be subject to all hazardous waste regulations and permitting standards since they are surface impoundments used to manage a hazardous waste (i.e., the sludge). The memorandum is silent as to how this sludge gets into the holding ponds. He does state that if a sludge is formed in a wastewater treatment tank, filtration device or surface impoundment it is a K001 sludge. Since the May 21, 1984 memorandum from Mr. Scarbrough, wherein he seeks Headquarters concurrence with his opinion on the status of the units involved, states that: "If a sludge is formed it is a K001 sludge." The premise has then now been laid that K001 sludge is in fact found in both the surface impoundment and the spray field as well. Mr. Skinner's memorandum concludes that as to the spray field irrigation field, which is the final step in the wastewater system, no decision has been made by Headquarters as to whether or not that part of the system is a regulated unit. He states that he is currently investigating the status of this unit and that he expects to get back to the Region on this point in the near future.

Therefore, the July 25, 1984 memo, on its face, apparently seems to be of help to the regulated community in as much as it refutes Mr. Scarbrough's earlier contention that since the wastewater emanating from the filter beds is a hazardous waste, therefore, of necessity any holding pond or subsequent treatment facility which manages that waste would be a regulated unit under RCRA. Mr. Skinner's memo then, with no apparent justification, immediately leaps from the decision that the wastewater is not a hazardous waste to the conclusion that the pond which receives this non-hazardous waste will, of necessity, be a regulated unit since it manages the sludge. Just how this sludge which is a listed hazardous waste is generated from a non-hazardous wastewater constituent is not explained at this time.

The next memorandum in the chronology is from Mr. Skinner to Mr. Scarbrough dated November 23, 1984 which is Respondent's Exhibit No. 44. This memo apparently is a follow-up to the earlier memo which left unresolved the decision as to whether the spray irrigation fields were regulated units under RCRA. Mr. Skinner states that since the last memorandum, he has discussed the issue with the Office of General Counsel and has concluded that such spray irrigation units or other land spreading of wastewaters from wood preserving operations constitute land treatment of a hazardous waste, namely the K001 bottom sediment sludge. Therefore, such land spreading or spraying would be subject to the regulations and The Act. He then describes the basis for this conclusion to the effect that the hazardous waste K001 is formed in the soil in a land treatment unit to which wastewaters from wood preserving processes are applied. The mechanism for forming this sludge, he says, is similar to those operating in trickling filters or at the bottom of surface impoundments where aerobic degradation takes place. He states that biological action taking place in such units will lead to an increase of mass from the accumulation of dead organisms. Contaminates in the wastewater could be absorbed on this biomass and co-precipitate with it. Suspended solids also could be separated from the wastewater by simple filtration while passing through the land treatment unit matrix forming sludges. He then states that some facilities have claimed that no sludges are formed in these units or that no hazardous constituents of concern remain in these units at regulatory significant levels. He states that if a facility is able to demonstrate that no bottom sediments sludge is formed as described above, then the land treatment unit would not be subject to regulation under RCRA. He parenthetically states that: "at the present time we ar- -t able to provide any guidance as to how one would make such a demonstr . He concludes by stating that if

sludges are formed in the land treatment unit but the facility is able to demonstrate that no hazardous constituents remain in an environmentally significant concentrations then the facility would have the option of delisting the sludges pursuant to 40 C.F.R §§ 260.20 and 260.22.

We now have a situation where initially EPA, at the regional level, had decided that all of these portions of the treatment system, i.e., the filter beds, the holding pond and the spray irrigation field, were all subject to RCRA and therefore regulated units for the reason that the water emanating from the filter bed was a hazardous waste. No mention of sludge formation was used as a justification for that initial conclusion. The Agency then at the Headquarters' level concluded that the water emanating from the filter unit was not in fact a hazardous waste but that since sludges, must of necessity, form in both the holding pond and the spray field due to the interaction of the organic constituents with the wastewater with the naturally occurring bacteria that is found in the soil, obviously any such material formed, would under the regulatory scheme, be considered K001 bottom sediment sludges. It is this latter conclusion that causes some concern both on the part of this Respondent and all other members of that industry as well as the American Wood Preservers Institute. They suggest that this internal interpretation of the formation of the sludges anywhere in the treatment scheme, are, of necessity, K001 bottom sediment sludges representing a new regulation, the effect of which is to place portions of the wastewater treatment system under the provisions of RCRA where heretofore the Agency and the regulated community had assumed that they were not regulated since they contain no K001 sludges.

At the Hearing, the Agency, at least at the regional level, took the position that they have always have felt that all of these units were regulated. But a careful reading of the memoranda involved suggests that the

Region's original basis for considering them to be regulated were that they handled a hazardous waste, i.e., the water from the sand filter, and not because K001 sludge was generated therein. Since the Region has been corrected on its assumption that the water was a hazardous waste in of itself, the new theory seems to be that since sludges will inevitably form in these units due to the interaction of the wastewater and naturally occurring bacteria in the soil that such sludges, biomasses or whatever description accurately describes this material is, under the regulation, K001 sludge that they now are regulated on that basis.

During all of this time, the Respondent, Brown Wood, continued to urge its case upon the State of Alabama and the Federal EPA to the effect that: (1) they are small quantity generators; (2) that the sand filter is under the definition in the regulations of a "tank" and, therefore, not a regulated unit; and (3) that the storage pond and spray field are not regulated units since they do not manage a hazardous waste as the industry has historically understood that term. Despite these strongly felt beliefs as to the non-applicability of RCRA to their facility, Brown Wood continued, through its consultants and others, to come into compliance and to satisfy the demands put upon them by various governmental regulatory agencies. At one point in time, the State of Alabama indicated to Brown Wood that if they would replace their wood sand filter device with a concreted one and demonstrate that the pond was not leaking that they could be relieved from the obligation of installing a groundwater monitoring system for those units. Apparently at this point in time, the State of Alabama did not consider the spray irrigation field to be a regulated unit. Pursuant to those instructions, the Respondent removed the wood-sided sand filter and replaced it with a concrete filter which everyone now agrees is a "tank" under even the most stringent interpretation of the

regulation's definition. The Respondent also attempted to satisfy the Agency's concerns about financial responsibility by providing the Agency with a trust agreement which the Agency apparently did not feel to be satisfactory.

Examination of Regulatory Scheme

Since the beginning of this controversy the Respondent has steadfastly argued that its wooden sand filter meets the definition of a tank, a position which the regulatory agencies have just as adamantly denied. Since the status of this unit, in my judgement, plays a crucial role in the application of the RCRA regulations to this facility, some examination of this position is warranted. As discussed above, the original sand filter employed by the Respondent as an essential part of its wastewater treatment system is a device consisting of a 20-by-20-by-15 impoundment with a natural clay bottom and sides constructed of preserved wood, having a depth of approximately five (5) feet. 40 C.F.R. § 260.10 contains the definitions which govern the applicability and the administration of the RCRA program. In that section, a tank is described as: "a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic) which provide structural suppport." Simple mathematical calculations reveal that the original sand filter is constructed primarily of non-earthen materials, that is to say, wood, and that only the bottom is of earthen material. In arriving at its conclusion that this device does not meet the regulatory definition of a tank, the Agency takes the position that in order for it to be a tank, it must maintain its structural integrity when removed from the ground and essentially support itself in mid-air. The Agency's position is that since the bottom of the tank is made of earth and clay materials, it would fall

out if removed from the ground and, therefore, it cannot meet the definition of a tank. See the testimony of complainant's witness, William Gallagher, Jr., at page 254 of the Transcript wherein he says: "For purposes of meeting the definition of a tank, we maintain that if the earth was removed from around this tank, it would support itself. Since it has no bottom, it cannot support itself." Obviously, the Agency's position on this matter is at odds with the written definition of a tank as it appears in the regulations, which are binding upon the Agency. Additionally, two expert witnesses appearing on behalf of the Respondent, who are professors of engineering at their respective universities, also disagreed with the Agency's interpretation thereof. They take the position that if a device is made primarily of non-earthen materials which provide structural support, it meets the definition of a tank. The Agency in its argument has added additional language to the regulations which a careful reading thereof does not support. All of the witnesses agreed that the wood sides of the original sand filter do provide structural support. The Agency's concern seems to be that since the bottom of the filter is made of clay, it cannot, under any circumstances, be considered a tank. If this was the Agency's intent, the definition it provided to the regulated community and to the other governmental regulatory agencies should have been more carefully written to suggest that the bottom of the device has to be made primarily out of non-earthen materials. The Agency attempts to bolster its position on this issue by suggesting that clay is not impervious to all substances and that, therefore, it does not contain "the hazardous waste treated therein". Whether or not the device leaks is not at issue here since the Agency has long since discovered that even tanks consisting of steel will on occasion leak and that whether or not a device is entirely water-proof or impervious to all materials contained therein is not part of

the definition of a tank. This contention is obviously ludicrous since the filter bed is designed with a sump in the bottom from which the wastewater is supposed to drain into the holding pond. If it were constructed in any other fashion, it would not accomplish its required function and would overflow onto the ground. I am, therefore, of the opinion that the original wood-sided sand filter employed by the Respondent as part of its treatment system met the definition of a "tank" as contained in the regulations and that the Agency's attempt to informally re-write the definition contained in their own regulations is an improper exercise of prosecutorial discretion.

All parties agree that a treatment device which meets the definitions of a tank is exempt from certain aspects of the regulatory scheme under RCRA including the necessity to have in place a groundwater monitoring system. As indicated above, the Respondent, shortly prior to the filing of the Amended Complaint, had replaced the wood filter with a concrete device which everyone agrees easily meets the regulatory definition of a tank. The main concern apparently in regard to this portion of the treatment scheme is whether or not the old wood-sided filter bed was closed pursuant to an approved closure plan. Testimony at the Hearing indicates that the Respondent is attempting, through its engineering consultants, to convince the regulatory agencies that the old filter bed was "clean-closed" and that, therefore, it was closed in a manner consistent with the regulations. Since I am of the opinion that the old wood-sided filter bed met the definition of a tank, any further discussion concerning its closure is for purposes of this decision, unnecessary.

Having determined that the old sand filter bed met the regulatory definition of a tank and since everyone agrees that the new concrete filter clearly meets the definition of a tank, additional examination of the regulatory definitions is appropriate to determine the effect of this ruling.

The above-cited section of the Federal regulations which contain the definitions applicable to RCRA define sludge as: "any solid, semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility exclusive of the treated effluent from a wastewater treatment plant." (Emphasis supplied.) Everyone agrees that K001 bottom sediment sludge is generated at several locations in the treatment scheme employed by the Respondent, i.e., at the bottom of the oil waste separator and clearly the material to which the floc has been added which settles out on the surface of the sand gravel filter bed. There is also apparently universal agreement among the parties that the wastewater which leaves the sand bed filter is not a hazardous waste under the regulatory scheme established by the EPA. We then are faced with the baseline question of determining whether or not a K001 sludge is generated by this nonhazardous wastewater at some other portions of the treatment scheme, in this case, primarily the surface holding pond and the spray irrigation field. Although the phrase "wastewater treatment plant" is not defined in the RCRA regulations, there is a definition which seems appropriate, contained in the same section of the Federal Register, that being "wastewater treatment unit". This device is defined as: "(1) as part of a wastewater treatment facility which is subject to regulation under either § 402 or § 307(b) of the Clean Water Act; and (2) receives and treats or stores an influent wastewater which is a hazardous waste as defined in § 261.3 of this chapter, or generates and accumulates a wastewater treatment sludge which is a hazardous waste as defined in § 261.3 of this chapter, or treats or stores a wastewater treatment sludge which is a hazardous waste as defined in § 261.3 of this chapter; and (3) meets the definition of tank in § 260.10 of this chapter." The sand bed filter is a part of a wastewater treat-

ment facility which is subject to regulation under § 402 of the Clean Water Act and it does receive, treat and store a hazardous wastewater treatment sludge and it does meet the definition of tank, as we have previously discussed. Applying all of these definitions to the facts at hand, one arrives to the conclusion that any material produced by the interaction of the non-hazardous wastewater contained in either the storage lagoon or the spray irrigation field with naturally occurring bacteria in the soil is excluded from the regulatory definition of a sludge since this material is a treated effluent from a wastewater treatment plant. This reasoning is supported by the language contained in the footnote to Mr. Skinner's July 25 memorandum. (Respondent's Exhibit No. 36.)

Although I am of the opinion that the analysis presented above is an accurate one as it applies to the situation in this case, one need not rely entirely upon such analysis to come to the conclusion that under the regulations neither the storage pond or spray irrigation field are regulated units under The Act or the regulations promulgated pursuant thereto. As discussed earlier the Agency's decision that these units are regulated units under The Act has its genesis in their unpublished theory that any materials created by the non-hazardous wastewater and soil bacteria is, of necessity, K001 sludge. The existence of such sludge must be demonstrated by something more than mere hypothetical theory on the part of the Agency to subject them to the rigors associated therewith of a RCRA regulated facility. The above-described memoranda from Mr. Skinner contain no data to support the notion that, of necessity, K001 bottom sediment sludge is always present in these units. On the contrary all of the testimony from the expert witnesses presented by the Respondent suggests that to the extent any additional biomass or new material is generated by such interaction it does not constitute K001 bottom sediment

sludge. The Respondent's witnesses uniformly testified that a sludge, as that term is universally accepted in the engineering community, means a visible measurable substance resulting from the treatment or management of some form of waste. Their testimony was that even if some material is generated by the biological action which takes place in the soil, it no longer has the characteristics of the constituents of concern in solution in the non-hazardous wastewater since that is one of the functions of biological treatment. By that it is meant that the bacteria which through evolution or acclimation, have the ability to feed on such organic materials, change its nature by the very act of their interaction with it and that the resulting material no longer has the same chemical make-up that was originally present. The Agency takes the position that the sludge generated in these two units, i.e., the lagoon and the spray irrigation field, may, in fact, be invisible and unmeasurable by normal means, but since they are of the opinion that such material is, in fact, generated, it is, by definition K001 bottom sediment sludge. It is this regulatory leap of faith which is of primary concern not only to this Respondent but to the entire wood treatment industry since it is contrary to the scientific community's previous notion of how these materials are generated.

Mr. James David Hagan II, one of the Agency's primary witnesses on the issue of the presence of K001 sludge in the treatment pond, testified on this issue at some length. It is felt that a recitation of this witnesses testimony is important to determine the validity of the Agency's position on this issue. This witness, who is an inspector and employee of the State of Alabama's Hazardous Waste Division, testified that he saw K001 sludge in the holding lagoon and that was one of the basis for his agency's as well as EPA's assumption that that is certainly a regulated unit. The following dialogue takes place on pages 165, 166, 167 and 168.

"MR. BROWN: Just a few more, Judge.

BY MR. BROWN:

Q. Can you explain what would happen if surface oil was on the pond?

A. Surface oil?

Q. Uh-huh (affirmative).

JUDGE YOST: What kind of oil are we talking about? Just any kind of oil?

MR. BROWN: Right, any kind of oil, oil associated with creosote.

JUDGE YOST: Okay.

THE WITNESS: You're talking about the carry oil or the fractions of creosote?

MR. BROWN: Light fractions.

THE WITNESS: They would float on the surface of the impoundment.

BY MR. BROWN:

Q. Is surface oil K-001 type surface oil that we're talking about?

A. No; it would not be considered to be K-001.

Q. Would it stain the soil along the bank when the wind blew the water around?

A. Possibly.

Q. Okay. Or if the water level dropped some, it would leave that stain?

A. Possibly.

Q. Could the black substance that you saw around the edge of that pond have been a stain rather than a sludge?

A. The black substance that I saw was a sludge. It met the definition of a sludge in the Alabama Hazardous Waste Management regulations. That was the only determination at that point that I was required to make."

"Q. Could it have been a sludge?

A. It was a sludge. A sludge can be a stain; a stain can be a sludge.

Q. What's the difference between a stain and a sludge?

A. I'm not sure there is a difference.

Q. Okay. So, that could have been a stain from oil, couldn't it? I mean you didn't test it to find out if it has any K-001 constituents, did you?

A. It met the definition of a sludge.

Q. Did you test it to see if it had any K-001 constituents?

A. No, but, as I've already described, that's not necessary to meet the listing description for K-001.

Q. What you saw on that bank of that pond could very well have been a stain from an oil residue, couldn't it?

A. It was also a sludge.

JUDGE YOST: Well, I don't understand. You keep referring to this regulation. Does the regulation describe this sludge?

THE WITNESS: Yes, sir; it gives a specific definition for sludge.

JUDGE YOST: Well, what is the definition?

THE WITNESS: It is the —

JUDGE YOST: Something that results from the process that they're engaged in?

THE WITNESS: It's any solid, semi-solid, liquid waste generated from a municipal, commercial or industrial waste water treatment facility, municipal water treatment facility or air pollution control facility, and it's exclusive of the effluent from those facilities.

BY MR. BROWN:

Q. Now, that's the general sludge definition. Is that right? Is that what you're quoting now?

A. Right."

"Q. Okay. Well, you're not claiming that any and every sludge is a hazardous waste, are you?

A. No.

Q. Only sludge — For purposes of this case, only sludge containing K-001 constituents would be a hazardous waste, wouldn't it?

A. No. Sludge generated in a waste water treatment facility from the treatment of waste water that comes from a wood preserving facility that uses pentachlorophenol or creosote is K-001, irrespective of its constituents.

Q. What regulation says that?

A. It's in the identification and listing of the Alabama Hazardous Waste Management regulations, Section 234, 4-234 through 4-235.

Q. Let me ask you this. If what you saw on the side of that pond was an oil stain, do you content that that is K-001 bottom sediment sludge?

A. I have no knowledge of whether that is an oil stain or ——"

The obvious inability of this witness to provide any sort of logical and sensible answers to the questions posed, in my judgement, points out the obvious flaws in the Agency's theory concerning the generation of K001 bottom sediment sludges. At one point the witness states that the dark stain he observed on the edge of the lagoon, if it were surface oil, it would not be considered K001 and yet he then goes to state that if he saw something there, it must, of necessity, be K001 sludge.

Professor Warren S. Thompson, appearing as an expert witness on behalf of the Respondent, discussed the Agency's theory as to the generation of K001 sludge both in the pond and the spray irrigation field at some length. Professor Thompson, who had visited the Respondent's facilities on many occasions, emphatically testified that at no point had he ever observed anything vaguely resembling K001 sludge, either in the holding lagoon or the

spray irrigation field. He agrees that the spray irrigation field is a biological treatment system and it is for that reason that the EPA recommended its use in order to meet the "zero discharge" limitations imposed by the Clean Water Act. He also emphatically stated his opinion that the materials formed in the spray irrigation field by this biological activity can in no way be considered as K001 sludge, as that term is defined in the regulations and as the scientific community has viewed such a sludge. On page 221 of the Transcript he emphasized the Agency's position by quoting from Lewis Carroll's book Through A Looking Glass to the effect that: "When I use a word, Humpty Dumpty said, in a rather scornful tone, it means just what I choose it to mean, nothing more, nothing less." The witness then goes to say:

> "And this is a word that EPA is using, sludge. It can refer to carload quantities, or it can refer literally to monomolecular layers when we're talking about spray irrigation fields. One cannot identify visually or by measurement a K001 sludge on a spray irrigation field.
>
> "So when I say that I disagree with Mr. Skinner, that is the reason, is that he is overlooking his own regulations in that regard."

Professor Thompson testifies again on this question on pages 224 and 225 of the Transcript, upon cross-examination by EPA counsel. When asked: "Isn't it true that biological activity that is going to take place at the top, takes place right at the top layer (discussing the spray irrigation field)?" He answers:

> "There is biological activity that takes place in the upper I'll say 12 inches of the soil, primarily in the top six inches of the soil. Now, this biological activity is activity associated with the breakdown of the dissolved preservative constituents in solution in the waste water, and with the wood sugars — There's still some wood sugars from the wood preserving process that are also in solution, and these are degraded biologically and photo-chemically on the spray irrigation field."

"Question: And isn't it true that that biological mass that's breaking down those constituents is considered K001 sludge?

Answer: This is a point where I disagree with that. The fact that there is a biological activity taking place does not necessarily mean that a sludge is forming."

Professor John Ball, also appearing as an expert witness on behalf of the Respondent, addressed both the question of the Agency's interpretation of the definition of a tank and its notion about the formation of K001 sludge both in the holding pond and the spray irrigation field. On page 395 of the transcript, Dr. Ball discusses EPA's contention that the biomass material, which is generated in the spray irrigation field and purportedly generated in the holding pond, constitutes K001 sludge. He states that as to all the sludges that he has ever had anything to do with, he has been able to distinguish them and wood preserving sludges he can easily distinguish. He was asked whether he had ever seen or heard of, prior to the testimony in this case, either an invisible sludge or a sludge you cannot see with the naked eye or a sludge you cannot measure under a standard test. He states that other than before the K001 question came up, "...I never heard or ran across anyone who has claimed that he is working with a sludge that is some sort of sludge that you can't see, invisible type sludge." On page 398 of the transcript, Dr. Ball also discusses the physical and biological changes that occur when bacteria attack and consume organic chemicals, such as naphthalene or other constituents of the wood preserving wastewater. He suggests that you do not end up with the same materials you started with because the bacteria eat into the molecules and it becomes another organic material entirely, which is certainly not K001 sludge.

On page 407 of the transcript, Dr. Ball discusses his opinion concerning whether or not the wooden filter that has now been replaced by the concrete

filter and which is identical to the one still remaining is or is not a tank under the definition in the EPA regulations. He stated he believes, under that definition, that it is a tank. He explained that: "It is made primarily of wood. "And when I think about that, 'primarily' to me means most of it is made of wood, most of the structural part, and it is made of wood. Under the definition it says 'primarily made of non-earthen materials', which to me would mean some of it could be made of earthen materials." On page 408, Dr. Ball continues his discussion about his problems with EPA's extension of the definition of a tank as it appears in the Federal Register and states that he thinks that they are going too far with that regulation in that they would suggest that you take the device in question and suspend it in mid-air and if it is able to hold itself together and maintain its integrity it is a tank and, if not, it is not a tank. It was his opinion that this extension of the written definition is unwarranted and improper. Dr. Ball, who also visited the facility on several occasions and took samples of the material in the holding pond and in the spray field, testified that on numerous occasions he has been there, he has never seen anything in either of those two areas that would vaguely resemble K001 sludge or anything similar. In addition, the testing performed by Dr. Ball at the Respondent's facilities did not reveal the presence of any K001 sludge, or, as to the spray field any of the K001 constituents in any significant quantities which would render them subject to regulation under The Act. Dr. Ball also expressed his vigorous disagreement with Mr. Skinner's (EPA Headquarters) theory about the generation of biomass which would be considered K001 bottom sediment sludge. He suggests such a theory is only that. No data has been presented by EPA or Mr. Skinner to substantiate his theory. His many years of experience in

dealing with wood processing operations and the generation of sludges by that industry, as well as by the petroleum industry, leads him to believe that there is no substance to Mr. Skinner's supposition in this area.

Discussion

As indicated in the letter from Mr. Scarbrough, EPA Region IV, to Mr. Bernard Cox, Alabama Hazardous Waste Management Office, the sole reason, at that time, for the Agency considering the holding pond and the spray irrigation field to be regulated units was that they managed a hazardous waste, i.e., the water emanating from the bottom of the sand filter. Nothing in that letter suggests that Mr. Scarbrough considered these units to be regulated for the reason that there was some K001 sludge generated therein. It was only after the later pronouncements by Mr. Skinner that: (1) the wastewater is not a hazardous waste; and (2) any sludge materials generated in these two units would, of necessity, be K001 bottom sediment sludge that the Agency appeared to change its position as to the rationale for regulating these units. The regulated industry, on the other hand, having read EPA's prior decisions in 1980, to the effect that the wastewater generated by such a filter is not a hazardous waste, never considered facilities such as the holding pond or spray irrigation field to be units regulated under RCRA. It was only upon reading Mr. Skinner's rather novel approach to this issue did they become seriously concerned about EPA's change of position and have, in fact, formally petitioned EPA Headquarters to review and change its opinion on this question about the generation of K001 sludge in surface impoundments and spray irrigation fields. The record indicates that EPA Headquarters is taking this question under advi and has not yet issued a reply to the petition for reconsideration.

The record is equally clear that no one from either EPA or the State of Alabama has ever sampled any of the materials in the holding pond or spray irrigation field and subjected such samples to laboratory analysis to determine the presence of either the wastewater constituents of concern or K001 sludge. The Agency's position is that anything generated from the interaction of this non-hazardous wastewater with naturally occurring bacteria is, by definition, K001 sludge, and that if the regulated community wishes to dispute that contention, they must do so by proving the negative to the Agency through a de-listing petition. The Agency has also expressed its position, in writing, that they have no idea of how a regulated facility would make such a demonstration to EPA.

The evidence in this case shows, by a substantial preponderance of the evidence, that the Agency has failed to prove its theory as to the spontaneous generation of a hazardous sludge from a non-hazardous wastewater. On the contrary, the only evidence given on this question by anyone who is qualified by virtue of his education and experience to render such opinions disagrees violently with Mr. Skinner's contention that all new materials created by some biological activity following the sand filter portion of the wastewater treatment device is a regulated hazardous waste, i.e., K001 bottom sediment sludge.

The Agency's position in this matter has placed the regulated community in an untenable position wherein by the expression of a unsubstantiated scientific theory they have required that community to demonstrate to it the non-existence of these materials when they are unable to provide any guidance whatsoever to the regulated community as to how this might be accomplished. Since no one at EPA or the State of Alabama has ever seen, measured, tested or analyzed any such freely occurring sludge, their position in this matter remains solely that of an undocumented theory.

While it may well be true that some wood processing facilities do generate K001 sludge in their holding ponds or spray fields, the record is devoid of any evidence which suggests that such sludge is generated at facilities employing the EPA-recommended treatment system utilized by this Respondent.

I am also of the opinion that the two memoranda sent by Mr. Skinner to Mr. Scarbrough, wherein this new theory is articulated, have no regulatory force or effect since it amounts to an extension of the previously recognized realm of regulated facilities and is, therefore, in violation of the provisions of the Administrative Procedure Act (APA) which clearly require that such pronouncements be the subject of publication, comment and final promulgation in the Federal Register. This argument concerning the invalidity of EPA's attempt to circumvent the provisions of the Administrative Procedure Act through the use of internal memoranda was discussed at some length in the amicus brief filed by the AWPI and the cases cited therein. I am, therefore, of the opinion that even if there were some scientific validity and supportive data to aid Mr. Skinner's new interpretation, it still would have to go through the APA process of notice and comment with the opportunity of the regulated community to scrutinize the scientific basis for such pronouncement.

An excellent discussion of this notion, as it applies to EPA activities, is found in the matter of U.S. Nameplate Company, Respondent, RCRA Docket No. 84-H-0012, issued by the Chief Judicial Officer of EPA on March 31, 1986. That decision concluded by stating:

> "Clearly, these reference were insufficient to give U.S. Nameplate 'effective enough knowledge so that it might easily and certainly assertain the conditions by which it was to be bound.' Based upon these imprecise references, U.S. Nameplate could not have been expected to know, or even suspect, that the Agency considered sludge from the etching from stainless steel to be 'F006 hazardous waste'."

In that case the Agency attempted to hold U.S. Nameplate responsible for managing its sludge from stainless steel etching as a regulated hazardous waste when neither the listing document, the background document nor other materials would suggest to U.S. Nameplate that the sludge that they were generating was included in the definition given in the regulations. The Agency in that case argued that they had, in fact, listed and indexed the documents referred to and that, therefore, that was sufficient under the APA to put the general public on notice as to the requirements. The Administrator disagreed with the Agency enforcement staff on that question and stated that mere publishing and indexing of the materials was not sufficient under the APA to advise the regulated community as to its responsibilities in handling such waste under RCRA.

In the instant case, the Agency has not even accomplished the bare minimums suggested by the APA either through publication, indexing or otherwise. The only notice to the regulated public in this case would be if they happened to get their hands on Mr. Skinner's two memoranda which were internal to the Agency, not publicized, not indexed, and not published in any fashion. Clearly, the attempted use of EPA of the theories contained in Mr. Skinner's internal memoranda do not even approach a threshold compliance with the requirements of the APA.

In this regard, the Agency argues that the pertinent memoranda are merely "interpretive rules" and as such fall within the exception provided by § 553 of the APA. This issue was also addressed in some detail in the Nameplate case, supra. See pages 10-11 of that opinion which quotes Lewis V. Weinberger, 415 F.Supp. 652 (D.N.M. 1976) as follows:

"The IHS contract care policy in dispute should have been published in the Federal Register. It falls within the scope of "statements of general policy or interpretations of general applicability formulated and adopted by the agency" under 5 U.S.C.A. §552(a)(1)(D) (1967).

"Regarding the necessity for publication of the memorandum in the Federal Register versus merely making it available for public inspection and copying, the Court stated:

"In reaching this conclusion, the Court has taken into account the provisions of section 552(a)(2) dictating that 'those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register' need only be available for public inspection and copying. 5 U.S.C.A. §552(a)(2)(B) (Supp. 1976).

"In determining whether particular policy or interpretive statements are required to be published or whether they need only be made available, subsections (a)(1) and (a)(2) of section 552 must be read together: 'statements of general policy must be published; interpretations which have been adopted by the agency must be available and interpretations of general applicability must be published.' K. Davis, Administrative Law Treatise §3A.7 (Supp. 1970) [hereinafter cited as Davis].

"A policy statement is not qualified as 'general' nor is an administrative interpretation deemed to be 'of general applicability' if: (1) only a clarification or explanation of existing laws or regulations is expressed; and (2) no significant impact upon any segment of the public results. See Hogg v. United States, 428 F.2d 274 (6th Cir. 1970); Anderson v. Butz, 37 Ad.L.2d 852 (E.D.Cal. 1975). See generally Davis §§ 3A.7,.9. Therefore, such material need not be published. Also within the availability requirements of §552(a)(2)(B) are statements affecting only an agency's internal or housekeeping operations and adjudicatory opinions which may be relied upon as precedents by the agency. See Hogg v. United States, supra; Davis §§ 3A.7,.9.

"'Statements of general policy or interpretations of general applicability' which fall within the publication requirement of section 552(a)(1) have been variously defined. Generally, however, policy or interpretive statements are deemed to fall within the scope of 552(a)(1)(D), requiring their publication, when they adopt new rules or substantially modify existing rules regulations, or statutes and thereby cause a direct and significant impact upon the substantive rights of the general public or a segment thereof. See Anderson v. Butz, supra."

> "The IHS memo serves as the present authorization for excluding off-reservation Indians' from the class of beneficiaries eligible for contract health care. As such, it is a 'statement of general policy' within the meaning of §552(a)(1)(D)."

Since the effect of these memoranda is to place portions of a wastewater treatment system (i.e., the holding pond and spray field) under the strictures of RCRA, which the regulated community theretofore did not consider to be regulated, they have a "direct and significant impact on the substantive rights" of a segment of the general public. They, therefore, must be published.

The Agency also argues that the regulated community should have been put on notice that these units were considered to be regulated under RCRA by reading the relevant "background document". I have carefully read this document and although several very general statements appear which might make one suspect that they are regulated, they lack the precision and completeness which the courts have required.[2] This vagueness is underscored by the Agency's own doubts about the status of the spray fields as evidenced by Mr. Skinner's first memorandum (Respondent's Exhibit No. 36) wherein he told Mr. Scarbrough that his office is currently investigating that issue and will advise him later.

Additionally, the "background document" was not published in the Federal Register, but merely mentioned in the preamble to the Federal Register Notice which originally listed K001. As to this situation, the Applachian Power court held that:

> "Any agency regulation that so directly affects pre-existing legal rights or obligations, Lewis v. Weinberger, 415 F.Supp. 652 (D.N.Mex. 1976), indeed that is 'of such a nature that knowledge [illegible] is needed to keep the outside interest inform[illegible]e agency's requirements in repsect to any subject w[illegible]s competence,' is within

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2 Appalachian Power Co. v. Train, 566 F.2d 451 (1977).

> the publication requirements. United States v. Hayes, 325 F.2d 307, 309 (4th Cir. 1963). As the substance of a regulation imposing specific obligations upon outside interests in mandatory terms, Piercy v. Tarr, 342 F.Supp. 1120 (N.D.Cal. 1972), the information in the Development Document is required to be published in the Federal Register in its entirety, or, in the alternative, to be both reasonably available and incorporated by reference with the approval of the Director of the Federal Register. 5 U.S.C. §552(a)(1).
>
> "[1 C.F.R.] §51.6(a) requires that the 'language incorporating material by reference shall be as precise and complete as possible,' while §51.7(a) provides that 'each incorporation by reference shall include an identification and subject description of the matter incorporated, in terms as precise and useful as practicable within the limits of reasonable brevity.' The obvious meaning of those two sections is that an incorporation by reference must give one affected enough knowledge so that he may easily and certainly ascertain the conditions by which he is to be bound.
>
> "The agency has failed to comply with either of the requirements. The language of the incorporation by reference is neither precise, nor complete, nor useful."

The Administrator in the U.S. Nameplate case, supra, reviewed the language in the preamble which the Agency argued satisfied the incorporation by reference requirements and held that:

> "Here, as previously stated, neither the background document nor the statement contained therein that defines electroplating to include chemical etching was published in the Federal Register. However, the Region does claim that the background document was referenced or 'noted' in the Federal Register at the time 40 CFR §2651.31 (F006) was originally promulgated. 45 FR 33084, 33112, 33113 (May 19, 1980). In response, U.S. Nameplate claims, and the Region does not dispute, that the only references in 45 FR 33084 et seq. (1980) to the background document are as follows:
>
> > "[A]mong other things, the docket contains background documents which explain, in more detail than the preamble to this regulation, the basis for many of the provisions of this regulations. 45 FR 33084"

"And at 45 FR 33112 and 33113:

> "Detailed justification for listing each hazardous waste in Subpart D [Subpart D contains the Agency's list of hazardous waste from non-specific sources, i.e., §261.31] is contained in specific background documents and so will not be set forth in this preamble."

> "Clearly, these references were insufficient to give U.S. Nameplate 'effective enough knowledge so that [it might] easily and certainly ascertain the conditions by which [it was] to be bound.' Based upon these imprecise references U.S. Nameplate could not have been expected to know, or even to suspect that the Agency considered sludge from the etching of stainless steel to be 'F006 hazardous waste.'"

The language in the preamble to the regulations listing K001 bottom sediment sludge is equally vague and does not satisfy the requirements set forth above.

For the reasons previously set forth, I am of the opinion that neither the memoranda nor the background document can be legitimately used by the Agency to bolster its case against this Respondent.

I am, therefore, of the opinion that the attempted use by the Agency of the unsupported theories espoused by Mr. Skinner in his two memoranda in an enforcement action such as is before me in this case is clearly unauthorized. In addition, the evidence adduced at the Hearing demonstrates that the basis for Mr. Skinner's scientific theory concerning the spontaneous generation of a hazardous waste sludge from a non-hazardous liquid medium is unsupported and in direct conflict with the sworn testimony of the two expert witnesses presented by the Respondent. The rules of procedure in these matters place the burden of establishig a prima facie case upon the Agency and they have not done so in this case. The mere presentation of unsupported internal memoranda which, in essence, create a new violation under The Act, not heretofore recognized, does not satisfy that burden. To merely come into an

enforcement proceeding with essentially an unsupported enforcement philosophy which has not undergone the scrutiny required by the APA and to use such a theory to boot-strap its position on the validity of its case is not authorized under the rules applicable to these proceedings. Even if one were to take the position that the Agency has satisfied its initial burden of proof as to the validity of its charges, the evidence presented by the Respondent in this case clearly rebutts any such presumption. In any event, the Agency has not sustained its burden with a preponderance of the evidence as required by the rules. (40 C.F.R. § 22.24.)

Based on the discussion above, I am of the opinion that the wood-sided sand filter meets the definition of a "tank" as that definition is expressed in EPA's own regulations and, therefore, that device is not a regulated unit under the provisions of RCRA. In addition to being scientifically unsupported, the Agency's notion about the subsequent generation of this hazardous waste is contrary to the definition of a sludge as heretofore set forth in the regulations and could not stand in any event. As stated above, the definition of a sludge excludes the treated effluent from a wastewater treatment plant and the only definition that approaches an explanation of what a wastewater treatment plant is is defined as a wastewater treatment unit which the facilities employed by the Respondent, in this case, clearly meet.

I am, therefore, of the opinion that, for a variety of reasons, all of which are enunciated above, the Agency has failed to show that the Respondent, Brown Wood Preserving Company, Inc., has violated the provisions of RCRA in the particulars set forth in the initial and Amended Complaint since none of the facilities which they operate are units regulated under RCRA.

Since I am of the opinion that the Agency has failed to sustain its burden of proving that the violations alleged in the Complaint did, in fact, occur there is no need to discuss the appropriateness of the penalty suggested by the Agency in its Complaint.

In addition to the reasons given above, the record also suggests that the Respondent, Brown Wood Preserving Company, Inc., would be entitled to the small quantity generator exemption since the record suggests that although the sand filters in question had been in operation, at least, since the mid-1970's it only generated K001 sludge in an amount considerably less than 2,200 lbs., which is the cutoff limit.* The Agency's observation that the small quantity generator exemption does not apply to this facility was based solely on the notion that the holding pond and spray irrigation fields were regulated hazardous waste management units and, therefore, any exemption to be enjoyed by one who would otherwise qualify as a small quantity generator would not be available to this Respondent. Since I am of the opinion that the Respondent does not, in fact, treat, handle, store or dispose of hazardous waste on its facility, the benefits accruing to one who qualifies as a small quantity generator could certainly be enjoyed by this Respondent should such a determination become necessary in the future.

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*See the testimony of Complainant's witness, James D. Hagan at Pg. 153 of the transcript, wherein he states that the cleanout of the old wooden filter only generated about a wheelbarrow load of K001 sludge.

ORDER[3]

For the reasons herein above stated, I am of the opinion that the original and the Amended Complaint, issued in this matter against the Respondent, Brown Wood Preserving Company, Inc., should be and is hereby dismissed.

DATED: May 30, 1986

Thomas B. Yost
Administrative Law Judge

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[3] 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).

Regulation of Wastewater Treatment Effluent from Processes that Generate K001 and F006 Wastewater Treatment Sludge

Matthew Straus, Acting Chief
Waste Identification Branch (WH-562)

James H. Scarbrough, Chief
Residuals Management Branch
Air and Waste Management Division

This is in response to your questions concerning regulation of wastewater treatment effluent from K001 and F006 processes.

The listing K001 includes any sludge formed from wastewater from wood preserving process wastes that use creosote and/or pentachlorophenol, regardless of where the sludge is formed. If a sludge is formed in the bottom or sides of a surface impoundment, on a sand filter or on a spray field of a land treatment unit, it is K001 sludge. The surface impoundment, the sand filter and the spray field would be subject to all hazardous waste permitting regulations.

The effluent remaining after the sludge settles out is not a listed hazardous waste. It would only be subject to the characteristics.

However, in the case of the sand filter, the water that drains from the filter beds is a hazardous waste.

This is based on the definition of hazardous waste, specifically §261.3(c)(2) which states hazardous waste includes:

> . . . Any solid waste generated from the treatment, storage or disposal of a hazardous waste, including any sludge, spill residue, ash, emission control dust or leachate (but not including precipitation runoff), is a hazardous waste.

The sludge that accumulates on the sand filter beds would be regulated as a listed hazardous waste from a specific souce per §261.32, waste code number K001. The water which drains from the filter beds would be regulated as a hazardous waste since it would be "leachate" generated from the treatment and storage of a hazardous waste (i.e., K001 sludges).

"Leachate" is defined in §260.10 as:

> any liquid, including any suspended components in the liquid, that has percolated through or drained from hazardous waste.

The regulations would apply to F006 sludge exactly the same way as described above for the K001 sludge.

COURT'S EXHIBIT NO. 1

MAY 2 1 1984

Request for Concurrence on Scope of F006 and K001

Chief, Residuals Management Branch
Air and Waste Management Division

Matthew Straus, Acting Chief (WH-562)
Waste Identification Branch

The purpose of this memorandum is to request your concurrence with our interpretation of the listing for F006 and K001.

I am requesting written concurrence. Therefore I have provided our interpretation in a response format. If you agree with our position, please sign the attached memo as soon as possible.

Because we have several permit actions and several enforcement actions including an Order we have issued pending, based on our interpretation, your concurrence is requested within 10 working days; if no response is received, concurrence will be assumed.

If you have any questions please contact Bill Gallagher of my staff at FTS 257-3016.

James H. Scarbrough

bcc: Beverly spagg
WCS
WES
WPS
Mickey Hartnett

This went out.

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DONALD C. BLUEDORN II
Attorney At Law
(412) 394-5450

March 23, 1989

VIA FEDERAL EXPRESS

J. Arthur Prestage, Esquire
Special Assistant Attorney General
Bureau of Pollution Control
2380 Highway 80 West
Jackson, Mississippi 39204

RE: Mississippi Department of Natural Resources
v. Koppers Company, Inc.; No. 1440-88
(Before the Mississippi Department of
Natural Resources, Bureau of Pollution Control)

Dear Art:

Per our telephone conversation earlier today, enclosed please find copies of the documents we have located which are responsive to your discovery request. We are still attempting to locate the engineering documents and any training manuals or operating records for the wastewater treatment facility, and I will forward them to you as they become available.

Sincerely,

Donald C. Bluedorn II

DCB/tmm

Encs.

cc: James A. Bollenbacher, Esquire

Two Gateway Center, Eighth Floor
Pittsburgh, Pennsylvania 15222
412 / 394-5400

TYPE E

U.S. District Court
USDC District of Columbia (Washington)

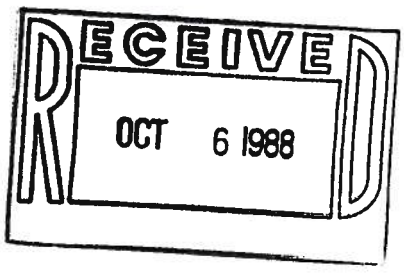
CIVIL DOCKET FOR CASE #: 88-CV-770

AMER. WOOD PRESERV., et al v. EPA, et al
Assigned to: Judge Royce C. Lamberth
Demand: $0,000
Lead Docket: None
Dkt# in other court: None

Filed: 3/22/88
Nature of Suit: 893
Jurisdiction: US Defendant

Cause: 28:2201 Declaratory Judgement
Case type: 1. civil 2. null

AMERICAN WOOD PRESERVERS INSTITUTE plaintiff	Stanley M. Spracker [COR LD NTC] WEIL, GOTSHAL & MANGES 1615 L Street, N. W. Suite 700 Washington, DC 20036 (202) 682-7000
KOPPERS COMPANY, INC. plaintiff	Stanley M. Spracker (See above) [COR LD NTC]
v.	
ENVIRONMENTAL PROTECTION AGENCY defendant	Denise Ferguson-Southard (202) 786-4778 [COR LD NTC] U.S. DEPARTMENT OF JUSTICE Land and Natural Resources Division L'Enfant Plaza Station P.O. Box 23986 Washington, DC 20026-3986
LEE M. THOMAS, Administrator defendant	



Proceedings include all events.
1:88cv770 AMER. WOOD PRESERV., et al v. EPA, et al TYPE E

3/22/88	1	COMPLAINT filed, exhibits (4); summons issued (yep) [Entry date 3/23/88]
3/22/88	2	RULE 109 Certificate of disclosure of corporate affiliations and financial interests by plaintiff KOPPERS COMPANY, INC (yep) [Entry date 3/23/88]
3/22/88	3	RULE 109 Certificate of disclosure of corporate affiliations and financial interests by plaintiff AMER. WOOD PRESERV. (yep) [Entry date 3/23/88]
3/28/88	4	AFFIDAVIT OF SERVICE of summons and complaint upon defendant LEE M. THOMAS on 3/25/88; upon defendant EPA on 3/25/88; upon U.S. Attorney General on 3/25/88; personally upon U.S. Attorney on 3/22/88 (gld) [Entry date 3/29/88]
4/20/88	5	MOTION by plaintiff KOPPERS COMPANY, INC, plaintiff AMER. WOOD PRESERV. for summary judgment; Attachments (gld) [Entry date 4/21/88]
5/5/88	6	ATTORNEY APPEARANCE for defendant EPA by Denise Ferguson-Southard CD/N (je) [Entry date 5/6/88]
5/11/88	7	ATTORNEY APPEARANCE for defendant EPA by Denise Ferguson-Southard (gld) [Entry date 5/12/88]
5/11/88	8	MOTION by defendant EPA, defendant LEE M. THOMAS to extend time to respond to plaintiffs motion for summary judgment (gld) [Entry date 5/12/88]
5/17/88	9	MOTION by defendant EPA, defendant LEE M. THOMAS to extend time to respond to plaintiff motion for summary judgment (gld) [Entry date 5/18/88]
5/18/88	10	ORDER by Judge Royce C. Lamberth : granting motion to extend time to respond to plaintiff motion for summary judgment until 5/25/88 [9-1] by LEE M. THOMAS, EPA (signed 5/13/88) (N) (gld) [Entry date 5/20/88]
5/25/88	11	OPPOSITION by plaintiff KOPPERS COMPANY, INC, plaintiff AMER. WOOD PRESERV., to motion to extend time to respond to plaintiff motion for summary judgment [9-1] LEE M. THOMAS, EPA (gld) [Entry date 5/26/88]
5/31/88	13	ORDER by Judge Royce C. Lamberth : granting motion to extend time to respond to plaintiff motion for summary judgment unril 6/1/88 [9-1] by LEE M. THOMAS, EPA (N) (gld) [Entry date 6/3/88]
6/1/88	12	MOTION by defendant EPA, defendant LEE M. THOMAS to dismiss; Exhibits (gld) [Entry date 6/2/88]

6/3/88	14	REPLY by defendant EPA, defendant LEE M. THOMAS to memorandum in opposition to motion for an extension of time [11-1] by AMER. WOOD PRESERV., KOPPERS COMPANY, INC (gld) [Entry date 6/7/88]
6/7/88	15	MOTION by defendant EPA, defendant LEE M. THOMAS for reconsideration of the Court's Order of 5/31/88 (gld) [Entry date 6/9/88]
6/15/88	16	MEMORANDUM by plaintiff KOPPERS COMPANY, INC, plaintiff AMER. WOOD PRESERV. in opposition to motion to dismiss [12-1] by LEE M. THOMAS, EPA ; Exhibit (gld) [Entry date 6/16/88]
6/27/88	17	REPLY by defendant EPA, defendant LEE M. THOMAS to memorandum in opposition to motion to dismiss [16-1] by AMER. WOOD PRESERV., KOPPERS COMPANY, INC (gld) [Entry date 6/28/88]

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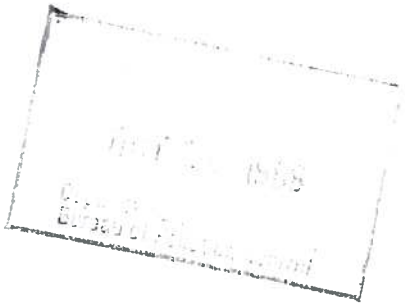

DONALD C. BLUEDORN II
Attorney At Law
(412) 394-5450

October 6, 1988

VIA FEDERAL EXPRESS

J. Arthur Prestage, Esquire
Special Assistant to Attorney General
Bureau of Pollution Control
P.O. Box 10385
Jackson, Mississippi 39209

Re: Mississippi Department of Natural Resources v. Koppers Company, Inc., No. 1440 88 (Before the Mississippi Department of Natural Resources, Bureau of Pollution Control).

Dear Mr. Prestage:

Pursuant to our telephone conversation regarding a hearing date in the above-referenced action, enclosed please find copies of the docket sheets, the Verified Complaint, and the plaintiffs' Motion for Summary Judgment and Statement of Undisputed Material Facts in American Wood Preservers Institute and Koppers Company, Inc. v. United States Environmental Protection Agency, et al. (United States District Court for the District of Columbia, No. 88-0770). As I mentioned to you during our earlier conversation, Koppers and the AWPI instituted the federal action to challenge the United States Environmental Protection Agency's contention that spray fields used to treat wood preserving process wastewater are subject to regulation under Subtitle C of the federal Resource Conservation and Recovery Act. We believe that because the federal litigation is likely to resolve the matter before the Bureau, the hearing on the merits should be stayed pending the final determination of the district court.

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Feb 22

Two Gateway Center, Eighth Floor
Pittsburgh, Pennsylvania 15222
412 / 394-5400

If, after reviewing the enclosed documents, you agree that a stay is appropriate, I will be happy to prepare a joint motion to the Bureau. If you have any questions about the enclosed documents or wish to discuss the matter further, please do not hesitate to contact me.

Sincerely,

Donald C. Bluedorn II

cc: Billie S. Nolan, Esquire
Dean A. Calland, Esquire

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Wood Preservers Institute,
1945 Old Gallows Road
Vienna, Va. 22180

Koppers Company, Inc.,
Koppers Building
Pittsburgh, Pa. 15219

Plaintiffs,

v.

United States Environmental Protection Agency, and Lee M. Thomas, Administrator,
401 M Street, S.W.
Washington, D.C. 20460

Defendants.

LAMBERTH, J.

MAR 22 1988

Civil Action No. 88-0770

VERIFIED COMPLAINT

Plaintiffs, the American Wood Preservers Institute ("AWPI") and Koppers Company, Inc. ("Koppers"), submit the following complaint seeking declaratory and injunctive relief, pursuant to the citizen's suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551 et seq., and the Declaratory Judgments Act, 28 U.S.C. §§ 2201, 2202, on the ground that the Environmental

Protection Agency ("EPA" or the "Agency") has failed to perform the nondiscretionary duty of conducting a rulemaking proceeding before regulating under RCRA spray irrigation fields ("spray fields") managing or closing nonhazardous process wastewater from wood preserving facilities.

JURISDICTION AND VENUE

1. The jurisdiction of this Court is predicated upon section 7002 of RCRA, 42 U.S.C. § 6972, and section 1331 of the Judicial Code, 28 U.S.C. § 1331.

2. Venue is proper in this Court pursuant to section 7002(a) of RCRA, 42 U.S.C. § 6972(a), and sections 1391(b), (e) of the Judicial Code, 28 U.S.C. §§ 1391(b), (e).

THE PARTIES

3. AWPI is a trade association of wood preserving companies. AWPI represents the views of its approximately 80 treating member companies before Congress, the courts, and federal agencies with regard to the formulation of policy and law affecting the wood preserving industry. In this role, AWPI has participated actively in the EPA's development of regulations governing hazardous waste management under RCRA since 1980.

4. Koppers is a corporation organized and existing under the laws of the State of Delaware, having its

principal place of business in Pittsburgh, Pennsylvania. Koppers is a diversified enterprise engaged, among other things, in wood preserving.

5. Lee M. Thomas is the Administrator of EPA, an agency of the United States of America. Defendants are charged under RCRA with the development of a regulatory program regarding the management of hazardous wastes, including some wastes from wood preserving operations.

STATUTORY BACKGROUND

6. Section 3001(b) of RCRA, 42 U.S.C. § 6921(b), authorizes EPA to identify the characteristics of hazardous waste and in addition to designate specific wastes as hazardous for regulation under the statute.

7. Section 3001(b) of RCRA, 42 U.S.C. § 6921(b), requires EPA to conduct a rulemaking proceeding including provision of notice and the opportunity for public comment before listing a substance as a hazardous waste. Section 3001(b) further requires that the Agency designate a substance as hazardous in the form of a regulation.

8. EPA administers the hazardous waste regulatory regime through a permit system. RCRA prohibits the treatment, storage, or disposal of wastes designated hazardous by EPA without a permit. See 42 U.S.C. § 6925(a).

Failure to obtain a permit authorizes EPA to impose substantial penalties or order a facility owner or operator to shut down operations.

9. To avoid undue disruption of ongoing manufacturing processes, however, the statute provides that owners or operators of facilities in existence on the date of enactment of the statute could submit a Part A RCRA permit application, which essentially provides EPA with notice of the intent to manage a listed waste. By so doing, the owner or operator qualifies for "interim status", under which he can maintain operations under standards set forth at 40 C.F.R. Part 265 while EPA processes his permit application. 42 U.S.C. § 6925(e).

10. To obtain an operating permit, facility owners or operators must submit to EPA a supplemental application ("Part B application"), which provides comprehensive environmental analyses, strategies for maintaining environmental quality during the period that the facility is in operation, and plans for the safe and effective cleanup and closure of any hazardous waste management units upon completion of operations. Standards governing facilities operating under final RCRA permits are set forth at 40 C.F.R. Part 264.

11. In 1984, Congress amended RCRA to require that owners or operators of land disposal facilities subject to interim status submit a Part B application within 12 months of the enactment of the amendments (i.e., by November 8, 1985). Failure of any facility to make this submission would result in the termination of interim status by operation of law, thereby compelling that disposal facility to cease operation. See RCRA §§ 3005(e)(2), (3), 42 U.S.C. §§ 6925(e)(2), (3).

12. Section 3006 of RCRA, 42 U.S.C. § 6926, authorizes EPA to delegate administration of the permitting program to individual states that establish regulatory requirements at least as stringent as the federal program. Pursuant to the 1984 amendments to RCRA, EPA has promulgated rules by which the Agency and the states to which EPA delegated administration of the RCRA permit program share authority to issue RCRA permits. See 40 C.F.R. §§ 271.19(f), 271.121(c)(3)(iii), 271.134(f).

THE WOOD PRESERVING PROCESS

13. Wood preserving involves the impregnation of wood with chemicals designed to protect it from the damaging effects of the elements and from attack by insects and microorganisms.

14. Among the chemicals used in the wood preserving process are creosote and pentachlorophenol.

15. Approximately 42 AWPI member companies throughout the country treat wood with pentachlorophenol and/or creosote at a total of 86 facilities.

16. Koppers treats wood with creosote or pentachlorophenol at 15 locations throughout the country.

17. The wood preserving process generates "process wastewater" containing dissolved and suspended materials and constituents of creosote and/or pentachlorophenol in low concentrations.

THE MANAGEMENT OF WASTES FROM WOOD PRESERVING

18. Pursuant to the Clean Water Act, EPA prohibits the discharge into navigable waters of wastewater from certain subcategories of wood preserving operations ("zero-discharge standard"). 40 C.F.R. §§ 429.70 et seq.

19. EPA's promulgation of the zero-discharge standard was premised in part upon the established industry practice of discharging process wastewater onto spray fields.

20. To comply with the zero-discharge standard, the wood preserving industry, in conjunction with, and with the approval of, EPA, developed the following method of

treating process wastewater from the covered subcategories of wood preserving operations.

21. Typically, the final step involved in the wood treating process is the separation and recovery of wood treating solution from waters generated during that process. This step is accomplished through the use of one or more production process oil/water separators. These process units permit gravitational separation of pentachlorophenol in oil and/or creosote from the water. After suitable time is allowed for separation, the pentachlorophenol in oil and/or creosote are removed from the water and reused in the wood treating process.

22. The wastewater that flows from the final production process oil/water separator may then pass through one or more surface impoundments for further treatment that may include settling, solar degradation, and/or biological degradation of organics.

23. In surface impoundments where biological degradation is promoted by aeration, naturally occurring microbes consume pentachlorophenol and/or creosote constituents and convert them to carbon dioxide, water, additional microbes, and other cationic or anionic species. This treatment method has been described by EPA as "quite effective" in reducing the concentration of hazardous

constituents in the wastewater. See EPA, Development Document for Effluent Limitations Guidelines and Standards for the Timber Products Point Source Category 181 (1981). Even in surface impoundments that do not rely on biodegradation, settling of pentachlorophenol and creosote occurs due to the long retention times of the wastewater in the surface impoundments. By the time the wastewater has reached the final surface impoundment in the treatment process, the concentration of constituents in the wastewater is several orders of magnitude lower than the concentration of constituents in the original process wastewater. In fact, Koppers' data demonstrates that these treatment methods reduce the concentration of phenols in the wastewater by at least 99% and the concentration of pentachlorophenol in the wastewater by at least 98%.

24. As the wastewater flows through the surface impoundments, suspended solids and bacteria settle on the bottom of the surface impoundment to form a layer of "bottom sediment sludge," which was properly listed under RCRA as hazardous waste K001. Bottom sediment sludge is characterized by high concentrations of pentachlorophenol, where used, and/or creosote constituents. These concentrations in bottom sediment sludge are several orders

of magnitude greater than the concentrations in the process wastewater flowing from the oil/water separators.

25. After the wastewater has passed through the surface impoundment system, it is discharged either to a spray field or other non-direct discharge point. No bottom sediment sludge is discharged onto the spray field. The pump and pipe system permits only treated process wastewater from the upper water zone to be sprayed onto the field. The sludge remains undisturbed on the bottom of the surface impoundment. Furthermore, because wood preserving facilities typically do not handle other wastes in their wastewater treatment systems, no listed RCRA hazardous wastes of any kind are discharged onto the spray fields.

26. This basic wastewater treatment method has been used by a substantial number of wood treating facilities operated by AWPI member companies.

27. Koppers has used this wastewater treatment method at the following wood preserving facilities: Oroville, California; Carbondale, Illinois; Green Spring, West Virginia; Montgomery, Pennsylvania; Superior, Wisconsin; Florence, South Carolina; Grenada, Mississippi; and Roanoke, Virginia.

REGULATION OF WASTES FROM WOOD PRESERVING UNDER RCRA

28. Pursuant to the requirements of Section 3001 of RCRA, 42 U.S.C. § 6921, including the conduct of a notice-and-comment rulemaking proceeding, EPA has listed as a hazardous waste K001 bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote and/or pentachlorophenol.

29. EPA stated in its Listing Background Document that the basis for designating bottom sediment sludge as hazardous was the high concentrations of phenolic compounds and polynuclear aromatic components of creosote present in such sludge.

30. EPA and/or the states in which Koppers' wood treating facilities are located regulate wastewater treatment surface impoundments as hazardous waste units because they store K001 bottom sediment sludge. Accordingly, Koppers and other companies engaged in wood preserving have complied with RCRA's permitting requirements in connection with the surface impoundments and are operating these surface impoundments either pursuant to a RCRA permit or under interim status.

31. Although EPA initially considered listing wastewater from wood preserving as a hazardous waste at the

time it listed K001 bottom sediment sludge, it explicitly declined to do so. See 45 Fed. Reg. 33,084 (1980); 45 Fed. Reg. 74,884, 74,888 (1980).

32. The decision not to list process wastewater is consistent both with data submitted to EPA during the rulemaking proceeding and with subsequent sampling performed by AWPI member companies and Koppers which demonstrate that the concentration of hazardous constituents in process wastewater is orders of magnitude below concentrations of constituents in K001 bottom sediment sludge.

33. EPA is in the process of developing a proposed rule designating additional wastes from wood preserving operations as hazardous under RCRA. See 52 Fed. Reg. 14,854, 14,897 (1987).

34. In February 1985, lacking sufficient information and in anticipation of the proposed rulemaking, EPA distributed to Koppers and other members of the wood preserving industry a questionnaire designed to elicit information about the characteristics of process wastewater and other wastes from wood preserving. Also in early 1985, EPA conducted site sampling at the facilities of several of AWPI's member companies, including Koppers' Florence, South Carolina facility, to increase the available information

about process wastewater and other unregulated wastes from wood preserving.

35. Neither EPA, nor the states in which Koppers' facilities are located, attempted to regulate spray fields managing process wastewater under RCRA until 1984.

EPA'S INTERNAL MEMORANDA

36. On November 23, 1984, EPA issued a memorandum that, for the first time, in effect designated process wastewater from wood preserving operations as a hazardous waste under RCRA. See Attachment A. The memorandum stated that any facility managing wastewater from wood preserving operations, including spray fields, was subject to the permitting requirements of section 3005 of RCRA, 42 U.S.C. § 6925.

37. The memorandum asserted without any supporting data that biological action on spray fields similar to that occurring in surface impoundments could generate K001 bottom sediment sludge at such fields.

38. The memorandum conceded that not all spray fields would necessarily generate K001 bottom sediment sludge and that the owner or operator of any spray field should therefore be afforded the opportunity to demonstrate that no K001 bottom sediment sludge is present in the unit. The

memorandum provided no protocol for demonstrating the absence of K001 bottom sediment sludge or criteria for judging such a demonstration.

39. The November 1984 memorandum was neither published in the Federal Register nor subjected to public comment.

40. On July 17, 1985, EPA issued a second internal memorandum which concluded that spray irrigation fields managing or which have managed wastewater automatically were subject to RCRA regulation. See Attachment B.

41. This memorandum was based on the identical theory relied upon in the earlier memorandum.

42. The July 1985 memorandum was neither published in the Federal Register nor subjected to public comment.

43. Furthermore, EPA did not provide the industry with any notice whatsoever of either of the two internal memoranda. Indeed, some of AWPI's member companies were unaware of the existence of these memoranda until they had become the subject of enforcement actions and obtained the documents through discovery. Other companies only learned of the existence of these memoranda upon receipt of correspondence from EPA demanding submission of RCRA permit applications for spray fields subject to these memoranda on the authority of these memoranda.

44. EPA continues to adhere to the view that the memoranda are binding on it and on industry. On January 17, 1986, for example, J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response, wrote to AWPI that the 1984 memorandum "will necessarily remain in effect. . . ." See Attachment C.

ENFORCEMENT OF THE EPA INTERNAL MEMORANDA

45. Upon issuance of the November 1984 and July 1985 memoranda, EPA and the states began to enforce vigorously the regulation of spray fields managing process wastewater from wood preserving facilities as set forth in the memoranda.

46. On the exclusive authority of these memoranda, EPA wrote Koppers' facilities in Florence, South Carolina and Dolomite, Alabama to demand that Koppers undertake the RCRA permit process with respect to the spray fields managing process wastewater located at those facilities. On May 22, 1985, for example, EPA wrote to Koppers that unless it complied with RCRA permit standards with respect to the spray field at its Dolomite, Alabama facility, Koppers would be required to close the field in accordance with applicable RCRA regulations set forth at 40 C.F.R. §§ 265.110-265.120, 265.280.

47. EPA wrote to AWPI's member companies to make similar demands.

48. Relying exclusively on the EPA memoranda, the States of South Carolina and Illinois asserted that Koppers' spray fields managing process wastewater located in Florence, South Carolina and Carbondale, Illinois were hazardous waste management facilities regulated under RCRA. These state agencies demanded submission of RCRA permit applications for Koppers' facilities.

49. Also relying exclusively on the memoranda, several other states have asserted that spray fields managing process wastewater operated by AWPI member companies were hazardous waste management facilities, and thus have required submission of RCRA permit applications.

50. AWPI and its member companies, including Koppers, vigorously disputed the assertions of EPA and the states that spray fields managing or which have managed process wastewater are hazardous waste management units requiring RCRA permitting.

51. Nonetheless, in light of the uncertainty surrounding the regulatory status of spray fields managing process wastewater and the November 8, 1985, statutory deadline for submitting Part B applications for land disposal facilities, Koppers was compelled to file protective Part B

applications for its spray fields managing process wastewater from wood preserving facilities. In each case, Koppers objected to EPA's attempted assertion of jurisdiction to regulate spray fields based solely on the unpublished memoranda.

52. Since the November 8, 1985 deadline for submission of RCRA permit applications, EPA has continued to process RCRA permit applications for spray fields managing or which have managed nonhazardous process wastewater. In processing permit applications, the Agency demands submission of supplemental studies, performance of additional monitoring and analytical work, and accumulation of other technical data to support issuance of an operating permit.

53. EPA has asserted that the failure to comply with these demands would lead to the revocation of interim status, thereby requiring cessation of operations of the spray field. For example, on April 10, 1986, EPA wrote Koppers stating that it had lost interim status for its Montgomery, Pennsylvania spray irrigation field and that Koppers was therefore required to cease operation and submit a plan for closure of the field pursuant to RCRA.

54. Koppers is currently incurring total costs of approximately $1 million dollars to bring its spray fields

into compliance with RCRA interim status standards as required by the EPA internal memoranda.

55. AWPI member companies have filed protective Part A or Part B applications, including closure permits, for their spray fields managing or which have managed process wastewater. They are incurring similar substantial additional costs associated with compliance with RCRA requirements, including closure requirements.

56. Koppers estimates that the cost of compiling a Part B permit application for a spray field and for bringing a spray field into compliance with RCRA's requirements for hazardous waste management units, including closure requirements, is approximately $1 million dollars per spray field. Thus, the cost to Koppers of bringing all its fields into RCRA compliance could exceed $10 million dollars.

57. AWPI member companies also would be required to incur similar expenses to obtain permits, including closure permits, pursuant to RCRA.

58. In addition to imposing substantial compliance costs upon the wood preserving industry, EPA has aggressively pursued the theory embodied in the internal memoranda in administrative enforcement actions brought pursuant to section 3008 of RCRA, 42 U.S.C. § 6928. For example, EPA has brought an enforcement action with respect to the spray field

operated by Koppers in Florence, South Carolina. EPA has also brought enforcement actions with respect to spray fields operated by other AWPI member companies, including Brown Wood Preserving Company.

59. In some of these enforcement actions, EPA sought penalties from companies for failure to comply with the memoranda. In other cases, the Agency has sought only prospective relief in the form of submission of a RCRA permit application on the grounds that the regulatory status of these fields was uncertain until 1984. Nonetheless, in In re Brown Wood Preserving Co., No. RCRA-84-16-R, EPA contended at the hearing that the spray field managing nonhazardous wastewater was subject to RCRA regulation since 1981.

60. In the Brown Wood case, an EPA Administrative Law Judge declared the November 23, 1984 and July 17, 1985 memoranda illegal for failure of EPA to comply with the rulemaking requirements of RCRA and the APA. He further prohibited enforcement of the memoranda and the theory articulated therein until EPA complied with the rulemaking procedures of RCRA and the APA. In re Brown Wood Preserving Co., No. RCRA-84-16-R, slip op. (EPA May 30, 1986) (opinion of ALJ Yost). That case has been appealed to the EPA Administrator.

61. The same Administrative Law Judge has refused to treat his holding in Brown Wood as determinative in cases involving similarly situated facilities. See In re Koppers Co., No. RCRA-85-45-R, slip op. at 2 (EPA July 24, 1986) (order of ALJ Yost).

62. In addition, EPA contends that even if the memoranda are held to be illegal in these enforcement proceedings, facility owners and operators, including parties to the enforcement proceedings, remain under an independent obligation to comply with the RCRA permitting process for spray irrigation fields managing or which have managed nonhazardous wastewater. Failure to comply with the RCRA permitting requirements could result in the termination of interim status, thereby requiring these facilities to cease operations and close pursuant to RCRA.

63. Furthermore, in accordance with RCRA regulations and in response to the uncertainty generated by EPA's memoranda, AWPI filed a petition with EPA on January 10, 1985, seeking reconsideration of the decision to classify spray irrigation fields managing nonhazardous materials as hazardous waste management facilities. The EPA has failed to act on this petition. In 1986, AWPI further requested a meeting with senior officials in the Office of Solid Waste to discuss the regulatory status of spray irrigation fields in

the context of EPA's forthcoming rulemaking on the regulation of additional wastes from wood preserving operations. The Agency rejected any such meeting. Therefore, the only way in which AWPI and Koppers can achieve relief from EPA's illegal regulatory action is through this lawsuit for declaratory and injunctive relief.

HARM TO AWPI AND KOPPERS

64. If Koppers is required to bring its spray fields into compliance with RCRA requirements for hazardous waste management units on the basis of EPA's internal memoranda, Koppers will be forced to shut down one or more of its plants which, in the absence of alternative disposal options for its process wastewater, currently operate spray fields.

65. AWPI member companies may also be required to shut down one or more of their plants if they are required to come into compliance with RCRA standards, including closure standards, on the basis of EPA's internal memoranda.

66. If Koppers and/or other of AWPI's member companies fail to comply with EPA's internal memoranda by obtaining a Part B permit, they risk EPA enforcement actions, including imposition of substantial penalties or issuance of an order requiring them to cease operating those spray fields

and close pursuant to RCRA. As noted above, EPA has already brought enforcement actions against several facilities operated by AWPI member companies, including Koppers' facility in Florence, South Carolina.

67. If Koppers or any other AWPI member company fails to comply with the RCRA permit process, EPA may deny that company's permit application and order it to cease operations of the spray field. 40 C.F.R. § 270.73(b). Indeed, EPA has specifically warned Koppers that "failure to supplement and complete its Part B Permit Application will inevitably result in a permit denial and an order to cease operation." See EPA letter to Jordan Dern (Feb. 6, 1987) (Attachment D).

NOTIFICATION TO EPA

68. On February 26, 1988, AWPI and Koppers gave notice to EPA of their intention to bring this action as required by RCRA § 7002(c), 42 U.S.C. § 6972(c) in the form prescribed by the Agency at 40 C.F.R. Part 254.

ABSENCE OF AN ADEQUATE REMEDY AT LAW

69. No statute permits recovery from the United States of the costs attributed to EPA's wrongful imposition

of permitting requirements on Koppers or other members of the wood preserving industry. Similarly, wood preserving companies, including Koppers, have no recourse against EPA in the event that enforcement of the illegal memoranda results in the closing of one or more wood preserving facility. Therefore, Koppers and AWPI have no adequate remedy at law to address the Agency's conduct that is the subject of this action.

COUNT I

VIOLATIONS OF RCRA

70. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-69.

71. RCRA imposes on EPA a nondiscretionary duty to conduct a rulemaking proceeding before listing a waste as hazardous. 42 U.S.C. § 6921.

72. EPA's attempt to designate process wastewater from wood preserving facilities as a hazardous waste through internal memoranda without conducting a rulemaking proceeding constitutes a violation of section 3001 of RCRA.

COUNT II

VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT

73. Plaintiffs incorporate by reference the allegations contained in paragraphs 1-72.

74. Section 4 of the APA, 5 U.S.C. § 553, requires agencies to provide public notice and an opportunity for comment before imposing "rules" on those they regulate.

75. Notice and comment is required where an agency action (1) grants rights and imposes obligations or produces other significant effects on private interests and (2) narrowly constricts the discretion of agency officials by largely determining the issue addressed.

76. The action of imposing RCRA permit requirements on spray irrigation fields managing or which have managed only process wastewater, a nonlisted waste, has a significant burdensome effect on private interests and narrowly constricts the discretion of agency officials by largely determining the issue addressed.

77. The act of regulating spray fields managing nonhazardous wastewater therefore constitutes a "rule" which, violates the procedural requirements of APA.

RELIEF

WHEREFORE, plaintiffs pray:

A. For judgment that defendants have violated section 3001(b) of RCRA, 42 U.S.C. § 6921(b);

B. For judgment that defendants have violated section 4 of the APA, 5 U.S.C. § 553;

C. For judgment that the EPA internal memoranda of November 23, 1984 and July 17, 1985 are illegal;

D. That defendants and all persons acting in concert with defendants, including their agents, servants, and employees, be permanently enjoined from:

(i) Continuing to enforce in administrative proceedings, judicial proceedings, or through the RCRA permitting process, the EPA internal memoranda dated November 23, 1984 and July 17, 1985, and the theory articulated therein unless EPA promulgates a final non-appealable rule pursuant to the requirements of RCRA and the APA designating process wastewater as a hazardous waste under RCRA;

(ii) Continuing to process any Part B RCRA permit applications for spray irrigation fields managing nonhazardous wastewater unless EPA promulgates a final non-appealable rule pursuant to the requirements of RCRA and the

APA designating process wastewater as a hazardous waste under RCRA;

(iii) Taking any additional steps to regulate spray fields managing or which have managed processwastewater as hazardous waste management facilities under RCRA unless EPA promulgates a final non-appealable rule designating such process wastewater as a RCRA hazardous waste;

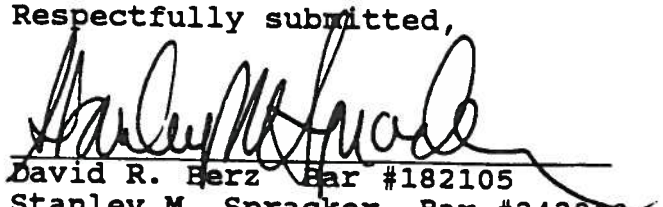
E. That defendants be required to advise formally all EPA Regional offices and all relevant state regulatory bodies that the November 23, 1984 and July 17, 1985 internal EPA memoranda that conclude that spray fields managing or which have managed process wastewater are regulated under RCRA as hazardous waste management facilities and the theory articulated therein are void and unenforceable;

F. That defendants be required to pay to plaintiffs the reasonable attorney fees incurred by them in pursuing this action, pursuant to RCRA § 7002(e), 42 U.S.C. § 6972(e);

G. That plaintiffs have and receive the costs, disbursements, and expenses of this action; and

H. That plaintiffs have such other relief as this Court may deem just and proper.

Respectfully submitted,



David R. Berz Bar #182105
Stanley M. Spracker Bar #342303
Randy S. Chartash Bar # 360593
WEIL, GOTSHAL & MANGES
1615 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 682-7000

Counsel for Plaintiffs,
American Wood Preservers
Institute and Koppers
Company, Inc.

Of Counsel:

John F. Hall, Esq.
American Wood Preservers
Institute
1945 Old Gallows Road
Vienna, Virginia 22180

Jill M. Blundon, Esq.
Billie S. Nolan, Esq.
Koppers Company, Inc.
1400 Koppers Building
Pittsburgh, PA 15219

Dated: March 22, 1988

A

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

NOV 23 1984

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

RE: WIBCJ0737

SUBJECT: Regulatory Status of Sludges from Land Treatment of Wood Preserving Wastewaters

FROM: John H. Skinner
Director
Office of Solid Waste

RECEIVED
DEC 7 1984
AFFAIRS

TO: James H. Scarbrough, Chief
Residuals Management Branch
Air and Waste Management Division
Region IV

In a previous memorandum sent to you dated July 25, 1984, we indicated that we were still evaluating the regulatory status (under RCRA) of spray irrigation fields used to treat wastewaters generated from plants using creosote or pentachlorophenol to preserve wood (see Attachment).* Since that time, we have discussed the issue with the Office of General Counsel and have concluded that such spray irrigation units, or any other land spreading of wastewaters from wood preserving operations, such as plow injection or flooding, to be land treatment of a hazardous waste--namely, EPA Hazardous Waste No. K001, bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol. Therefore, such land spreading units would be subject to the hazardous waste regulations, including appropriate permitting standards (Parts 264, 265, 270, 271, and 124).

Our basis for this conclusion is as follows. EPA Hazardous Waste K001 is formed in the soil in a land treatment unit to which wastewaters from wood preserving processes that use creosote and/or pentachlorophenol are applied. The mechanism for forming the sludge is similar to those operating in trickling filters or at the bottom of surface impoundments where aerobic degradation

---

* You initially requested an interpretation of the regulatory status of surface impoundments holding wastewaters, sand filtration units, and the effluents from these sand filters in a memo to me dated May 21, 1984.

takes place. Biological action taking place in such units will lead to an increase of mass from the accumulation of dead organisms. Contaminants in the wastewater could be absorbed on this biomass or co-precipitate with it. Suspended solids also could be separated from the wastewater by simple filtration while passing through the land treatment unit matrix, forming sludges. Dissolved substances or suspended liquids (pentachlorophenol, creosote, oil, and grease) could be absorbed onto the biomass, soil, or accumulated organic substances in the land treatment unit, also leading to increased sludge volume. Such build-up has been observed at a number of land treatment operations.

Some facilities have claimed that no sludges are formed in these units or that no hazardous constituents of concern remain in these units at regulatory significant levels. If a facility is able to demonstrate that no bottom sediment sludge is formed as described above, then the land treatment unit would not be subject to regulation under RCRA. (At the present time, we are not able to provide any guidance as to how one would make such a demonstration.)

Alternatively, if sludges are formed in the land treatment unit, but the facility is able to demonstrate that no hazardous constituents remain in environmentally significant concentrations, then the facility would have the option of delisting the sludges pursuant to 40 CFR §260.20 and 260.22.

I hope this response will answer any remaining questions that you may have. Please feel free to contact Dr. Cate Jenkins at 8-382-4788 if you have any questions or comments.

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

JUL 17 1985

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

RE: WIBCJ0285

SUBJECT: Status of Sludges in Surface Impoundments or Land Treatment Units when Wastewater Treatment Sludges are Listed in §261.31 & §261.32

FROM: John H. Skinner, Director
Office of Solid Waste

TO: James H. Scarbrough, Chief
Residuals Management Branch, Region IV

In your June 20, 1985 memorandum, you asked if wastewater treatment sludge listings under §261.31 or §261.32 would apply in all situations where land disposal or storage of the associated wastewaters was practiced. You cited a previous memorandum from this office dated November 23, 1984, wherein a determination was made that wastewaters from wood preserving facilities treated in spray irrigation fields generated listed K001 wastewater treatment sludges, and that such units are subject to the hazardous waste facility permitting standards.

Any pollution abatement technique such as the land treatment, disposal, or storage of a wastewater will invariably generate a sludge. The mechanisms for sludge formation involve either precipitation, adsorption, or accumulation of biomass. These units would be subject to regulation if the associated wastewater treatment sludges are listed in §261.31 and §261.32, if the sludges exhibit a characteristic, or if the wastewaters themselves are listed or exhibit a characteristic. These units would therefore be subject to §264, 265 and 270 requirements.

cc: Regional Administrators
Regional Branch Chiefs

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

JAN 17 1986

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

AWPI
JAN 22 1986
RECEIVED

Walter G. Talarek
General Counsel
American Wood Preservers
Institute
Suite 405
1945 Gallows Road
Vienna, VA 22180

Dear Mr. Talarek:

This letter is in response to your inquiry of November 22, 1985, which requested information on the status of the American Wood Preservers Institute's "Petition for Reconsideration of Decision to Classify Wood Preserving Spray Irrigation Fields as Hazardous Waste Land Treatment Units and for Clear Definition of K001 Sludge." Currently the Agency is considering the issues you have raised and intends to respond formally to your petition as expeditiously as possible.

As part of our review we will examine closely some of the technical conclusions you have advanced. Several of these are of concern to us because the data you have presented do not appear to support the conclusions stated in your petition. For example, we question whether the concentrations of toxicants in the wastewater applied to the spray field are generally lower than the Ambient Water Quality Criteria. In the course of our review we will make sure that we fully understand the technical conclusions you have reached and consider them carefully.

Again, I assure you that we are working to complete our evaluation of your petition as quickly as possible, since the current interpretation (as described in the November 23, 1984 memorandum from John Skinner to James Scarbrough) will necessarily remain in effect until the Agency has ruled on your petition. Thank you for your interest in this matter.

Sincerely yours,

J. Winston Porter
Assistant Administrator for
Solid Waste and Emergency
Response

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV
345 COURTLAND STREET
ATLANTA, GEORGIA 30365

FEB 06 1987

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

4WD-RM

Mr. Jordan Dern, Manager
Environmental Regulatory Programs
Keystone Environmental Resources
436 Seventh Avenue
Pittsburgh, PA 15219

RE: Koppers Organics Plant, Dolomite, Alabama Facility
EPA I.D. Number ALD 085 765 808

Dear Mr. Dern:

Reference the letter of November 14, 1986, from Weil, Gotshal and Manges concerning the subject Part B Hazardous Waste Permit application.

In that letter, you reiterate your contention that the oxidation fields at the subject facility are not regulated under RCRA and, furthermore, that you cannot be required to complete your pending Part B application for a hazardous waste permit.

Your assertion that you cannot be compelled to either submit a complete, technically adequate Part B, agree in writing to submit a closure plan no later than February 8, 1988, or face denial of your permit (with the consequent shutdown of your hazardous waste operations at the site) is in error.

In our letter of March 19, 1986, to Mr. Charles Brush of your organization by which we granted a 60-day extension for responding to our initial Notice of Deficiency (in response to your letter of February 24, 1986), we stated clearly that the challenging of regulatory status in an administrative enforcement action does not relieve you of your responsibility to comply with all applicable permitting requirements.

In his opinion, Judge Yost ruled upon only those matters which were before him; the specific requirements in the Order provision of the Amended Complaint dated December 6, 1986. The Order required that certain tasks be completed in order for Koppers to be considered in compliance with the regulatory standards established for interim status facilities under RCRA. These requirements appeared in the Order as follows:

- °implement groundwater monitoring which complies with 40 CFR §265, Subpart F within 45 days and submit data to EPA to substantiate such compliance within 50 days
- °submit a sampling and analysis plan which meets the requirements of 40 CFR §265.92 within 20 days
- °take soil samples in the closed waste pile area to determine contamination levels within 20 days
- °submit a Part A which identifies all hazardous waste units as required by 40 CFR §270.13(h) and (i) within 10 days

The Region acknowledges that the requirements as listed above, in accordance with the opinion of Judge Yost were "stayed." The Stay resulted from the filing of an Answer and Request For Hearing. However, the provisions of the Order related only to Koppers' regulatory requirements under 40 CFR §265 which would enable it to retain its interim status. The requirements of both 40 CFR §270(c)(1)(ii), which establishes the scope of permit requirements and §264, which lists the standards applicable to the permitting process, operate independently of §265 and were not "stayed" as a consequence of Judge Yost's Order.

Moreover, in the paragraph of the aforementioned Order which immediately precedes the language cited in your letter of November 14, 1986, Judge Yost states, unequivocally, that the [EPA's] "Amended Complaint and Compliance Order...reveals no mention of the requirement to submit a Part B Permit...." RCRA-85-45-R, Order On Motion, July 24, 1986 at Page 1. (Emphasis in original). Further, the Judge opined that [he had] "no authority to issue an Order concerning" [the requirement to submit a Part B Application.] Order On Motion at 2. (Emphasis added).

Consequently, any relief granted Koppers as a result of Judge Yost's July 24 Order cannot and will not remove Koppers from its so-called Hobson's choice. The requirements of 40 CFR §270 and §264 are continuing obligations applicable to the Koppers facility. The spray field at Koppers' Organics Plant is considered a land treatment unit. If Koppers intends to continue operation of this unit it must be under the auspices of a RCRA permit. The Region cannot issue a permit unless and until such time as it receives a completed Part B Permit Application; otherwise the Region's only option is permit denial.

The fact that the oxidation fields' regulatory status has been challenged in an enforcement action cannot serve to postpone or defeat the lawful requirements of the RCRA permitting process. Koppers' continued failure to supplement and complete its Part B Permit Application will inevitably result in a permit denial and an order to cease operation.

You also cite the Brown Wood Perserving Company, Inc. decision (RCRA-84-16-R (May 30, 1986)) as a further basis of delaying full compliance with regulatory requirements. However, on August 6, 1986, (RCRA-85-45-R ORDER ON MOTION), Judge Yost denied your motion for a dismissal of all claims made in the Complaint against the oxidation field. In that decision, Judge Yost held that no evidence had been presented to establish your claim that the instant case is "indistinguishable" from Brown Wood; and reiterated that the Brown Wood decision was limited to that specific case. In plain fact, the Brown Wood case is not applicable to your situation.

Our letter of October 16, 1986, (with enclosure) alerted you to the upcoming land disposal ban and its applicability to your oxidation fields.

Furthermore, soil and groundwater data on your facility show evidence of significant contamination resulting from the application of K035 effluent to the oxidation fields.

To further clarify your situation, there are two options available to you as outlined in the guidance memorandum entitled "Permitting of Land Treatment Units: EPA Policy, and Guidance Manual on Land Treatment Demonstration," dated September 17, 1986, (enclosed for your reference):

1. You may diligently pursue your application for an operating permit, responding to all Notices of Deficiency in a timely, complete and conscientious manner, or

2. You may provide written agreement to submit a closure plan no later than February 8, 1988, 180 days prior to the effective date of the land disposal ban on K035 waste.

Failure to exercise either of these options is grounds for denial of your application for a permit. Such denial would apply only to the operating permit, since a post-closure permit would be utilized to implement any required corrective action.

If we have not received written agreement of your intent to submit a closure plan, in accordance with #2 above, within ten (10) days of receipt of this letter, review of your permit application revisions will proceed.

Any questions pertaining to the above may be directed to Mr. Jack Harvanek at (404)347-3433.

Sincerely yours,

James H. Scarbrough

James H. Scarbrough, P.E., Chief
Residuals Management Branch
Waste Management Division

Enclosure

cc: Daniel E. Cooper, Alabama Department of Environmental Management
James W. Neal, Alabama Department of Environmental Management

w/ enclosure

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Wood Preservers Institute and Koppers Company, Inc., Plaintiffs, v. United States Environmental Protection Agency, and Lee M. Thomas, Administrator, Defendants.	MAR 22 1988 Civil Action No. 88-0770

VERIFICATION

I declare under penalty of perjury that the foregoing complaint is true and correct.

Executed this 23rd day of February, 1988.

James R. Batchelder
Vice President and Manager,
Technical and Environmental Services,
Tar and Wood Products Sector,
Koppers Company, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Wood Preservers Institute, Koppers Company, Inc., Plaintiffs, v. United States Environmental Protection Agency, and Lee M. Thomas, Administrator, Defendants.	MAR 22 1988 Civil Action No. 88-0770

VERIFICATION

I declare under penalty of perjury that the foregoing complaint is true and correct.

Executed this 26th day of February, 1988.

John F. Hall
President
American Wood Preservers Institute

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Wood Preservers Institute, and Koppers Company, Inc., Plaintiffs, v. United States Environmental Protection Agency, and Lee M. Thomas, Administrator, Defendants.	MAR 22 1988 88-0779 Civil Action No.

CERTIFICATE REQUIRED BY RULE 109 OF THE LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT of COLUMBIA

I, the undersigned, counsel of record for the American Wood Preservers Institute certify that to the best of my knowledge and belief, there are no parent companies, subsidiaries or affiliates of the American Wood Preservers Institute which have any outstanding securities in the hands of the public. These representations are made in order that judges of this court may determine the need for recusal.

Stanley M. Spracker Bar #342303
Weil, Gotshal & Manges
1615 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 682-7000
Attorney of Record for the
American Wood Preservers
Institute

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Wood Preservers Institute, and Koppers Company, Inc., Plaintiffs, v. United States Environmental Protection Agency, and Lee M. Thomas, Administrator, Defendants.	MAR 22 1988 Civil Action No. 88-0770

CERTIFICATE REQUIRED BY RULE 109 OF THE LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

I, the undersigned, counsel of record for Koppers Co., Inc. certify that to the best of my knowledge and belief, there are no parent companies, subsidiaries or affiliates of Koppers Co., Inc., which have any outstanding securities in the hands of the public. These representations are made in order that judges of this court may determine the need for recusal.

Stanley M. Spracker Bar #342303
Weil, Gotshal & Manges
1615 L Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 682-7000
Attorney of Record for
Koppers Co., Inc.

BABST
CALLAND
CLEMENTS
AND
ZOMNIR
A PROFESSIONAL CORPORATION

LINDSAY P. HOWARD
Attorney At Law
(412) 394-5444

CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

December 2, 1988

Koppers Industries, Inc.
436 Seventh Avenue
Pittsburgh, Pennsylvania 15219

Attention: Robert K. Wagner

Re: Order No. 1209-87 and 1208-87

Dear Mr. Wagner:

In connection with the pending acquisition of Koppers Company, Inc.'s ("Koppers'") Grenada, Mississippi facility, enclosed please find a copy of the above-referenced documents executed by the Mississippi Department of Natural Resources on March 25, 1987.

If you have any questions or comments, please do not hesitate to contact the undersigned.

Very truly yours,

BABST, CALLAND, CLEMENTS & ZOMNIR, P.C.

By: [signature]

Enclosure

cc: John I. Palmer, Jr.
Billie S. Nolan, Esquire

Two Gateway Center, Eighth Floor
Pittsburgh, Pennsylvania 15222
412 / 394-5400

BABST
CALLAND
CLEMENTS
AND
ZOMNIR
A PROFESSIONAL CORPORATION

LINDSAY P. HOWARD
Attorney At Law
(412) 394-5444

CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

December 2, 1988

Koppers Industries, Inc.
436 Seventh Avenue
Pittsburgh, Pennsylvania 15219

Attention: Robert K. Wagner

Re: Administrative Order 1440-88

Dear Mr. Wagner:

In connection with the pending acquisition of Koppers Company, Inc.'s ("Koppers'") Grenada, Mississippi facility, enclosed please find a copy of the above-referenced document executed by the Mississippi Department of Natural Resources on July 26, 1988.

If you have any questions or comments, please do not hesitate to contact the undersigned.

Very truly yours,

BABST, CALLAND, CLEMENTS & ZOMNIR, P.C.

By: Richard Howard

Enclosure

cc: John I. Palmer, Jr.
Billie S. Nolan, Esquire

Two Gateway Center, Eighth Floor
Pittsburgh, Pennsylvania 15222
412 / 394-5400

BABST
CALLAND
CLEMENTS
AND
ZOMNIR
A PROFESSIONAL CORPORATION

LINDSAY P. HOWARD
Attorney At Law
(412) 394-5444

CERTIFIED MAIL-
RETURN RECEIPT REQUESTED

December 2, 1988

Koppers Industries, Inc.
436 Seventh Avenue
Pittsburgh, Pennsylvania 15219

Attention: Robert K. Wagner

Re: Administrative Order 1438-88

Dear Mr. Wagner:

In connection with the pending acquisition of Koppers Company, Inc.'s ("Koppers'") Grenada, Mississippi facility, enclosed please find a copy of the above-referenced document executed by the Department of Natural Resources on July 22, 1988.

If you have any questions or comments, please do not hesitate to contact the undersigned.

Very truly yours,

BABST, CALLAND, CLEMENTS & ZOMNIR, P.C.

By: _____

Enclosure

cc: John I. Palmer, Jr.
Billie S. Nolan, Esquire

Two Gateway Center, Eighth Floor
Pittsburgh, Pennsylvania 15222
412 / 394-5400

BEFORE THE MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES BUREAU OF POLLUTION CONTROL

IN THE MATTER OF	:	
MISSISSIPPI DEPARTMENT OF NATURAL RESOURCES,	:	
Complainant,	:	
v.	:	ORDER NO. 1440 88
KOPPERS COMPANY, INC., MS0007027543	:	
Respondent.	:	

SWORN PETITION REQUESTING A HEARING

Dean A. Calland, Esquire
Donald C. Bluedorn II, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel for Respondent,
Koppers Company, Inc.

BEFORE THE MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES BUREAU OF POLLUTION CONTROL

IN THE MATTER OF	:	
MISSISSIPPI DEPARTMENT OF NATURAL RESOURCES,	:	
Complainant,	:	
v.	:	ORDER NO. 1440 88
KOPPERS COMPANY, INC., MS0007027543	:	
Respondent.	:	

SWORN PETITION REQUESTING A HEARING

Koppers Company, Inc. ("Koppers"), by and through its undersigned attorneys Babst, Calland, Clements & Zomnir, P.C., hereby files this Sworn Petition Requesting A Hearing pursuant to Section 49-17-41 of the Mississippi Code Annotated (1972), and in support thereof states as follows:

1. Koppers owns and operates a wood preserving plant located in Grenada County, Mississippi. The wood preserving process involves the impregnation of wood with chemicals designed to protect it from the damaging effects of the elements and from attack by insects and microorganisms.

2. One of the wastestreams generated by wood preserving plants is "process wastewater" containing dissolved and suspended materials and constituents of creosote and/or pentachlorophenol in low concentrations. In most such plants, the final step of the wood treating process is the separation and recovery of wood treating solution from the process wastewater. The process wastewater is introduced into oil/water separators for initial screening, then through wastewater basins for final settling. As the process wastewater flows through the wastewater basin, suspended solids and bacteria settle on the bottom of the basin to form a layer of "bottom sediment sludge."

3. This bottom sediment sludge has been designated as the industry-specific hazardous waste K001 by the United States Environmental Protection Agency ("U.S. EPA") pursuant to the federal Resource Conservation and Recovery Act ("RCRA"). 40 C.F.R. § 261.32. The U.S. EPA considered listing the process wastewater as a hazardous waste, but decided not to do so because there is insufficient data to justify the listing. 45 Fed. Reg. 33084 (1980); 45 Fed. Reg. 74884, 74888 (1980). Thus, the bottom sediment sludge would be subject to the provisions of Sections 17-17-1 et seq. of the Mississippi Code Annotated (1972), but the process wastewater would not.

4. In the past, Koppers operated a process wastewater treatment system such as the one described above. After the process wastewater had passed through the oil/water separator and the wastewater basin, the treated nonhazardous water was then discharged onto a spray irrigation field for final disposition. No K001 or other RCRA hazardous waste was ever discharged onto the spray irrigation field. Indeed, it was a design impossibility for the K001 to ever reach the discharge point to the spray irrigation field.

5. On July 18, 1988, Koppers ceased operation of the wastewater basin and spray irrigation field. By July 29, 1988, all K001 had been removed from the wastewater basin and has been disposed of in accordance with all applicable laws, rules, and regulations. A closure plan has been submitted for the wastewater basin and the unit will be closed in accordance with the approved plan.

6. By cover letter dated July 29, 1988 and addressed to Keystone Environmental Resources, Inc., a subsidiary of Koppers, the Mississippi Department of Natural Resources Bureau of Pollution Control ("Bureau") issued to Koppers Administrative Order No. 1440 88 ("Order"), a true and correct copy of which is attached hereto as "Exhibit A." The Order and cover letter were received by Keystone Environmental Resources, Inc. on August 3, 1988.

7. The Order states that the spray irrigation field "treats . . . the listed hazardous waste K001" and is therefore subject to regulation as a hazardous waste management unit. The Order further requires Koppers to submit an updated Part A permit application for the spray irrigation field by August 7, 1988; to cease operation of the wastewater basin (surface impoundment) and spray irrigation field on or before August 8, 1988, unless a national variance to the "Land Ban Restrictions" is issued for K001; and, to submit a "Part B permit application for a post-closure permit" for the spray irrigation field on or before November 8, 1988.

8. At the time the Order was issued to Koppers, the spray irrigation field and wastewater basin had been completely removed from service. Moreover, the spray irrigation field had never been used to treat, store, or dispose of K001, or any other RCRA hazardous waste, and therefore was not a "hazardous waste management unit." Accordingly, the Order is improper and unlawful in several respects, including but not limited to the following:

a. Requirements 1 and 3 of the Order are improper and unlawful because the spray irrigation field does not require, and never has required, a RCRA hazardous waste permit;

b. Requirement 2 of the Order is improper and unlawful because the "Land Ban Restrictions" are not applicable to either the spray irrigation field or the wastewater basin. RCRA §§ 3004(d) & (k), 42 U.S.C.A. §§ 6924(d) & (k)(West Supp. 1988).

9. Requirement 2 of the Order is improper and unlawful because the "Land Ban Restrictions" have been stayed by the United States Court of Appeals for the District of Columbia Circuit. A true and correct copy of the Petition for Review challenging the restrictions and the court order staying the restrictions are attached hereto as "Exhibit B."

10. The "Land Ban Restrictions" upon which the Order is based were not yet promulgated at the time the Order was issued and, to date, have not been published in the Federal Register. For this reason among others, issuance of the Order deprives Koppers of its constitutional right to due process and affects an unconstitutional taking of private property.

11. The Bureau does not have the authority to issue orders requiring compliance with the "Land Ban Restrictions."

12. Operation of the spray irrigation field and wastewater basin never posed a danger to the environment or to human health, safety, or welfare. Neither the K001 bottom sediment sludge nor any other RCRA hazardous waste was ever discharged to the field. The only material discharged to the spray irrigation field was the treated nonhazardous process wastewater. The spray irrigation field and wastewater basin were operated for years with the Bureau's knowledge and tacit approval. Indeed, the Bureau acknowledged that "neither the surface impoundment nor the spray field appear to be the source of groundwater contamination at the Koppers Grenada Plant." Letter from J. Hardage to C. Markle, February 10, 1987.

WHEREFORE, Koppers respectfully requests that the Commission hold a hearing on the Order and issue a final order of determination consistent with the above discussion.

Respectfully submitted,

Dean A. Calland

Dean A. Calland, Esquire
Donald C. Bluedorn II, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel for Respondent,
Koppers Company, Inc.

Dated: August 16, 1988

BEFORE THE MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES BUREAU OF POLLUTION CONTROL

IN THE MATTER OF	:	
MISSISSIPPI DEPARTMENT OF NATURAL RESOURCES,	:	
Complainant,	:	
v.	:	ORDER NO. 1440 88
KOPPERS COMPANY, INC., MS0007027543	:	
Respondent.	:	

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :

COUNTY OF ALLEGHENY :

Before me, the undersigned authority, personally appeared DEAN A. CALLAND, Esquire, who, after being duly sworn by me according to law, deposed and said as follows:

1. I am a shareholder in the professional legal corporation of Babst, Calland, Clements & Zomnir, A Professional Corporation, and represent Koppers Company, Inc. in the above-captioned matter.

2. The facts contained in the foregoing Sworn Petition Requesting A Hearing are true and correct to the best of my knowledge, information, and belief and are based upon reliable sources.

3. I am providing this Verification on behalf of Koppers Company, Inc. because the individuals with personal knowledge of the facts are outside the jurisdiction or are otherwise unavailable within the time allowed for filing the Petition.

Dean A. Calland
DEAN A. CALLAND

Sworn to and subscribed
before me this 16th day
of August, 1988.

Christine A. Orlen
Notary Public

My Commission Expires: 3-6-89

EXHIBIT "A"

MISSISSIPPI DEPARTMENT OF NATURAL RESOURCES
Bureau of Pollution Control
P. O. Box 10385
Jackson, Mississippi 39209
(601) 961-5171

July 29, 1988

CERTIFIED MAIL NO. P 125 261 162

Mr. Robert J. Anderson
Keystone Environmental
Resources, Inc.
436 Seventh Ave., Suite 1940
Pittsburgh, Pennsylvania 15219

Dear Mr. Anderson:

Enclosed is Administrative Order No. 1440-88, which has been issued by the Mississippi Department of Natural Resources as a result of certain environmental problems regarding Koppers Company, Inc., Tie Plant, Mississippi. Your cooperation in carrying out the provisions of this order is encouraged.

As you know, appeals can be taken in accordance with State law.

If you have any questions in this matter, please contact Mr. Dave Bockelmann at telephone #601/961-5171.

Sincerely,

Charles H. Chisolm
Bureau Director

CHC:mh

Enclosure

BEFORE THE MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES
BUREAU OF POLLUTION CONTROL

IN THE MATTER OF:

MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES

COMPLAINANT

VS. ORDER NO. 1440 88

KOPPERS COMPANY, INC.
MS0007027543

RESPONDENT

ADMINISTRATIVE ORDER

Under the authority of Section 49-2-13, Mississippi Code of 1972, the above styled cause came on this date for consideration and the Executive Director, having heard and considered the same, finds as follows:

1.

The Respondent, Koppers Company, Inc., located in Tie Plant, Grenada County, Mississippi, owns and operates a wood preserving plant which generates and subsequently manages hazardous waste, and, as such, is subject to the provisions of laws of this State governing the treatment, storage, and disposal of hazardous waste, the same appearing as Section 17-17-1, et. seq., and the rules and regulations of the Mississippi Commission on Natural Resources.

2.

Respondent operates a spray irrigation field at its Tie Plant facility which contains and treats, by biodegradation, the listed hazardous waste K001, and, as such, the spray irrigation field is a hazardous waste management unit subject to regulation under those applicable parts of the Mississippi Hazardous Waste Management Regulations (MHWMR).

Part 270 of the Mississippi Hazardous Waste Management Regulations requires that all hazardous waste management units be included in Part A of the facility's permit application.

4.

Respondent has not included the spray irrigation field in Part A of its permit application.

5.

Land Ban Restrictions (40 CFR Part 268; MHWMR Part 268) for the first third scheduled wastes, which include the listed hazardous waste K001, have been proposed and are scheduled to become effective on August 8, 1988. If the Land Ban Restrictions are promulgated as proposed and if a national capacity variance is not granted for K001 wastes, then the land disposal of K001 wastes will be prohibited after August 8, 1988 without pretreatment by incineration or equivalent technology to specific standards.

6.

Premises considered, the Executive Director finds that Respondent is in apparent violation of Part 270 of the Mississippi Hazardous Waste Management Regulations and must submit an updated Part A application which includes the spray irrigation field and a complete Part B post-closure permit application for the spray irrigation field.

IT IS, THEREFORE, ORDERED that the Respondent, shall comply with the following schedule:

1. On or before August 7, 1988, Respondent must submit an updated Part A application which includes the spray irrigation field.

2. If proposed Land Ban Restrictions for the first third scheduled wastes are promulgated as regulations and a national capacity variance is not granted for the listed hazardous waste K001, then Respondent must cease operation of Respondent's surface impoundment and spray irrigation field on or before August 8, 1988. If a national capacity variance is granted for the listed hazardous waste K001 then Respondent must cease operation of the spray

irrigation field and surface impoundment on or before November 8, 1988.

3. On or before November 8, 1988, Respondent must submit a complete Part B application for a post-closure permit for the spray irrigation field.

IT IS FURTHER ORDERED AND ADJUDGED that Respondent, if aggrieved by this Order, shall file a sworn petition with this Commission in a timely manner as provided by Section 49-17-41, Mississippi Code Annotated (1972), in which Respondent shall set forth the grounds and reasons for said complaint and shall ask for a hearing thereon.

SO ORDERED, this the 26th day of July, 1988, by the Executive Director of the Mississippi Department of Natural Resources.

MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES

BY: J. Y. Palmer, Jr.
J. Y. PALMER, JR.
EXECUTIVE DIRECTOR

EXHIBIT "B"

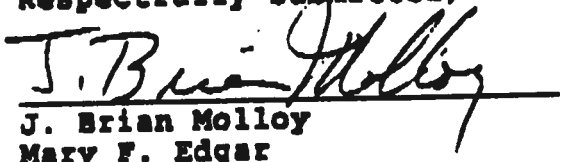
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHEMICAL WASTE MANAGEMENT, INC., Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No.

PETITION FOR REVIEW

Chemical Waste Management, Inc. hereby petitions this Court, pursuant to section 7006 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6976, and Rule 15 of the Federal Rules of Appellate Procedure, for review of the final rule promulgated by the United States Environmental Protection Agency ("EPA") entitled "Land Disposal Restrictions for First Third Scheduled Wastes." These regulations were signed by the EPA Administrator on August 8, 1988.

Respectfully submitted,



J. Brian Molloy
Mary F. Edgar
James P. Rathvon
Douglas H. Green
PIPER & MARBURY
1200 19th Street, N.W.
Suite 800
Washington, D.C. 20036
(202)861-3900

Attorneys for Petitioner

Of Counsel:

Joan Z. Bernstein
Roger C. Zehntner
Philip L. Comella
CHEMICAL WASTE MANAGEMENT, INC.
3003 Butterfield Road
Oak Brook, Illinois 60521
(312)218-1500

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1581 **September Term, 1987**

Chemical Waste Management, Inc.,

Petitioner

v.

United States Environmental Protection Agency,

Respondent

BEFORE: Buckley and Santelle, Circuit Judges

O R D E R

Upon consideration of petitioner's motion for stay pending review, it is

ORDERED on the court's own motion that respondent's order under review in this action be stayed pending further order of the court. This stay will give the court sufficient opportunity to consider petitioner's motion for stay pending appeal. See D.C. Circuit Handbook of Practice and Internal Procedures 39 (1987). It is

FURTHER ORDERED that respondent file a response to the motion for stay by 4:00 p.m., Friday, August 12, 1988, and petitioner file its reply, if any, by 4:00 p.m., Monday, August 15, 1988. The parties are directed to hand deliver and hand serve their pleadings.

Per Curiam

CERTIFICATE OF SERVICE

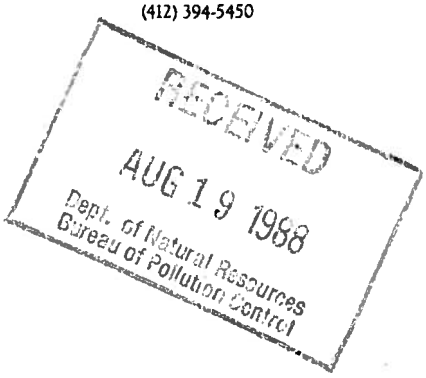
I hereby certify that a true and correct copy of the foregoing Sworn Petition Requesting A Hearing was served by first class U.S. Mail, postage prepaid, this 16th day of August, 1988, upon J. I. Palmer, Jr., Executive Director, Mississippi Department of Natural Resources, Bureau of Pollution Control, P.O. Box 10385, Jackson, Mississippi 39209.

BABST, CALLAND, CLEMENTS & ZOMNIR, P.C.

By: Dean J. Calland

BABST
CALLAND
CLEMENTS
AND
ZOMNIR
A PROFESSIONAL CORPORATION

DONALD C. BLUEDORN II
Attorney At Law
(412) 394-5450



August 16, 1988

VIA FEDERAL EXPRESS

Mr. Jolly McCarty
Chairman
Mississippi Commission on Natural Resources
Southport Center
Corner of Highway 80 and Ellis Avenue
Jackson, Mississippi 39209

Re: Mississippi Department of Natural Resources
v. Koppers Company, Inc., MS0007027543
Order No. 1440 88

Dear Mr. McCarty:

Enclosed for filing please find the original and seven true and correct copies of Koppers Company, Inc.'s Sworn Petition Requesting a Hearing for the above-referenced Order.

Sincerely,

Donald C. Bluedorn II

DCB/swd
Enclosures

cc: James I. Palmer, Esquire
Mr. David Bockleman

Two Gateway Center, Eighth Floor
Pittsburgh, Pennsylvania 15222
412 / 394-5400

BEFORE THE MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES BUREAU OF POLLUTION CONTROL

IN THE MATTER OF	:	
MISSISSIPPI DEPARTMENT OF NATURAL RESOURCES,	:	
Complainant,	:	
v.	:	ORDER NO. 1440 88
KOPPERS COMPANY, INC., MS0007027543	:	
Respondent.	:	

SWORN PETITION REQUESTING A HEARING

Dean A. Calland, Esquire
Donald C. Bluedorn II, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel for Respondent,
Koppers Company, Inc.

BEFORE THE MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES BUREAU OF POLLUTION CONTROL

IN THE MATTER OF	:	
MISSISSIPPI DEPARTMENT OF NATURAL RESOURCES,	:	
Complainant,	:	
v.	:	ORDER NO. 1440 88
KOPPERS COMPANY, INC., MS0007027543	:	
Respondent.	:	

SWORN PETITION REQUESTING A HEARING

Koppers Company, Inc. ("Koppers"), by and through its undersigned attorneys Babst, Calland, Clements & Zomnir, P.C., hereby files this Sworn Petition Requesting A Hearing pursuant to Section 49-17-41 of the Mississippi Code Annotated (1972), and in support thereof states as follows:

1. Koppers owns and operates a wood preserving plant located in Grenada County, Mississippi. The wood preserving process involves the impregnation of wood with chemicals designed to protect it from the damaging effects of the elements and from attack by insects and microorganisms.

2. One of the wastestreams generated by wood preserving plants is "process wastewater" containing dissolved and suspended materials and constituents of creosote and/or pentachlorophenol in low concentrations. In most such plants, the final step of the wood treating process is the separation and recovery of wood treating solution from the process wastewater. The process wastewater is introduced into oil/water separators for initial screening, then through wastewater basins for final settling. As the process wastewater flows through the wastewater basin, suspended solids and bacteria settle on the bottom of the basin to form a layer of "bottom sediment sludge."

3. This bottom sediment sludge has been designated as the industry-specific hazardous waste K001 by the United States Environmental Protection Agency ("U.S. EPA") pursuant to the federal Resource Conservation and Recovery Act ("RCRA"). 40 C.F.R. § 261.32. The U.S. EPA considered listing the process wastewater as a hazardous waste, but decided not to do so because there is insufficient data to justify the listing. 45 Fed. Reg. 33084 (1980); 45 Fed. Reg. 74884, 74888 (1980). Thus, the bottom sediment sludge would be subject to the provisions of Sections 17-17-1 et seq. of the Mississippi Code Annotated (1972), but the process wastewater would not.

4. In the past, Koppers operated a process wastewater treatment system such as the one described above. After the process wastewater had passed through the oil/water separator and the wastewater basin, the treated nonhazardous water was then discharged onto a spray irrigation field for final disposition. No K001 or other RCRA hazardous waste was ever discharged onto the spray irrigation field. Indeed, it was a design impossibility for the K001 to ever reach the discharge point to the spray irrigation field.

5. On July 18, 1988, Koppers ceased operation of the wastewater basin and spray irrigation field. By July 29, 1988, all K001 had been removed from the wastewater basin and has been disposed of in accordance with all applicable laws, rules, and regulations. A closure plan has been submitted for the wastewater basin and the unit will be closed in accordance with the approved plan. Present plan has not been approved.

6. By cover letter dated July 29, 1988 and addressed to Keystone Environmental Resources, Inc., a subsidiary of Koppers, the Mississippi Department of Natural Resources Bureau of Pollution Control ("Bureau") issued to Koppers Administrative Order No. 1440 88 ("Order"), a true and correct copy of which is attached hereto as "Exhibit A." The Order and cover letter were received by Keystone Environmental Resources, Inc. on August 3, 1988.

7. The Order states that the spray irrigation field "treats . . . the listed hazardous waste K001" and is therefore subject to regulation as a hazardous waste management unit. The Order further requires Koppers to submit an updated Part A permit application for the spray irrigation field by August 7, 1988; to cease operation of the wastewater basin (surface impoundment) and spray irrigation field on or before August 8, 1988, unless a national variance to the "Land Ban Restrictions" is issued for K001; and, to submit a "Part B permit application for a post-closure permit" for the spray irrigation field on or before November 8, 1988.

8. At the time the Order was issued to Koppers, the spray irrigation field and wastewater basin had been completely removed from service. Moreover, the spray irrigation field had never been used to treat, store, or dispose of K001, or any other RCRA hazardous waste, and therefore was not a "hazardous waste management unit." Accordingly, the Order is improper and unlawful in several respects, including but not limited to the following:

a. Requirements 1 and 3 of the Order are improper and unlawful because the spray irrigation field does not require, and never has required, a RCRA hazardous waste permit;

b. Requirement 2 of the Order is improper and unlawful because the "Land Ban Restrictions" are not applicable to either the spray irrigation field or the wastewater basin. RCRA §§ 3004(d) & (k), 42 U.S.C.A. §§ 6924(d) & (k)(West Supp. 1988).

9. Requirement 2 of the Order is improper and unlawful because the "Land Ban Restrictions" have been stayed by the United States Court of Appeals for the District of Columbia Circuit. A true and correct copy of the Petition for Review challenging the restrictions and the court order staying the restrictions are attached hereto as "Exhibit B."

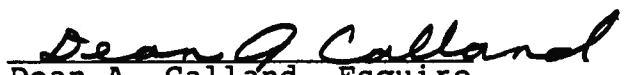
10. The "Land Ban Restrictions" upon which the Order is based were not yet promulgated at the time the Order was issued and, to date, have not been published in the Federal Register. For this reason among others, issuance of the Order deprives Koppers of its constitutional right to due process and affects an unconstitutional taking of private property.

11. The Bureau does not have the authority to issue orders requiring compliance with the "Land Ban Restrictions."

12. Operation of the spray irrigation field and wastewater basin never posed a danger to the environment or to human health, safety, or welfare. Neither the K001 bottom sediment sludge nor any other RCRA hazardous waste was ever discharged to the field. The only material discharged to the spray irrigation field was the treated nonhazardous process wastewater. The spray irrigation field and wastewater basin were operated for years with the Bureau's knowledge and tacit approval. Indeed, the Bureau acknowledged that "neither the surface impoundment nor the spray field appear to be the source of groundwater contamination at the Koppers Grenada Plant." Letter from J. Hardage to C. Markle, February 10, 1987.

WHEREFORE, Koppers respectfully requests that the Commission hold a hearing on the Order and issue a final order of determination consistent with the above discussion.

Respectfully submitted,



Dean A. Calland, Esquire
Donald C. Bluedorn II, Esquire
Babst, Calland, Clements & Zomnir, P.C.
Two Gateway Center
Pittsburgh, Pennsylvania 15222
(412) 394-5400

Counsel for Respondent,
Koppers Company, Inc.

Dated: August 16, 1988

BEFORE THE MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES BUREAU OF POLLUTION CONTROL

IN THE MATTER OF	:	
MISSISSIPPI DEPARTMENT OF NATURAL RESOURCES,	:	
Complainant,	:	
v.	:	ORDER NO. 1440 88
KOPPERS COMPANY, INC., MS0007027543	:	
Respondent.	:	

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :

COUNTY OF ALLEGHENY :

Before me, the undersigned authority, personally appeared DEAN A. CALLAND, Esquire, who, after being duly sworn by me according to law, deposed and said as follows:

1. I am a shareholder in the professional legal corporation of Babst, Calland, Clements & Zomnir, A Professional Corporation, and represent Koppers Company, Inc. in the above-captioned matter.

2. The facts contained in the foregoing Sworn Petition Requesting A Hearing are true and correct to the best of my knowledge, information, and belief and are based upon reliable sources.

3. I am providing this Verification on behalf of Koppers Company, Inc. because the individuals with personal knowledge of the facts are outside the jurisdiction or are otherwise unavailable within the time allowed for filing the Petition.

Dean A Calland
DEAN A. CALLAND

Sworn to and subscribed
before me this 16th day
of August, 1988.

Christine A Orlin
Notary Public

My Commission Expires: 3-6-89

EXHIBIT "A"

MISSISSIPPI DEPARTMENT OF NATURAL RESOURCES
Bureau of Pollution Control
P. O. Box 10385
Jackson, Mississippi 39209
(601) 961-5171

July 29, 1988

CERTIFIED MAIL NO. P 125 261 162

Mr. Robert J. Anderson
Keystone Environmental
Resources, Inc.
436 Seventh Ave., Suite 1940
Pittsburgh, Pennsylvania 15219

Dear Mr. Anderson:

Enclosed is Administrative Order No. 1440-88, which has been issued by the Mississippi Department of Natural Resources as a result of certain environmental problems regarding Koppers Company, Inc., Tie Plant, Mississippi. Your cooperation in carrying out the provisions of this order is encouraged.

As you know, appeals can be taken in accordance with State law.

If you have any questions in this matter, please contact Mr. Dave Bockelmann at telephone #601/961-5171.

Sincerely,

Charles H. Chisolm
Bureau Director

CHC:mh

Enclosure

BEFORE THE MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES
BUREAU OF POLLUTION CONTROL

IN THE MATTER OF:

MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES

COMPLAINANT

VS. ORDER NO. 1440 88

KOPPERS COMPANY, INC.
MS0007027543

RESPONDENT

ADMINISTRATIVE ORDER

Under the authority of Section 49-2-13, Mississippi Code of 1972, the above styled cause came on this date for consideration and the Executive Director, having heard and considered the same, finds as follows:

1.

The Respondent, Koppers Company, Inc., located in Tie Plant, Grenada County, Mississippi, owns and operates a wood preserving plant which generates and subsequently manages hazardous waste, and, as such, is subject to the provisions of laws of this State governing the treatment, storage, and disposal of hazardous waste, the same appearing as Section 17-17-1, et. seq., and the rules and regulations of the Mississippi Commission on Natural Resources.

2.

Respondent operates a spray irrigation field at its Tie Plant facility which contains and treats, by biodegradation, the listed hazardous waste K001, and, as such, the spray irrigation field is a hazardous waste management unit subject to regulation under those applicable parts of the Mississippi Hazardous Waste Management Regulations (MHWMR).

Part 270 of the Mississippi Hazardous Waste Management Regulations requires that all hazardous waste management units be included in Part A of the facility's permit application.

4.

Respondent has not included the spray irrigation field in Part A of its permit application.

5.

Land Ban Restrictions (40 CFR Part 268; MHWMR Part 268) for the first third scheduled wastes, which include the listed hazardous waste K001, have been proposed and are scheduled to become effective on August 8, 1988. If the Land Ban Restrictions are promulgated as proposed and if a national capacity variance is not granted for K001 wastes, then the land disposal of K001 wastes will be prohibited after August 8, 1988 without pretreatment by incineration or equivalent technology to specific standards.

6.

Premises considered, the Executive Director finds that Respondent is in apparent violation of Part 270 of the Mississippi Hazardous Waste Management Regulations and must submit an updated Part A application which includes the spray irrigation field and a complete Part B post-closure permit application for the spray irrigation field.

IT IS, THEREFORE, ORDERED that the Respondent, shall comply with the following schedule:

1. On or before August 7, 1988, Respondent must submit an updated Part A application which includes the spray irrigation field.

2. If proposed Land Ban Restrictions for the first third scheduled wastes are promulgated as regulations and a national capacity variance is not granted for the listed hazardous waste K001, then Respondent must cease operation of Respondent's surface impoundment and spray irrigation field on or before August 8, 1988. If a national capacity variance is granted for the listed hazardous waste K001 then Respondent must cease operation of the spray

irrigation field and surface impoundment on or before November 8, 1988.

3. On or before November 8, 1988, Respondent must submit a complete Part B application for a post-closure permit for the spray irrigation field.

IT IS FURTHER ORDERED AND ADJUDGED that Respondent, if aggrieved by this Order, shall file a sworn petition with this Commission in a timely manner as provided by Section 49-17-41, Mississippi Code Annotated (1972), in which Respondent shall set forth the grounds and reasons for said complaint and shall ask for a hearing thereon.

SO ORDERED, this the 26th day of July, 1988, by the Executive Director of the Mississippi Department of Natural Resources.

MISSISSIPPI DEPARTMENT OF
NATURAL RESOURCES

BY: J. I. Palmer, Jr.
J. I. PALMER, JR.
EXECUTIVE DIRECTOR

EXHIBIT "B"

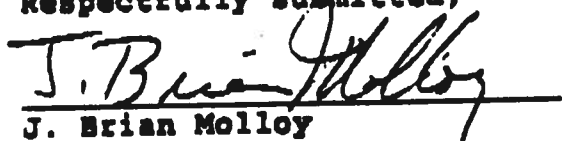
IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHEMICAL WASTE MANAGEMENT, INC., Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.	No.

PETITION FOR REVIEW

Chemical Waste Management, Inc. hereby petitions this Court, pursuant to section 7006 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6976, and Rule 15 of the Federal Rules of Appellate Procedure, for review of the final rule promulgated by the United States Environmental Protection Agency ("EPA") entitled "Land Disposal Restrictions for First Third Scheduled Wastes." These regulations were signed by the EPA Administrator on August 8, 1988.

Respectfully submitted,



J. Brian Molloy
Mary F. Edgar
James P. Rathvon
Douglas H. Green
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1200 19th Street, N.W.
Suite 800
Washington, D.C. 20036
(202)861-3900

Attorneys for Petitioner

Of Counsel:

Joan Z. Bernstein
Roger C. Zehntner
Philip L. Comella
CHEMICAL WASTE MANAGEMENT, INC.
3003 Butterfield Road
Oak Brook, Illinois 60521
(312)218-1500

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1581 September Term, 1987

Chemical Waste Management, Inc.,

Petitioner

v.

United States Environmental Protection Agency,

Respondent

BEFORE: Buckley and Sentelle, Circuit Judges

ORDER

Upon consideration of petitioner's motion for stay pending review, it is

ORDERED on the court's own motion that respondent's order under review in this action be stayed pending further order of the court. This stay will give the court sufficient opportunity to consider petitioner's motion for stay pending appeal. See D.C. Circuit Handbook of Practice and Internal Procedures 39 (1987). It is

FURTHER ORDERED that respondent file a response to the motion for stay by 4:00 p.m., Friday, August 12, 1988, and petitioner file its reply, if any, by 4:00 p.m., Monday, August 15, 1988. The parties are directed to hand deliver and hand serve their pleadings.

Per Curiam

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Sworn Petition Requesting A Hearing was served by first class U.S. Mail, postage prepaid, this 16th day of August, 1988, upon J. I. Palmer, Jr., Executive Director, Mississippi Department of Natural Resources, Bureau of Pollution Control, P.O. Box 10385, Jackson, Mississippi 39209.

BABST, CALLAND, CLEMENTS & ZOMNIR, P.C.

By: Dean J. Calland

BOARD OF NATURAL RESOURCES

STATE OF GEORGIA

IN RE:	:	Record Nos.
	:	
FEDERAL PACIFIC ELECTRIC COMPANY	:	DNR-EPD-HW-AH 4-86
	:	DNR-EPD-HW-AH 5-86

FINAL DECISION

I. Introduction

These two hazardous waste matters came on for hearing on October 21 through 24 and November 12 through 14, 1986, as a result of (1) The Federal Pacific Electric Company's ("Federal Pacific") appeal of an administrative order ("Order No. EPD-HW-269") issued to Federal Pacific by the Director of the Environmental Protection Division ("EPD") of the Georgia Department of Natural Resources (the "Director") on April 29, 1986 and (2) a petition seeking a $51,500 civil penalty against Federal Pacific filed by the Director on June 30, 1986. Because the two matters involved the same electroplating wastewater management operation at Federal Pacific's Vidalia, Georgia, plant and similar operative facts and legal issues, they were consolidated for hearing.

The Amended Prehearing Order entered on September 9, 1986, limited the issues to be heard and contained a number of agreed upon facts. In the principal issue, the Director asserts in both matters that Federal Pacific generated, treated,

and stored or disposed of a listed hazardous waste, F006, in two spray irrigation areas, or sprayfields, without complying with numerous provisions of the Georgia Hazardous Waste Management Act (O.C.G.A. T. 12, Ch. 8, Art. 3 - the "Act") and the regulations adopted thereunder by the Georgia Board of Natural Resources (Rules of the Georgia Department of Natural Resources Ch. 391-3-11 -- the "Rules").[1/] In addition, the Director asserts that the placement of certain monitoring wells for two surface impoundments at the plant fails to meet regulatory requirements and that Federal Pacific's alleged violations concerning the sprayfields and the monitoring wells and Federal Pacific's admitted failure to obtain certain required insurance coverages warrants the imposition of a substantial civil penalty. Federal Pacific responds by denying the Director's allegations as to the sprayfields and monitoring wells and asserting that the Director is estopped or precluded from seeking any civil penalty as to the monitoring wells or absence of insurance.

Having considered the provisions of the Amended Prehearing Order, the materials presented at the evidentiary hearing, and the arguments of counsel, Order No. EPD-HW-269 is **AFFIRMED** and a civil penalty of $27,500 is imposed.

II. The Nature of this Case

This is a de novo review of the Director's determination to issue Order No. EPD-HW-269 and an original determination as to any civil penalty and this Final Decision is based solely upon the evidence produced at the evidentiary hearing and the facts agreed upon in the Amended Prehearing Order. Rule 391-1-2-.22(1). The Director has the burdens of going forward and persuasion on all issues in both matters except as to the factual allegations upon which Federal Pacific's affirmative defenses depend. Rule 391-1-2-.07. The standard of proof on all issues is a preponderance of the evidence. Rule 391-1-2-.22(4).

III. Summary Discussion

A. The Sprayfields. From mid-1977 until March 1, 1986, wastewater from an electroplating operation at Federal Pacific's Vidalia plant was managed by adding a flocculant, running it through two successive surface impoundments, and pumping liquid from the second impoundment to the sprayfields. The parties agree that a listed hazardous waste enumerated in the Rules as F006, "wastewater treatment sludges from electroplating operations"[2/] was generated and is currently stored in the two surface impoundments; the issue is whether F006

was (1) sprayed onto or (2) generated in the sprayfields. The preponderance of the evidence presented indicates both these activities occurred.

The generation of F006 requires the treatment of electroplating wastewater since the listing is limited to sludges.[3] In the instant case, the wastewater is first treated by mixing it in batch treatment tanks with a flocculant to encourage the aggregation of particles in the wastewater. The wastewater is then moved to the surface impoundments where it is treated via a settling process by which some, but not all, of these aggregated particles settle out over time to the bottom of the impoundments. Both the flocculation and the settling processes constitute treatment[4] as that term is used in the Rules.

Subsequent to the wastewater's treatment by flocculation and during its treatment by settling, liquid from the second or lower pond is pumped to and sprayed upon the sprayfields. This liquid is itself F006 since it is the product of the treatment of electroplating wastewater but is not the treated effluent from Federal Pacific's wastewater treatment plant. Alternatively, under a more restricted view of F006, this liquid both contains the listed hazardous waste F006 -- the aggregated particles which have not settled to the bottom of the impoundments -- and is itself a hazardous waste since it is a solid waste mixed with F006, a listed hazardous waste.[5]

Moreover, the liquid moving from the impoundments to the sprayfields is electroplating wastewater which is subject to treatment[6/] by microbial degradation and assimilation in the soil of the sprayfields themselves. The product of this treatment is F006 and the physical evidence indicates that this listed hazardous waste, either as a result of its transport to or generation in the sprayfields or both, was and is present in the sprayfields.

The conclusion reached herein that the sprayfields contain hazardous waste is not an obvious one as is evidenced by EPD's own delay in reaching this conclusion. It is and was, however, Federal Pacific's responsibility to insure its compliance with the Act and the Rules and Federal Pacific's access to and familiarly with its facility is much greater than EPD's. Federal Pacific has placed a listed hazardous waste into the environment without complying with the multitude of requirements that govern such placement and provide protection for society. It is not unreasonable to impose a substantial civil penalty for Federal Pacific's failure to recognize what it was doing and its failure to comply with the law.

B. The Monitoring Wells. Since the surface impoundments are used to manage F006, Federal Pacific is required to install three hydraulically downgradient monitoring wells at the limit

of this waste management area.[7] Although Federal Pacific has in place two such wells, it has twice failed, with an EPD employee's assistance, to place properly a third well. Federal Pacific now proposes to make another attempt at proper placement but, twice burned, seeks written approval from EPD before drilling another well.

The responsibility for proper placement of the monitoring wells is Federal Pacific's, not EPD's, and an EPD employee's erroneous past advice does not relieve Federal Pacific of its obligation to have in place a third complying well. Nor is Federal Pacific entitled to any particular type or level of EPD pre-approval. However, Federal Pacific reasonably relied upon EPD's assistance in the placement of the two existing non-complying wells and the imposition of more than a nominal civil penalty in such a case would be unreasonable.

C. Liability Insurance. Independent of the status of the sprayfields, Federal Pacific is required to maintain specified levels of sudden and nonsudden liability insurance for this facility since the surface impoundments contain F006.[8] While Federal Pacific once had the required coverages, they were cancelled by the carrier on January 7, 1986, and have not been replaced.

The insurance required has become very difficult for hazardous waste facilities to obtain and Federal Pacific has made a substantial effort to obtain replacement coverage. Federal Pacific has not done all it can do to obtain such insurance, however, and part of the problem in obtaining the insurance, the risk created by the nature of the facility and its regulatory history, cannot be used by Federal Pacific to shield it from the insurance requirement or civil penalties for failing to meet the requirement. While the insurance may be very difficult or expensive to obtain, the difficulty and expense may be a good indicator of the need.

IV. Findings of Fact

A. The Sprayfields.

1.

Federal Pacific conducted electroplating operations at its Vidalia, Georgia plant from the Fall of 1966 through March 1, 1986.

2.

Federal Pacific's electroplating processes at the plant resulted in the generation of wastewater.

3.

From 1966 until mid-1977, the effluent resulting from the treatment of this wastewater was discharged to surface waters pursuant to National Pollution Discharge Elimination System ("NPDES") Permit No. GA0002186 issued by the Director under authority of the federal Clean Water Act (33 U.S.C. § 1251, et seq.)

4.

The treatment process for the wastewater has at all relevant times included two successive surface impoundments to and through which the wastewater was directed.

5.

From mid-1977 until the present, liquid from the second or lower impoundment has been managed by pumping it to the sprayfields at the plant. This process is known as spray irrigation or land application.

6.

In 1976, EPD proposed to renew the NPDES Permit for the plant with new limits which were stricter than presently applicable federal categorical discharge standards. The stricter limitations were based upon the inability of Little Rock Creek to assimilate the volume of the discharge with the constituent concentrations presented by operations at the plant.

7.

During the permit renewal period in 1976-1977, EPD suggested as an alternative to Federal Pacific that it explore use of spray irrigation as opposed to discharging effluent from the Vidalia plant to surface waters. Of the three choices potentially available to Federal Pacific at that time -- spray irrigation, upgrading its treatment facilities to meet the new NPDES permit standards, and discharge to the City of Vidalia's wastewater treatment plant -- spray irrigation was the most economically feasible choice.

8.

As a result of the treatment of wastewaters from the facility's electroplating processes, F006, a listed hazardous waste, has been generated and has been, and is now, stored in the two surface impoundments.

9.

Federal Pacific did not include the sprayfields in its Part A or Part B Hazardous Waste Management Permit Applications for the facility and has not attempted to comply with many of the statutes or rules relating to hazardous waste treatment, storage and disposal with respect to the sprayfields.

10.

Federal Pacific has included a hazardous waste drum storage area and two surface impoundments in its Part A Hazardous Waste Permit Application for the plant and has

included the two surface impoundments in its Part B Hazardous Waste Management Permit Application.

11.

Federal Pacific operates the sprayfields under a letter permit issued to the Company by EPD's Industrial Wastewater Program in April of 1979. Federal Pacific applied for renewal of the letter permit in December of 1983 and the Director has taken no action on that application due to the ongoing dispute over the sprayfields' status as hazardous waste facilities.

12.

Federal Pacific operated the entire plant at Vidalia until June 30, 1986. Effective July 1, 1986, operation of the manufacturing portion of the facility was transferred to Challenger Electric Equipment Corporation. Federal Pacific continues to be the operator of the surface impoundments, a drum storage area, and the sprayfields.

13.

Federal Pacific utilized cyanide in its electroplating operations at the facility until July 10, 1984, when use of that material was discontinued. Federal Pacific ceased electroplating operations entirely at the facility effective March 1, 1986. Wastewater from other industrial operations and the treated effluent of a domestic wastewater plant continue to flow into the surface impoundments.

14.

The total estimated quantity of F006 sludge reported by Federal Pacific to be present in the impoundments at the facility as of December 31, 1985, was 2504.25 tons. Presumably, even more is present now.

15.

The capacity of the two surface impoundments is 1.25 million gallons each.

16.

The surface impoundments at the facility are constructed totally or almost totally of earthen materials.

17.

Spray irrigation schedules provided by Federal Pacific show weekly application rates for liquid at the sprayfields during 1981, 1982 and 1983 ranging from approximately 150,000 to 207,000 gallons per week. The sprayfield spraying schedule was and is designed to promote treatment, avoid runoff, and minimize contamination of the groundwater.

18.

Facilities at the plant which treated the electroplating wastewater stream included batch pretreatment or flocculation tanks, the two surface impoundments, and the sprayfields.

19.

The electroplating wastewater was treated in the batch pretreatment or flocculation tanks by mixing the wastewater with a flocculant to encourage the aggregation of particles in the wastewater. The purpose of the aggregation was to create larger, heavier particles that would settle out of the wastewater in later treatment.

20.

After the addition of the flocculant, the wastewater was moved from the batch treatment tanks to the first or upper surface impoundment. The wastewater was treated in this impoundment by its retention for a period of time to allow some of the particles in the wastewater to settle to the bottom of the impoundment.

21.

The wastewater was then moved to the second or lower surface impound where further treatment by settling occurred. The total time wastewater typically remained in both impoundments was in the area of 10 to 30 days.

22.

The settling process in both impoundments did not remove all of the aggregated particles in the wastewater.

23.

The liquid from the second impoundment, which almost certainly contains within it a portion of the aggregated particles created by the flocculation process, was then pumped onto the sprayfields.

24.

Once in the sprayfields, the liquid from the second impoundment and the solid particles within it underwent further treatment including microbial degradation, chemical complexing of metals, and removal of metals by soil particles.

25.

Unlike discharging wastewater or effluent into a moving body of water which may dilute the concentrations of any hazardous constituents, land treatment like that which occurred in the sprayfields may increase the concentrations of such constituents in the soil.

26.

The accumulation of metals in the sprayfield soil has occurred and the occurrence of F006 constituents, specifically nickel, in the soil matrix in levels in excess of background indicates that treatment of the electroplating wastewater has occurred in the sprayfields or F006 has been sprayed upon them or likely both.

27.

The results of the spraying of the aggregated particles on the sprayfields and from further treatment of these particles and the liquid from the pond in the sprayfields cannot be visualized at the sprayfields because they are spread over a large horizontal area of several acres and spread vertically through the depth of the sprayfield soil and because the ground is covered with porous litter and other biodegradable material.

28.

While the process that removes the liquid from the second pond to the sprayfields could theoretically cause scouring and the removal to the sprayfields of the material which has settled on the bottom of the surface impoundments, there is no evidence to indicate it is likely that such scouring has occurred.

29.

No evidence was presented to indicate that any of the wastewater or sludge or other materials involved in the treatment process at Federal Pacific's plant is hazardous by characteristic.

30.

At times, the effluent pumped from the lower pond to the sprayfields has approached drinking water standards and more than met EPA NPDES standards for discharge to a publically-owned treatment works.[9/]

31.

The fact that Federal Pacific stopped pumping electroplating wastewater to the surface impoundments on March 1, 1986, does not mean that the treatment of such wastewater previously placed in the impoundments stopped on that date or that wastewater from electroplating stopped being sprayed upon or treated in the sprayfields on that date. In fact, with impoundments the size of these, remnants of that wastewater may still exist and may still be subject to treatment in both the surface impoundments and the sprayfields.

32.

Groundwater samples taken at the sprayfields indicate contamination of the groundwater has occurred.

33.

Samples taken in 1983 before the use of cyanide was terminated at the plant evidenced elevated cyanide concentrations in the unsaturated zone at the sprayfields and one of the surface impoundments.

34.

Samples taken from monitoring wells M-1, M-2, and M-3 in June and July of 1985 showed statistically significant increases in total organic halogen and total organic carbon. These increases are considered indicators of groundwater contamination under the Rules. 40 C.F.R. § 265.92(b)(3).

35.

Soil samples taken from the sprayfields on or about July 1, 1986, indicate the presence of the constituents aluminum, copper, tin and zinc in levels in excess of levels indicated by samples taken from outside the sprayfield areas. These four constituents are now and have been present to some extent in the liquid in the surface impoundments which is applied to the sprayfields.

B. The Monitoring Wells.

36.

Monitoring wells M-3 and M-10 of the facility are not placed at the downgradient limit of the surface impoundment waste management area. Wells M-1 and M-2 are placed at the downgradient limit but are the only ones so placed.

37.

On or about April 11, 1984, Federal Pacific informed EPD of the proposed location of monitoring well M-3. No immediate objection to the proposed location was forthcoming from EPD and monitoring wells M-1, M-2, and M-3 were then installed.

38.

In January of 1985 during a visit from Mr. Tom Watson of EPD's hazardous waste program, Federal Pacific was notified there might be a problem with M-3's location although Mr. Watson indicated to Federal Pacific his belief it was properly located after physically viewing the site of the well.

39.

On May 28, 1985, the Director designated Mr. Watson as the individual within EPD with whom Federal Pacific was to coordinate the location of certain monitoring wells for the sprayfields. Mr. Watson was and is the only registered professional geologist on the EPD hazardous waste program manager's staff. There are other such geologists in EPD.

40.

On July 26, 1985, Federal Pacific was formally notified by Administrative Order No. EPD-HW-232 of the Director's determination that M-3 was improperly located.

41.

Federal Pacific notified EPD by letter to the Director dated August 27, 1985, of the installation of an additional groundwater monitoring well, M-10, in response to Administrative Order No. EPD-HW-232. Monitoring well M-10 was intended by Federal Pacific to be a replacement for well M-3.

42.

Mr. Watson was informed by Federal Pacific of the proposed location of M-10 on or about August 16, 1985, and Mr. Watson indicated to Federal Pacific that he believed the location to be reasonable.

43.

Federal Pacific sampled M-10 on August 29, 1985, and so informed the Director by letter dated September 10, 1985.

44.

Federal Pacific provided the analytical results and a report of the installation of M-10 to the Director by letter dated November 15, 1985.

45.

EPD acquiesced in the location of M-10 for over six months before informing Federal Pacific that EPD believed the well was improperly located. During this time EPD corresponded with Federal Pacific regarding other technical aspects of the installation of M-10.

46.

In May of 1986, Federal Pacific proposed a replacement for M-10 on the condition that EPD provide written concurrence with the well's location before the well is installed.

47.

While placement of a third monitoring well at the limit of the downgradient boundary of the surface impoundment waste management area, i.e., at the toe of the dyke of the lower pond, may present some logistical problems, such placement is required and the evidence presented does not indicate it is technically impossible.

48.

Federal Pacific's reliance upon Mr. Watson's concurrence with the location of wells M-3 and M-10 is understandable. However, the responsibility for compliance lies solely with Federal Pacific and the consultant utilized by Federal Pacific for well placement was aware of this responsibility.

C. Insurance.

49.

Federal Pacific's insurance coverage for sudden and nonsudden accidental occurrences, which covered the surface impoundments but not the sprayfields, expired at 12:01 a.m. on January 7, 1986. No replacement insurance coverage has been obtained.

50.

Although this type of insurance coverage has been difficult for hazardous waste facilities to obtain since late 1984 or early 1985, such coverage might be offered by insurers as part of an overall insurance package. Federal Pacific made no effort to move all of its other insurance coverages to a single insurer in order to obtain such accommodation coverage.

51.

An environmental risk assessment report prepared by TRC Environmental concerning the Vidalia facility was a factor which led at least one underwriter of environmental liability insurance to decline to cover the facility. The portions of the report cited by the underwriter in declining coverage included information on past administrative problems regarding hazardous waste regulations at the facility as well as the use of unlined impoundments to hold hazardous wastes.

52.

On December 26, 1985, Federal Pacific filed a petition for a variance from the sudden and nonsudden accidental occurrence financial responsibility requirement as applied to a drum storage area and two surface impoundments. The petition was received by the EPD on December 30, 1985.

53.

Federal Pacific has made, and continues to make, good faith efforts to obtain replacement insurance on a stand-alone basis (as opposed to accommodation coverage). These efforts began several months in advance of the termination of its coverage in early 1986 and included applications to all markets for such insurance reasonably known to Federal Pacific and its broker.

54.

While the Director provided evidence that there are at least five hazardous waste facilities in Georgia which have obtained insurance of the type Federal Pacific needs, no evidence was presented to indicate these five operations are comparable from an insurability aspect to the Federal Pacific plant at Vidalia.

55.

Federal Pacific has in place financial assurance for closure of the surface impoundments and drum storage area.

56.

Federal Pacific submitted an Interim Status Closure Plan for the surface impoundments shortly after its insurance lapsed. The Director has not yet provided a written response to the plan although its proposal to empty the impoundments by pumping the liquid to the sprayfields makes it an unlikely candidate for approval in light of the determinations included in this Final Decision.

D. Civil Penalties.

57.

Three enforcement orders have been issued prior to Order No. EPD-HW-269 with regard to this facility:

a) Final Order No. 84-07-R, entered into between Federal Pacific and EPA, dated May 30, 1984;

b) Consent Order No. EPD-HW-106, entered into between Federal Pacific and the Director, dated May 31, 1984; and

c) Administrative Order No. EPD-HW-232, issued by the Director, dated July 26, 1985.

58.

Federal Pacific paid civil penalties by consent with the filing of two of the orders as follows:

a) Consent Order No. EPD-HW-106, dated May 30, 1984 - $2,000.00; and

b) Final Order No. 84-07-R - $4,000.00.

While the entry of these orders and the payment of civil penalties thereto were made without admission or adjudication of the violations cited in the orders, their entry provided Federal Pacific with more than adequate notice of the need to comply with the Act and the Rules.

59.

Federal Pacific was late in submitting its Hazardous Waste Annual Report for 1983 (due on or before March 1, 1984) to EPD. It was received by EPD on March 29, 1984, after EPD sent Federal Pacific a notice of violation.

60.

Federal Pacific failed to meet the following deadlines for compliance with financial responsibility requirements in 1982 and 1983:

a) July 6, 1982 - closure assurance and post-closure care assurance;

b) July 15, 1982 - liability coverage for sudden accidental occurrences; and

c) January 16, 1983 - liability coverage for nonsudden accidental occurrences.

Although Federal Pacific apparently believed at the time of these failures that it was a small quantity generator under the Rules, that belief was ill-founded and incorrect.

61.

As part of Consent Order EPD-HW-106, dated May 31, 1984, Federal Pacific agreed and was ordered to monitor the

groundwater at the sprayfields in accordance with 40 C.F.R. Part 265, Subpart F, and evaluate the resulting information. Federal Pacific was unable to comply with Subpart F monitoring requirements because it was unable to determine the direction of groundwater flow and chose to put wells in the middle of the sprayfield rather than upgradient or downgradient as required by 40 C.F.R. § 265.91 and Order No. EPD-HW-106.

62.

Federal Pacific derived economic benefits from waiting until 1984 to install regulatory complying monitoring wells which were legally required to be installed in 1981. These benefits included avoiding three years of quarterly analyses of groundwater monitoring data at a cost of about $3,000.00 per quarter. Although Federal Pacific apparently had three other monitoring wells in place during this period, amounts spent on those wells do not somehow replace the savings from not having the required wells and doing the required testing.

63.

Federal Pacific derived economic benefits from its failure to obtain and pay for the sudden and nonsudden liability insurance coverage required for the plant.

64.

Many of the constituents for which F006 is listed, including those found in the sprayfields, are highly toxic and some are suspected carcinogens. Thus, the hazard or danger

to the environment created by the use of the sprayfields for the disposal of F006 is potentially great and is enhanced by the threat of the accumulation of increasing volumes of toxic or dangerous constituents in plant, animal or human tissues as it moves up the food chain.

65.

Another danger is presented by the potential over-utilization of the sprayfields' soil matrix by contaminating the soil with excess levels of hazardous constituents which would result in the leaching of contaminants to groundwater and runoff of constituents to surface water.

66.

By not recognizing and treating the sprayfields as a hazardous waste facility and despite the presence of certain indicators of contamination, Federal Pacific has not taken the required steps to monitor the sprayfields as a hazardous waste facility. The existing monitoring system contains an insufficient number of wells and fails to monitor the unsaturated zone or properly monitor groundwater flows. Additionally, Federal Pacific has failed to collect soil water samples or do any complete organics testing such as a full Appendix VIII analysis to reveal the extent of any contamination. It is Federal Pacific's failure to do the required monitoring that makes evaluation of the risk posed by the sprayfields very difficult.

67.

The fact that the effluent sprayed upon the sprayfields may not exceed federal drinking water standards does not mean that contamination has not occurred or should be disregarded; contamination is determined by comparing upgradient background levels of contaminants to levels in the sprayfield soil and underlying groundwater after spraying has begun.

V. Conclusions of Law

1.

The appeal of Order No. EPD-HW-269 is a de novo proceeding based solely upon the competent evidence presented at the hearing. Rule 391-1-2-.22(1).

2.

The determination on the Director's petition for civil penalties requires an original decision based solely upon the competent evidence presented at the hearing in which the factors set forth in O.C.G.A. § 12-8-81(c) are to be considered.

3.

The burdens of going forward and persuasion lie with the Director on all issues in both matters except that Federal Pacific bears these burdens as to its affirmative defenses. Rule 391-1-2-.07.

4.

The standard of proof on all issues is by a preponderance of the evidence. Rule 391-1-2-.22(4).

A. The Sprayfields.

5.

"Wastewater treatment sludges from electroplating operations" is a listed hazardous waste enumerated as F006. 40 C.F.R. § 261.31.

6.

As a listed hazardous waste, any material determined to be F006 is a hazardous waste subject to regulation under the Act and the Rules unless the specific material at issue has been delisted under 40 C.F.R. §§ 260.20 and 260.22. 40 C.F.R. § 261.3(a)(2)(ii).

7.

Moreover, unlike a solid waste determined to be hazardous by characteristic, see 40 C.F.R. § 261.3(a)(2)(i) and Part 261, Subpart C, material determined to be F006 is regulated as a hazardous waste whether or not it is actually shown to be somehow dangerous to the environment. Thus, for example, the actual concentrations of the constituents for which F006 was listed in any specific material determined to be F006 is relevant to the question of whether that material is to be regulated only in the context of a delisting petition.

8.

The constituents for which F006 was listed are cadmium, hexavalent chromium, nickel, and cyanide (complexed). 40 C.F.R. Part 261, Appendix VII.

9.

"Sludge" is defined in the Rules as "any solid, semisolid, or liquid waste generated from[10/] a[n]. . .industrial wastewater treatment plant . . . exclusive of the treated effluent from a wastewater treatment plant." 40 C.F.R. § 260.10(a). This definition is considerably broader than the traditional view of sludge expressed by Federal Pacific's expert witness, Dr. Wallace,[11/] as excluding liquids and being limited to solids or semisolids that have settled on the bottom of a surface impoundment.[12/] It is likely that it is the expansion of the meaning of the term sludge in the Rules that has caused some of the delay and difficulty that both parties to this matter have experienced in recognizing the possibility that a wastewater treatment sludge, namely F006, might be sprayed onto or generated in sprayfields. The definition in the Rules is, however, explicit and clear.

10.

Although the term "treatment" is defined in the Rules only in terms of processing hazardous wastes,[13/] the addition of the flocculant in the batch pretreatment tanks, the settling process in the impoundments, and the biological and chemical processes occurring in the sprayfields all constitute treatment of the wastewater or liquid from Federal Pacific's electroplating process.

11.

Once the electroplating wastewater is changed by treatment with the addition of a flocculant in the batch treatment tanks,[14/] the resulting material, the products of that change, is F006 except that portion which can be labeled a "treatment effluent from a wastewater treatment plant." 40 C.F.R. § 260.10(a).

12.

Neither "treated effluent" nor "wastewater treatment plant"[15/] is defined in the Rules.

13.

There is no reason not to give the term wastewater treatment plant its obvious meaning, that is, those facilities at any particular industrial operation which function to treat that operation's wastewater. In this instance, the term would include at least the batch pretreatment tanks, the surface impoundments, the sprayfields, and related pumps and piping.

14.

Federal Pacific's attempt to limit the term wastewater treatment plant so as to exclude the sprayfields (and thus make the liquid leaving the impoundments the treated effluent from the wastewater treatment plant, i.e., not sludge and thus not F006) is inconsistent with the "cradle to grave" scheme for handling hazardous waste intended by the Act and

Rules, and, perhaps more importantly, with the listing concept for specified wastes, including F006, where an examination of the actual chemical make up of the waste is not required. Federal Pacific's position that the sprayfields should not be considered part of the treatment process depends upon a showing that the treatment accomplished in the impoundments was so successful as to eliminate concern about its output and the results of subsequent treatment. There is a place for such showings -- in delisting proceedings under 40 C.F.R. § 260.20 and 260.22. The F006 present at Federal Pacific has not been delisted and this is not a delisting hearing.

15.

Nor can Federal Pacific escape regulation of its sprayfields by focusing on the term treated effluent. As outlined above, trying to define this term in qualitative terms is inconsistent with the concept of the Act and the Rules and the listing concept. Moreover, were treated effluent intended to be judged by some qualitative standard, surely those standards would be provided in the Rules and the Act. Similarly, the inclusion of liquids in the definition of sludge means treated effluent cannot be judged on a percent solids basis.

16.

The impoundment effluent discharged to the sprayfield is not a treated effluent. This material undergoes significant

additional treatment in the sprayfields, and would not, without additional treatment, qualify for an NPDES discharge permit.

17.

Accordingly, as a product of the treatment of electroplating wastewater that is not the treated effluent of a wastewater treatment plant, the material entering the impoundments, in the impoundments, and leaving the impoundments to the sprayfields is F006[16/].

18.

In the instant case, considerably narrower readings of the Act and the Rules than that expressed in conclusions of law 11 through 17 above still put F006 in the sprayfields. These are expressed in conclusions of law 19 through 21 below.

19.

The aggregated particles resulting from the addition of the flocculant in the batch pretreatment tanks constitute F006 which is sprayed onto the sprayfields since not all of these particles settle to the bottom of the surface impoundments.

20.

The mixture of these aggregated particles and the liquid in the surface impoundments in which these particles are suspended is a hazardous waste under the mixture rule since the liquid is a solid waste, the particles are F006, and the mixture has not been delisted. 40 C.F.R. § 261.3(a)(2)(iv).

21.

In addition, even if the liquid being pumped to the sprayfields is neither F006 nor contains F006, that liquid is wastewater from electroplating operations which is being treated in the sprayfields with the generation of F006 as the result.

22.

The discharge from the lower impoundment to the sprayfields is not a "point source discharge subject to regulation under Section 402 of the Clean Water Act" as that phrase is used in 40 C.F.R. § 261.4(a)(2) and is not excluded from being a solid waste by that provision. The preamble provided by EPA when it promulgated 40 C.F.R. Part 261 and the statutory basis for the exclusion found at 40 C.F.R. § 261.4(a)(2) make it clear the exclusion is limited to point sources subject to NPDES permits under Section 402 so as to avoid duplicative regulation under the Act and Rules and the Clean Water Act. 45 Fed. Reg. 33084, 33098 (May 19, 1980). See 42 U.S.C. § 6903(27) ("solid waste. . .does not include solid or dissolved material in. . .industrial discharges which are point sources subject to permits under [Section 402]"). Section 402 permits are for discharges into navigable waters and not for discharges into a storage or disposal facility. 33 U.S.C. § 1342. See 45 Fed. Reg. 33084, 33098 (May 19, 1980).

23.

The sprayfields constitute hazardous waste management units for the treatment and storage or disposal[17/] of hazardous waste as defined in the Rules.[18/]

24.

As hazardous waste management units for the treatment and storage or disposal of hazardous wastes, the sprayfields are subject to a number of rules governing their operation. These rules include, but are not limited to:

a) Rule 391-3-11-.04, requiring the owner or operator of a hazardous waste storage, treatment, or disposal facility to notify EPD of such activities on specified forms;

b) O.C.G.A. § 12-8-68(a) and Rule 391-1-11-.05, which require the demonstration of financial responsibility (Rule 391-1-11-.05 incorporates 40 C.F.R. Part 264, Subpart H and Part 265, Subpart H by reference);

c) Rule 391-3-11-.10, setting forth standards for owners and operators of hazardous waste treatment, storage and disposal facilities and specifically:

(1) 40 C.F.R. § 265.13, requiring a waste analysis;

(2) 40 C.F.R. § 265.14, requiring securing of the facility;

(3) 40 C.F.R. §§ 265.31 through 265.56, dealing with preparedness and prevention and contingency plans and emergency procedures;

(4) 40 C.F.R. §§ 265.70, 265.73 through 265.75, and 265.77, dealing with manifests and other record-keeping and reporting;

(5) 40 C.F.R. §§ 265.90 through 265.94, regarding ground-water monitoring;

(6) 40 C.F.R. §§ 265.110 through 265.120, dealing with closure and post-closure care; and

(7) 40 C.F.R. §§ 265.270 through 265.282, dealing with land treatment and disposal of hazardous wastes.

25.

EPD's role in the late 1970's in Federal Pacific's decision to utilize the sprayfields in the management of its electroplating wastewater is not relevant to the legal status of the sprayfields under the Act and Rules. F006 was first listed in 1980.

B. Insurance.

26.

Federal Pacific does not have the sudden and nonsudden liability insurance required for its facility. Because the surface impoundments contain F006, this requirement is applicable independent of the status of the sprayfields. 40 C.F.R. § 265.147.

27.

While Federal Pacific has actively and in good faith sought to obtain the required insurance, it has not attempted

all feasible steps to correct this violation in that it has not explored obtaining such insurance as a matter of accommodation by a carrier providing all of Federal Pacific's insurance needs. Federal Pacific has limited its efforts to obtaining the insurance on a stand-alone basis. Moreover, a part of Federal Pacific's problem in obtaining the insurance is of its own making due to the nature of the facility and Federal Pacific's regulatory compliance history at the facility.

28.

Although certainly worthy of consideration, EPA's policy on good faith efforts to obtain the required insurance is neither directly relevant nor still in effect. Moreover, as to the civil penalties question in this State action, good faith efforts by Federal Pacific are but one of several factors to be considered under O.C.G.A. § 12-8-81(c).

29.

The force majeure clause of Consent Order No. EPD-HW-106, entered into by the parties on May 31, 1984, is not available as a defense against the assessment of a civil penalty in this proceeding for Federal Pacific's failure to have the required insurance since:

a) the failure to have the insurance is not entirely due to factors "beyond [Federal Pacific's] control"; and

b) the operative effect of the clause is limited to an attempt of the Director to enforce the agreed upon $500

per day automatic penalty imposed by the paragraph of the Consent Order of which the force majeure clause is a part. This is not such an attempt.

C. The Monitoring Wells.

30.

Since the surface impoundments constitute a waste management area, Federal Pacific is required to install three hydraulically downgradient monitoring wells "at the limit of the waste management area." 40 C.F.R. § 265.91(a)(2). This limit is the "waste boundary (perimeter)" of the surface impoundments. 40 C.F.R. § 265.91(b)(1).

31.

While Federal Pacific has two properly placed wells, M-1 and M-2, its two attempts at properly placing a third well, M-3 and M-10, have failed as neither M-3 or M-10 is at the limit of the waste management area but are instead some distance away. In the Matter of Landfill, Inc., pp. 17-18, RCRA-IV-85-62-R (Sept. 16, 1986) ("Landfill").

32.

The responsibility for properly placing the wells lies solely with Federal Pacific as the owner and operator of the surface impoundments.

33.

While Federal Pacific's reliance or deference to Mr. Watson's opinions is understandable, the expressions of opinions by an EPD employee do not constitute acts binding

upon the Director. At most, the Director authorized Mr. Watson to coordinate the placement of certain wells in the sprayfields; there is no indication the Director authorized Mr. Watson to make binding determinations as to M-3 and M-10.[19/]

34.

While the Director is authorized to determine and ensure compliance with the Act and the Rules, O.C.G.A. § 12-8-65(a)(4), it is the Board of Natural Resources which possesses sole authority to determine what monitoring is required, O.C.G.A. § 12-8-64(1)(A)(iii). The Director is not authorized to waive the Board's monitoring requirements to the detriment of Federal Pacific's neighbors nor would the Director be estopped by an erroneous determination made by him or a properly designated employee. Corey Outboard Advertising v. Board of Zoning Adjustment of the City of Atlanta, 254 Ga. 221, 224-226 (1985); In Re Wade H. Kelly, Record No. DNR-EPD-DS-AH 1-86 (Order on Motions for Summary Determination -- February 12, 1987).

D. Civil Penalties.

35.

In determining the imposition and amount of any civil penalty, several statutory factors are to be considered. They are:

"a) The amount of civil penalty necessary to ensure immediate and continued compliance and the extent to which the violator may have profited by failing or delaying to comply;

b) The character and degree of impact of the violation or failure on the natural resources of the State, especially any rare or unique natural phenomena;

c) The conduct of the person incurring the civil penalty in promptly taking all feasible steps or procedures necessary or appropriate to comply with this article or to correct the violation or failure;

d) Any prior violations of, or failures by, such person to comply with statutes, rules, regulations, orders, or permits administered, adopted, or issued by the Director;

e) The character and degree of injury to or interference with public health or safety which is caused or threatened to be caused by such violation or failure; and

f) The character and degree of injury to or interference with reasonable use of property which is caused or threatened to be caused by such violation or failure." O.C.G.A. § 12-8-81(c).

Good faith alone is not an absolute defense to a civil penalties action by the Director. It is but one factor to be considered.

36.

With regard to the failure to operate the sprayfields in compliance with all the requirements of the Act and Rules the following analysis of the statutory factors is entered:

a) Federal Pacific has profited by substantial sums by not operating these facilities in compliance with all the regulatory requirements applicable to hazardous waste facilities since 1980. These savings include the costs of groundwater monitoring, record keeping, and insurance;

b) There is no evidence of any rare or unique natural phenomena in the area and the character or degree of impact on the State's natural resources is not known with any certainty although the potential risks are significant due the constituents of F006 that are involved. It is Federal Pacific's failure to comply with the Act and Rules that is in large part responsible for the lack of specific information about the risks involved;

c) While some delay in recognizing the sprayfields are hazardous waste facilities might be understandable, Federal Pacific was notified of their status in early 1984 by EPD but has yet to remedy the violations by compliance with the Act and the Rules;

d) Federal Pacific's past regulatory history for the facility includes a number of failures to comply with deadlines and an inability to properly determine the status of the facility (e.g. claim of small quantity generator status, monitoring well locations, etc.)

e) The potential threat to public health and safety by the release of F006 into the environment is significant although, as outlined in subparagraph 36b immediately above,

the actual threat is unknown due in part to Federal Pacific's failure to comply with the Act and Rules; and

f) The character and degree of injury to or interference with use of the property is unknown again due, in part, to Federal Pacific's compliance failures.

37.

With regard to the failure to have in place the required sudden and nonsudden liability insurance for the plant, including the impoundments, the following analysis of the statutory criteria is entered:

a) Federal Pacific has profited by not having to pay for the required insurance since expiration of its policy on January 7, 1986;

b) The absence of insurance does not directly relate to any impact upon the environment although its absence could impact upon Federal Pacific's financial ability to respond to any need to correct a release to the environment;

c) While Federal Pacific has taken all feasible steps to obtain the insurance as a matter of a single line of coverage, it has not explored obtaining it as a matter of accommodation coverage. Moreover, Federal Pacific's choice of type of facility and regulatory history has impacted its ability to obtain insurance;

d) See subparagraph 36d immediately above. Moreover, by erroneously asserting small quantity generator status initially, Federal Pacific failed to obtain the required insurance until after the entry of Consent Order EPD-HW-106 in 1984;

e) See subparagraph 37b immediately above; and

f) See subparagraph 37b immediately above.

38.

With regard to the failure to have in place a third properly placed monitoring well:

a) Federal Pacific has profited substantially by not having the third well in place or performing the required testing as to that well. Amounts expended on noncomplying wells are no substitute;

b) While the absence of a properly placed monitoring well does not impact directly the State's natural resources, it increases the possibility that such an impact may go undetected or become more severe than if detected sooner by a properly placed well;

c) Federal Pacific has attempted to put in proper place a third monitoring well in good faith and in understandable reliance on an EPD employee's opinion;

d) See subparagraph 36d immediately above;

e) See subparagraph 38b immediately above; and

f) See subparagraph 38b immediately above.

39.

Based upon all the conclusions listed herein, a civil penalty in the amount of $27,500 is determined appropriate. In the event an allocation of the civil penalty among the violations found is required, the following allocation is determined appropriate.

a) Sprayfields - $25,000;

b) Insurance - $2,000; and

c) Monitoring Wells - $500.

VI. Conclusion

Based upon the evidence presented and the above discussion, findings of fact, and conclusions of law, Order No. EPD-HW-269 if **AFFIRMED** and a civil penalty of $27,500 imposed. Accordingly, Federal Pacific is **ORDERED** to:

1. Comply with all requirements imposed by Order No. EPD-HW-269 on the schedule imposed by said order with April 20, 1987, serving as the effective date of Order No. EPD-HW-269; and

2. Pay a civil penalty in the amount of $27,500 to the State of Georgia within thirty (30) days of the entry of this Order.

So **ORDERED**, this 10th day of April, 1987.

Mark A. Dickerson

MARK A. DICKERSON
Administrative Law Judge

FOOTNOTES

1/ Most of the Rules merely reference or incorporate provisions of the federal Solid Waste Disposal Act, as amended, particularly by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. § 6901, et seq.) and the regulations adopted thereunder (40 C.F.R. Parts 124, 260-266, and 270) by the United States Environmental Protection Agency ("EPA"). References in this Final Decision to the federal act or regulations will generally omit any citation to the incorporating Georgia provision.

2/ 40 C.F.R. § 261.31.

3/ 40 C.F.R. §§ 260.10 and 261.31.

4/ 40 C.F.R. § 260.10.

5/ 40 C.F.R. § 261.3(a)(2)(iv). See 40 C.F.R. § 261.2.

6/ 40 C.F.R. § 260.10.

7/ 40 C.F.R. § 265.91(a)(2).

8/ 40 C.F.R. § 265.47(a) and (b).

9/ There are no standards in the Act or the Rules relating to the effluent of a listed hazardous waste stream and the drinking water and NPDES standards are not incorporated by reference.

10/ It can be argued that the use of the preposition "from" means a material becomes sludge only when it exits a wastewater treatment plant. In the instant matter, such an interpretation would require the conclusion that the material on the bottom but still within the surface impoundments is not sludge and therefor not F006 contrary to the facts to which both the Director and Federal Pacific have agreed.

(Footnotes Continued)

11/ Dr. Wallace did not purport to offer an opinion as to the meaning of the term sludge under the Act and Rules.

12/ It should be noted that at least one listed hazardous waste, K001, is explicitly limited to "bottom sediment sludge." 40 C.F.R. § 261.32. The definitions of F006 and sludge contain no such limitation.

13/ 40 C.F.R. § 260.10(a) (". . .any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste, so as to neutralize such waste, . . ., or so as to render such waste non-hazardous or less hazardous; safer to transport, store, or dispose of; or . . . amenable for storage, or reduced in volume."). In the instant matter, at least until it is first treated in the batch pretreatment tanks, the electroplating wastewater itself is not a hazardous waste. The F006 listing is limited to sludges. Compare, e.g., the F006 and F019 listings (sludges) with the K104, K111, and K117 listings (wastewaters); 40 C.F.R. § 231.31 and 231.32.

14/ Although not emphasized by the parties, treatment by neutralization also occurs in the batch pretreatment tanks.

15/ "Wastewater treatment unit" is defined in the Rules. 40 C.F.R. § 260.10(a). In In re Brown Wood Preserving Co., Inc., RCRA-84-16-R, USEPA (May 30, 1986) ("Brown Wood"), the EPA Administrative Law Judge, without explanation, chose to use this definition to define waste water treatment plant. Such a unit may be part of a plant but the definition is not helpful in determining what the entire plant is.

16/ It may be argued that once the electroplating wastewater is treated and the wastestream rendered F006, any further treatment would not generate F006 since it would be F006, and not electroplating wastewater, that was being treated. However, the product of the treatment of any F006 would also be a hazardous waste. 40 C.F.R. § 261.3(c)(2).

(Footnotes Continued)

17/ 40 C.F.R. § 260.10(a). Whether the sprayfields are used for storage or disposal depends upon whether the hazardous waste will remain after closure (disposal) or will be removed (storage).

18/ Federal Pacific relies heavily on two earlier administrative cases to oppose the conclusion that F006 is present in the sprayfields. Neither is applicable to the facts presented in this matter. In re The Torrington Company, DNR-EPD-HW-AH 14-85 (June 17, 1986) turned on the failure of the Director to demonstrate any treatment occurred in the surface impoundments in question; Brown Wood, supra, turned on EPA's failure to demonstrate any material (i.e. sludge) was generated by the treatment of the wastewater in the sprayfields in question. Both treatment and a resulting sludge have been demonstrated by the Director to have occurred in Federal Pacific's sprayfields.

19/ In the Landfill matter, the EPA Administrative Law Judge determined that South Carolina's equivalent of EPD "approved" the location of the monitoring wells in question. Landfill, supra, at p. 6. The factual predicate for that approval is unstated and, in any event, I do not find that EPD, as opposed to one of its employees, approved the location of M-3 or M-10.

BOARD OF NATURAL RESOURCES

STATE OF GEORGIA

IN RE:	:	Record No.
	:	
FEDERAL PACIFIC ELECTRIC COMPANY	:	**DNR-EPD-HW-AH 4-86**
	:	**DNR-EPD-HW-AH 5-86**

CERTIFICATE OF SERVICE

In accordance with Rule 391-1-2-.28 of the Rules of the Georgia Department of Natural Resources, I hereby certify that true and correct copies of the foregoing Final Decision were served on all parties or their counsel of record as follows: Lowell F. Martin, Esq., David G. Tripp, Esq., Morgan, Lewis & bockius, 1800 M Street, N.W., Suite 800 N, Washington, D.C. 20036 (service by certified mail, return receipt requested); Michael S. Rosenthal, Esq., Weinstein, Rosenthal & Smith, Eleven Piedmont Center, Suite 808, Atlanta, Georgia 30305 (service by certified mail, return receipt requested).

Dated this 10th day of April, 1987.

Jean H. Speegle
Adjudicatory Hearing Clerk

Board of Natural Resources
205 Butler Street, S.E.
Suite 1254, Floyd Towers East
Atlanta, Georgia 30334

July 9, 1986

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN RE BROWN WOOD PRESERVING COMPANY, INC. Respondent.	RCRA 84-16-R BRIEF OF APPELLANT

I. INTRODUCTION

This is an appeal from an Initial Decision of the Administrative Law Judge ("ALJ") dated May 30, 1986 in the above-referenced matter. In the decision, the ALJ dismissed the Complaint and Compliance Order issued to Respondent, Brown Wood Preserving Co., Inc. ("Brown Wood") by Appellant, U.S. Environmental Protection Agency, Region IV ("EPA"), pursuant to Section 3008 of the Resource Conservation and Recovery Act ("RCRA"), as amended, 42 U.S.C. §6928. As will be set forth in more detail herein, Appellant asserts that the ALJ incorrectly interpreted regulatory language so as to improperly determine the regulatory status of the Brown Wood facility.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Whether the ALJ improperly interpreted the regulatory definition of a "tank".

B. Whether the ALJ improperly interpreted language contained in the regulatory definition of "sludge".

III. STATEMENT OF THE NATURE OF THE CASE AND FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

A. Relevant Facts

The Respondent Brown Wood Preserving Company, Inc. ("Brown Wood") owns and operates a wood treatment plant in Brownville, Alabama, utilizing creosote in its treatment process. In the 1970's, in an attempt to comply with the Clean Water Act, Brown Wood developed a system for the treatment of the process water used in its wood preserving process. That system includes settling and flocculation tanks, followed by sandbed filtration, a holding pond, and finally a spray irrigation field. It is the regulatory status of the last three units - the filter, pond and field-which are at issue in this proceeding.

On August 11, 1980, Brown Wood submitted to EPA a Notification of Hazardous Waste Activity as required by Section 3010 of RCRA, 42 U.S.C. §6930. In its notification, Brown Wood stated that it did or would generate hazardous waste listed at 40 C.F.R. §261.32 as "K001-bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol." (EPA Ex. 1-A) On November 18, 1980, Brown Wood submitted to EPA, and amended on January 29, 1981, a Part A permit application as required by Section 3005 of RCRA, 42 U.S.C. §6925. In its permit application Brown Wood stated that it did or would treat, store, or dispose of hazardous wastes. Specifically, Brown Wood stated that it did or would dispose of its K001 sludge by land application. (EPA Ex. 1, Ex. 10) On June 11, 1981, the Vice-President of Brown Wood re[illegible]mined the definitions for treating, storing, or disposing of hazardous waste and informed EPA that the

company wished to add that activity to its original Notification. (EPA Ex. 2, Tr. 352)

Pursuant to Section 3006(c) of RCRA, 42 U.S.C. §6926(c), the State of Alabama was granted Phase I Interim Authorization on February 21, 1981, and became authorized to enforce its Hazardous Management Regulations of 1978, as amended. Thus, the State regulations referred to above were applicable to Respondent in lieu of the comparable federal requirements. However, on August 1, 1984, Alabama was denied Final Authorization for its hazardous management program, and Phase I of its interim authorization reverted to EPA. Therefore, after that date Brown Wood became subject to dual regulation by EPA and the State of Alabama Department of Environmental Management ("ADEM").

B. Nature of the Case

Appellant refers the Administrator to the discussion on pages 2-3 of the Initial Decision for a statement as to the nature of the case. In short, Appellant, in its original and Amended Complaint and Compliance Order, charged Brown Wood with violations of RCRA interim status standards for owners and operators of hazardous waste treatment, storage, and disposal ("TSD") facilities, including the failure to have a groundwater monitoring program, closure plans, and the failure to demonstrate compliance with the appropriate financial responsibility requirements.

Brown Wood, in its Answer and at the hearing held on this matter, argued that it did not treat, store, or dispose of hazardous waste, and was therefore not subject to the interim status standards

applicable to TSD facilities. Specifically, Brown Wood argued that the treatment of process water in its holding pond and on its spray irrigation field did not generate K001 sludge. Further, Brown Wood argued that a sandbed filter with four wooden sides and a clay bottom met the regulatory definition of a "tank," and that Brown Wood therefore was not in violation of the RCRA regulations when it operated such a unit without groundwater monitoring, and when it closed the unit without a closure or post-closure plan. The ALJ, in his Initial Decision, agreed with those assertions and, therefore, dismissed the EPA Complaint.

IV. ARGUMENTS

A. THE ALJ INCORRECTLY INTERPRETED THE REGULATORY DEFINITION OF A TANK BY CONCLUDING THAT BROWN WOOD'S SANDBED FILTER MET THAT DEFINITION.

At pages 16-18 of his Initial Decision, the ALJ discussed a wooden sandbed filter previously utilized by Brown Wood, and determined that the unit met the definition of a "tank" as set forth at 40 C.F.R. §260.10. A hazardous waste management unit which meets the definition of a tank is exempt from compliance with certain interim status standards, including the requirement of groundwater monitoring. See, e.g, 40 C.F.R. §265, Subparts F and J. The regulatory definition provides:

> "Tank" means a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthen materials (e.g. wood, concrete, steel, plastic) which provide structural support.
> 40 C.F.R. §260.10

Appellant, at the hearing in this matter and in its briefs, maintained that the terms "provide structural support" require that the

constructed unit be able to support itself absent surrounding earthen materials. In fact, EPA has consistently interpreted the definition in this manner and in fact has so informed the regulated community. See, e.g. 49 Fed. Reg. 44719 (November 8, 1984) which provides:

> In applying this definition, the Agency has provided guidance that a unit is to be evaluated as if it were freestanding and filled to its design capacity with the material it is intended to hold. If the walls or shell of the unit alone provide sufficient structural support to maintain the structural integrity of the unit under these conditions, the unit is considered to be a tank. Alternatively, if the unit is not capable of retaining its structural integrity without supporting earthen materials, it is considered to be a surface impoundment.

The ALJ, at page 17 of his Initial Decision, asserts that "Obviously, the Agency's position on this matter is at odds with the written definition of a tank as it appears in the regulations...". In fact, the contrary is obvious, as the Agency's position is consistent with the regulatory language. The ALJ and Respondent attached great significance to the portion of the definition requiring a tank to be constructed of "primarily non-earthen materials." The position of the ALJ and Respondent implies that as long as the unit is so constructed, it is a tank. This position ignores the fact that the regulations require that those non-earthen materials must, pursuant to the definition, provide structural support. Thus, a unit which is reliant upon surrounding earthen materials for its

structural support is not, by definition, a tank.1/

Appellant's position is likewise consistent with that of the State regulatory agency in this matter, the Alabama Department of Environmental Management (ADEM), which notified Brown Wood as early as September 28, 1982, that its sand filter beds did not meet the regulatory definition of a tank. See e.g., Resp Ex. 11, in which an ADEM representative notified Brown Wood that "[s]ince the sand filtration units are not "tanks" as defined by the regulations, they would require groundwater monitoring as surface impoundments." In fact, it was at the suggestion of ADEM that Brown Wood concreted its filter beds for the specific purpose of meeting the regulatory definition. See Resp. Ex. 13, 21, 22, and 30. It is interesting to note that it was not until after Brown Wood had taken such action and then learned that the regulatory agencies considered it liable for failing to comply with certain interim status standards before the unit was altered so as to be exempt from such requirements, that Brown Wood began to argue that the previous unit had met the definition of a tank.

In addition, Appellant feels compelled to protest the ALJ's dismissal as irrelevant the fact that Brown Wood's previous filter bed was not in fact containing its accumulation of hazardous waste, as

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1/. It is incorrect to state, as the ALJ does at page 17, that "all of the witnesses agreed that the wood sides of the original sand filter do provide structural support." In fact, the EPA witness testified that they did not agree with that position. See, e.g. Tr. 254. Rather, the EPA witnesses maintained that the wooden sides of the Brown Wood unit were dependent upon surrounding earthen materials for their support. Id.

a tank by definition must be designed to do. See Initial Decision, p. 17. The ALJ correctly asserts that even tanks consisting of steel will on occasion leak; however, such a possibility does not relieve an owner/operator of the responsibility to design a tank with the purpose of containing its waste. It is not, as the ALJ states at page 17 of the Initial Decision, the Agency's position that a filter with a clay bottom cannot, under any circumstances, be considered a tank. Rather, it is the Agency's position that there is a factual issue as to whether the bottom of the Brown Wood filter was actually part of a constructed unit designed to contain waste or was, in the alternative, merely a natural topographic depression, man-made excavation or diked area in the natural clay at the site. The latter interpretation would suggest that the unit more closely met the definition of a surface impoundment as set forth at 40 C.F.R. §260.10, which was the assertion of both ADEM and EPA. The evidence demonstrating that the unit at the Brown Wood site was in fact leaching contaminants into the environment supports the position of the agencies that the unit should be treated as a surface impoundment, thus subjecting it to the requirements designed to minimize just such damage from such units.

Further, the ALJ attaches significance to the fact that the Brown Wood sandbed filter was specifically designed so as to allow wastewater to drain from that unit into a holding pond, and suggests that such a process renders "ludicrous" the Agency's contention that it is relevant that the may not have been containing its waste. Again, Appellant must agree with the ALJ's assertion.

Respondent has asserted that its filter was designed with a collection manifold at the bottom, from which wastewater flows into a holding pond. Appellant fails to recognize how this would impair the Agency's position. There is an obvious and distinct difference between wastewater filtering into a collection manifold; and contamina leaching into the groundwater. While both may be occurring at the same unit, the latter occurrence would still suggest that the unit was not properly designed so as to contain its waste.

Appellant urges the Administrator to modify or set aside the conclusion of the ALJ that the original wood-sided sand filter utilized by Brown Wood as part of its treatment system met the definition of a "tank" as set forth in the regulations. Further, Appellant asks that the Administrator remand this matter to the ALJ for a determination, or exercise his own discretion to make a determination as to the appropriateness of the civil penalty assessed for Brown Wood's failure to comply with requirements applicable to that unit.

B. THE ALJ INCORRECTLY INTERPRETED THE MEANING AND EFFECT OF LANGUAGE CONTAINED IN THE REGULATORY DEFINITION OF SLUDGE.

The ALJ determined that Appellant did not satisfy its burden of proof in demonstrating by a preponderence of the evidence that RCRA and its regulations are applicable to the holding pond and spray irrigation field in use at the Brown Wood facility. The ALJ, in the Initial Decision, expressed a number of reasons for this conclusion without a clear exposition as to which reason was controlling. One such reason was his determination that those units were exempt from RCRA regulation because of language in the

definition of "sludge" excluding from that definition "treated effluent from a wastewater treatment plant." (See pp. 19-20 and 36 of the Initial Decision).

As will be set forth below, the effect of the ALJ's interpretation of that language would be to prohibit RCRA from regulating hazardous waste management units which it was clearly intended to regulate. Although it does not appear to be the basis for the outcome of the Initial Decision in this matter, the ALJ's interpretation of the definition of sludge could have a determinative effect on other Agency proceedings. Further, neither party to the instant proceeding argued that the language quoted above had any relevance to the outcome of the case. As a result, neither party provided testimony or briefs on this point. Thus, the ALJ decided a matter which was not properly before him and deprived the parties of an opportunity to testify to and brief this important issue which could have a significant impact on many actions taken by the Agency. For these reasons, Appellant urges the Administrator to set aside the ALJ's findings and conclusions with regard to this matter so as to prevent a detrimental precedential effect. If the Administrator chooses to modify the findings and conclusions regarding this matter, Appellant urges that he adopt the findings and conclusions set forth by the Agency in the discussion below.

At pages 19-20 of the Initial Decision, the ALJ discusses the regulatory definition of "sludge" and its relevance to the wastewater treatment system at the Brown Wood facility. 40 C.F.R. §260.10 provides:

> "Sludge" means any solid semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility exclusive of the treated effluent from a wastewater treatment plant.

The ALJ focused on the latter clause of the definition regarding the exclusion for treated effluent from a wastewater treatment plant, and determined that the wastewater leaving the tank at the Brown Wood facility[2/] is entitled to such an exclusion. Appellant must disagree, as that determination was based on erroneous interpretations of the regulatory language and contradicts the language and intent of RCRA and its regulations.

The ALJ errs first by determining that in the absence of a regulatory definition for a "wastewater treatment plant," the appropriate point of reference is the definition of a "wastewater treatment unit." Such a comparison is not supported by the plain meaning of the words to which the ALJ refers, or by other statutory or regulatory language.

Initially, the words "plant" and "unit" are not ordinarily considered to be interchangeable in meaning. The regulations themselves describe a wastewater treatment unit as a <u>part of</u> a wastewater treatment facility, and a facility is defined to include all contiguous land, structures, and other appurtenances as well as improve-

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2/. The ALJ found that the wooden sand bed filter in use at the Brown Wood facility until 1984 was a "tank." Appellant disagrees with that determination, but agrees that the concrete filter currently in use at the facility meets the regulatory definition of a tank.

ments on the land, used for treating, storing, or disposing of hazardo waste. While it is correct to state, as the ALJ did at page 19 of the Initial Decision, that the regulations do not provide a definition of a wastewater treatment plant, the common, ordinary meaning of the word "plant" suggests that it is more closely analogous to a wastewater treatment facility than a wastewater treatment unit.

It is a fundamental canon of statutory construction that unless words are otherwise defined, they will be interpreted as taking their ordinary, contemporary, common meaning. Perrin v. United States, 444 U.S. 37, 42 (1979). Webster's New World Dictionary of the American Language (2d. College ed. 1972) defines "plant" as "...4. the tools, machinery, buildings, grounds, etc. of a factory or business..." As noted above, this definition more closely resembles the regulatory definition of a facility than that of a wastewater treatment unit.

More significantly, the ALJ erred in his interpretation of the term "treated effluent" and in his determination that the wastewater exiting the tank at the Brown Wood facility was in fact treated effluent excluded from the definition of sludge. This conclusion was a result of his determination that the tank at the Brown Wood facility was a wastewater treatment unit. A careful analysis of the relevant statutory and regulatory language suggests that such a determination does not support the ALJ's resulting conclusion.

The Agency, at 40 C.F.R. §265.1(c)(10), excluded from the interim status standards those units meeting the regulatory definition of a wastewater treatment unit. 40 C.F.R. §260.10 provides:

> "Wastewater treatment unit" means a device which:
>
> (1) Is part of a wastewater treatment facility which is subject to regulation under either section 402 or Section 307(b) of the Clean Water Act; and
> (2) Receives and treats or stores an influent wastewater which is a hazardous waste as defined in §261.3 of this chapter, or generates and accumulates a wastewater treatment sludge which is a hazardous waste as defined in §261.3 of this chapter; and
> (3) Meets the definition of a tank in §260.10 of this chapter.

As noted above, the ALJ found, at pages 19-20 of the Initial Decision, that once wood preserving process wastewater has been treated in such a unit, it becomes treated effluent; and held further that any material produced during subsequent wastewater treatment is excluded from the definition of a sludge by the exclusion for "treated effluent from a wastewater treatment plant." That conclusion would in effect prohibit RCRA from regulating any subsequent treatment, storage, or disposal units whenever the wastewater which they received had been treated in such a tank prior to being discharged to those later units. This result is clearly contrary to relevant statutory and regulatory language which suggests that a wastewater is not a "treated effluent" until it is discharged to navigable waters and thus subject to Clean Water Act jurisdiction, and that any treatment, storage or disposal of the wastewater occurring prior to the point at which it falls within the provinces of the Clean Water Act will be subject to regulation under RCRA.

For example, Sectic 04(27) of RCRA, 42 U.S.C. §6903(27), and 40 C.F.R. §261.4(a) exclu m the definition of solid waste (thus exempting them from the RCRA regulation) industrial waste water

discharges that are point source discharges subject to regulation under Section 402 of the Clean Water Act, as amended. The comment to the regulatory provision states:

> This exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment.
>
> Comment, 40 C.F.R. §261.4(a).

In a passage in the May 19, 1980, RCRA rulemaking, in which EPA addressed the applicability of RCRA at NPDES Treatment Train Facilities the Agency stated:

> ...EPA...construes the exclusion for point sources to apply only to actual discharges into navigable waters, not to industrial wastewaters upstream from the point of discharge.
>
> * * *
>
> ...EPA has decided to rely on [the Clean Water Act programs] to regulate the discharge of wastewater effluents (which may be hazardous) to navigable waters.
>
> * * *
>
> It must be recognized, however, that this use of Clean Water Act programs to regulate hazardous wastes only extends as far as the jurisdiction and goals of those programs.
>
> * * *
>
> ...[A]ny impoundment containing a hazardous waste is covered by these regulations, particularly with regard to their effect on air and groundwater, until the hazardous waste in the impoundment comes within [Clean Water Act] jurisdiction.
>
> 45 Fed. Reg. 33172 (May 19, 1980).

The language cited above suggests that the exclusion which the ALJ found relevant was in fact intended to apply only to wastewater effluents once they have been treated to the point at which they can be discharged to navigable waters.3/ In contrast, the Brown Wood treatment process was designed to include additional wastewater treatment after the wastewater left the tank, thus the wastewater leaving the tank was not in fact a treated effluent ready to be discharged to navigable waters. While that wastewater continued through treatment in the pond and on the spray irrigation field, it was not yet within the jurisdiction of the Clean Water Act; rather it was subject to the jurisdiction of RCRA if it generated, contained, or was a hazardous waste. This is logical in light of the environmental objectives pertaining to the treatment, storage, or disposal of such wastes which Congress addressed through RCRA rather than the Clean Water Act.

This matter was further clarified in the rulemaking published at 45 Fed. Reg. 76074 (November 17, 1980) in which the Agency specifically discussed its decision to exempt from certain RCRA requirements those units meeting the 40 C.F.R. §260.10 definition of wastewater treatment unit. There the Agency stated:

> The regulatory controls imposed on wastewater treatment facilities under the NPDES

3/ This conclusion is supported by the fact that the definitions applicable to the National Pollutant Discharge Elimination System (NPDES) suggest that effluent is synonymous with point source discharge. See, e.g. 40 C.F.R. §122.2, at which "effluent limitations" is defined as restrictions imposed on point source discharges into waters or the United States.

> and pretreatment programs of the Clean Water Act focus on control of effluent discharges into surface waters or Publically Owned Treatment Works (POTW)-not on potential environmental releases to the land, groundwater or atmosphere.
> 45 Fed. Reg. 76077

The Agency stated with respect to the exclusion which it was promulgating:

> It also covers...[wastewater treatment tanks] ....in industrial wastewater treatment systems which (1)produce a treated wastewater effluent which is discharged into surface waters or into a POTW sewer system and therefore is subject to the NPDES or pretreatment requirements of the Clean Water Act or (2)produce no treated wastewater effluent as a direct result of such requirements. This definition is not intended to include surface impoundments. Nor is it intended to include wastewater treatment units which are not subject to regulation under the Clean Water Act, including systems that are not required to obtain an NPDES permit because they do not discharge a treated effluent.
> 45 Fed. Reg. 76078

This language, as well as the other statutory and regulatory provisions analyzed above, suggests that RCRA regulation is intended for the treatment, storage or disposal of hazardous wastewaters up until the point at which they are actually discharged under the jurisdiction of the Clean Water Act.

The language cited above suggests a very clear and consistent delineation between those units intended to be regulated by RCRA, and those to be regulated by the Clean Water Act; and suggests further that at facilities subject to the jurisdiction of both, one Act will regulate where the other does not. To the extent that the ALJ's language in the Initial Decision regarding the "treated effluent from a wastewater treatment plant" exclusion in

the definition of sludge would prohibit RCRA regulation at treatment storage or disposal units outside of the jurisdiction of the Clean Water Act, Appellant urges the Administrator to reject that portion of the Initial Decision and thus prohibit a detrimental precedential effect.

VI. CONCLUSION

As set forth in the arguments above, the ALJ incorrectly interpreted regulatory language so as to reach erroneous determinations regarding the regulatory status of certain units at the Brown Wood facility. With regard to the wooden sandbed filter, Appellant urges the Administrator to reject the conclusion of the ALJ that the unit was a "tank", and to allow for assessment of an appropriate penalty for Brown Wood's failure to comply with the standards applicable to the unit. With respect to the ALJ's findings and conclusions regarding the relevance of language contained in the definition of sludge, Appellant urges the Administrator to set aside those findings and conclusions because the applicability of that language to the facts at hand was not a matter before him and was not fully developed, through either testimony or briefs, for decision. Alternatively, Appellant urges the Administrator to adopt the findings and conclusions regarding this matter set forth herein by Appellant.

Respectfully submitted,

Dated: July 9, 1986

Andrea E. Zelman

ANDREA E. ZELMAN
Assistant Regional Counsel

CERTIFICATE OF SERVICE

I hereby certify that the originals of the foregoing NOTICE OF APPEAL AND BRIEF OF APPELLANT were filed with the Judicial Officer, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 and that true and correct copies were served by certified mail, return receipt requested, to:

Thomas H. Brown, Esquire
Sirote, Permutt, Friend, Friedman
Held, & Apolinsky, P.C.
Post Office Box 55727
Birmingham, AL 35255

David R. Berz, Esquire
Stanley M. Spracker, Esquire
Carmen M. Shepard, Esquire
Weil, Gotshal & Manges
1615 L Street, N.W., Suite 700
Washington, D.C. 20036

Walter G. Tolerak, Esquire
American Wood Preservers Institute
Tysons Internationa Bldg., Suite 405
Vienna, VA 22180

and by hand-delivery to:

Sandra Beck, Regional Hearing Clerk
U.S. EPA - Region IV
345 Courtland St., N.E.
Atlanta, GA 30365

Honorable Thomas B. Yost
Administrative Law Judge
345 Courtland St., N.E.
Atlanta, GA 30365

Dated this 9th day of July 1986.

Janice E. Riley

JANICE E. RILEY

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN RE:	)	
	)	RCRA 84-16-R
BROWN WOOD PRESERVING COMPANY, INC.	)	
	)	NOTICE OF APPEAL
Respondent.	)	
	)	

COMES NOW the United States Environmental Protection Agency (EPA), and notifies all interested parties of its appeal of rulings contained in the Initial Decision in the above-referenced matter, as explained in the accompanying appellate brief.

Pursuant to 40 C.F.R. §22.30, Appellant sets forth the following alternative findings of fact, alternative conclusions regarding issues of law or discretion and a proposed order.

ALTERNATIVE FINDINGS OF FACT*

1. Brown Wood, until approximately 1984, treated, stored or disposed of hazardous waste in a sandbed filter which was a surface impoundment as defined at 40 C.F.R. §260.10.

2. With respect to the sandbed filter, Appellant hereby incorporates the Findings of Fact set forth as numbers 1-12 in Complainant's Findings of Fact, Conclusions of Law and Order (filed April 7, 1986).

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* Appellant is somewhat handicapped by the fact that the ALJ, in his Initial Decision, failed to delineate which portions of the language contained therein were findings of fact, which were conclusions of law and which were merely discussions thereof. In order to propose alternative findings or conclusions, Appellant must make assumptions as to just what findings the ALJ made and what conclusions he reached; and to the extent that those assumptions are incorrect, Appellant apologizes for any mistakes or mischaracterizations.

ALTERNATIVE CONCLUSIONS OF LAW

1. Brown Wood, by failing to manage its former sand filter bed in accordance with the management standards appropriate to such units, violated several provisions of 40 C.F.R. Part 265, including Subparts B,C,D E,F,G,H and K.

2. With respect to the wooden sandbed filter, Appellant hereby incorporates the Conclusions of Law set forth as numbers 1-15, 17 and 18 in Complainant's Findings of Fact, Conclusions of Law, and Order (filed April 7, 1986).

3. The language contained in the definition of sludge found at 40 C.F.R. §260.10, in which treated effluent from a wastewater treatment plant is excluded from that regulatory definition does not prohibit RCRA regulation of treatment, storage or disposal of hazardous wastes occurring subsequent to treatment in a wastewater treatment unit.

4. A penalty of _____ is appropriate in light of the seriousness of the violations and any good faith efforts made by Brown Wood to comply.

ORDER

Pursuant to Section 3008 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6928, the following order is entered against Respondent, Brown Wood Preserving Company, Incorporated:

(a) A civil pena[illegible]s assessed against the Respondent for violations of RCRA as described herein.

(b) Payment of the full amount of the civil penalty shall be made within sixty (60) days after receipt of this Final Order. Payment shall be made by forwarding a cashier's check or certified check in the amount of _____ ___, payable to the Treasure United States of America, to the following address:

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

So Ordered.

Dated:

Ronald L. McCallum
Chief Judicial Officer

May 30, 1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	RCRA-84-16-R
BROWN WOOD PRESERVING CO., INC.	)	
	)	
Respondent	)	

1. Resource Conservation and Recovery Act - The EPA is bound by the clear language of its own regulations and may not, for any purpose, add to or embelish the definitions contained therein to suit its own ideas of what the regulations mean.

2. Resource Conservation and Recovery Act - Definitions - A device buried in the ground consisting of four (4) wooden sides and a clay bottom, under the facts in this case, is a "tank" as defined in 40 C.F.R. § 260.10.

3. Resource Conservation and Recovery Act - Effect of Internal Memoranda - The use of unpublished internal memoranda to support an enforcement action against a facility owner regarding units, which had previously been considered unregulated, is improper and in violation of the provisions of the Administrative Procedures Act.

4. Resource Conservation and Recovery Act - Burden of Proof - Where the Agency has not proven the allegations in the complaint by a preponderance of the evidence, the complaint must be dismissed.

Appearances:

Andrea E. Zelman, Esquire
For Complainant, U.S. Environmental Protection Agency
Atlanta, Georgia

Thomas H. Brown, Esquire
Sirote, Permutt, Friend, Friedman, Held & Apolinsky
For Respondent, Brown Wood Preserving Company, Inc.
Birmingham, Alabama

INITIAL DECISION

This is a proceeding brought pursuant to Section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 ("RCRA" or "The Act"), 42 U.S.C. § 6928. Section 3008 of RCRA provided[1] in pertinent part:

> (a) Compliance Orders-(1)...[W]henever on the basis of and information the Administrator determines that any person is in violation of any requirements of this subchapter, the Administrator may issue an order requiring compliance immediately or within a specified time period....
>
> (c) ...Any order issued under this section may... assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.
>
> (g) ...Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

On March 31, 1984, the U.S. Environmental Protection Agency, Region IV ("EPA") issued a Complaint, Compliance Order, Consent Agreement, and Notice of the Right to Request a Hearing charging the Respondent, Brown Wood Preserving Company, Inc. ("Brown Wood"), with violation of certain requirements of RCRA. Specifically, the Complaint charged Brown Wood with violations relating

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[1] Any references to RCRA are to the Act as it was in effect in March of 1984 when the original Complaint and Compliance Order was issued to Respondent. In November 1984, Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984), ("HSWA") which significantly amended RCRA. One change brought about by HSWA was a revsion and reorganization of Section 3008, 42 U.S.C. § 6928. Thus, the authority to assess penalties which is cited in the text below as it was formerly found at §§ 3008 (c) and (g) can now be found at §§ 3008(a)(1), (3) and (g). See 42 U.S.C. § 6901 et seq. (1984).

to financial responsibility requirements found in the RCRA interim status standards for owners and operators of hazardous waste treatment, storage, and disposal facilities, 40 C.F.R. Part 265, Subpart H. On March 29, 1985, Complainant moved to amend that Complaint to include additional violations of RCRA requirements. That motion was granted on April 24, 1985. The Amended Complaint and Compliance Order ("The Order") alleged violation of additional requirements of the interim status standards, including the failure to have a groundwater monitoring program in accordance with 40 C.F.R. Part 265, Subpart F, and an adequate closure plan in conformance with 40 C.F.R. Part 265, Subpart G. The Order included a schedule which set forth dates by which Brown Wood was to comply with the specific provisions of which it was in violation. In addition, The Order proposed the assessment of a civil penalty in the amount of $24,000 (twenty-four thousand dollars). The Order also proposed stipulated penalties for Brown Wood's noncompliance with the schedule set forth in the Order.

Brown Wood filed an Answer in which it denied that it treats, stores or disposes of hazardous waste, and therefore denied that it was or should be subject to the interim status standards applicable to such hazardous waste management facilities. Following the opportunity for the parties to settle informally, an exchange of information was ordered. The parties exchanged lists of witnesses expected to be called, proposed exhibits, and additional information regarding this matter. On January 29-30, 1986, a Hearing on the matter was held in Atlanta, Georgia.

Following the availability of the Hearing transcript, the parties filed and exchanged initial submissions of findings of fact, conclusions of law, briefs in support thereof, and [illegible]s. The American Wood Preservers Institute ("AWPI"), an industry asso[illegible]n, moved for leave to file an amicus brief. The parties filed no opposition and the motion was granted.

In rendering this Initial Decision, I have carefully considered all of the information in the record. Any proposed findings of fact or conclusions of law inconsistent with this decision are rejected.

Factual Background

The Respondent, Brown Wood Preserving Company, Inc., is a creosote wood treatment plant located in Brownville, Alabama. In the 1970's in association with the State of Alabama Water Improvement Commission and in compliance with the Clean Water Act, Brown Wood established a system for the treatment of the process water generated in connection with its wood preserving process.

The system consists of collection pits and sumps that collect the process water; it is then pumped into two large settling tanks where the creosote sinks to the bottom and is recycled. The process water is then routed to two open horizontal tanks, where additional settling takes place and the creosote is recycled. The water is then entered into two quick-mixer tanks, where flocculation takes place. The water and the resulting floc is then pumped onto a hill into a sandbed filter where the floc is filtered out as K001 bottom sediment sludge. The process water then progresses through sand into a collection manifold at the bottom of the filter, and flows into a holding pond. The water is then pumped onto a spray irrigation field where additional wastewater treatment occurs and any overflow or underflow from this operation is returned to the holding pond.

The above-described treatment for the wood preserving process water follows specifically the state-of-the-art methodology established by EPA under the Clean Water Act in order for the Respondent to meet the requirements of that Act and to receive an NPDES permit.

In 1980, pursuant to the requirements of RCRA, Mr. Heath, the part-owner of Brown Wood filed a notification under The Act which indicated that they were a generator of hazardous waste K001 (bottom sediment sludge from the wood preserving industry). In that notification, Mr. Heath indicated that the facility was only a generator of such sludge and not a treator, storer or disposer thereof.

In November 1980, Mr. Heath filed the facilities Part A application and on this form indicated "Yes" to the question: "Does or will this facility treat, store or dispose of hazardous waste?" Mr. Heath checked that box because at that time the facility had a future intention to disk plow the K001 sludge generated in its filter beds into the earth rather than having it taken off site for disposal in a licensed solid waste disposal facility. Since that time, Brown Wood has decided not to dispose of its hazardous waste in that fashion but rather to have it shipped off site for licensed disposal. From the outset, Brown Wood never considered itself to be a TSD facility and did not consider either the holding pond or the spray field, or the sand filter bed to be regulated units under RCRA.

When the Respondent filed its original Part A application, it identified the owner of the facility as being the City of Tuscaloosa, since that City was the legal owner of that facility, inasmuch as it issued revenue bonds to finance the facility and as such holds title to the property. EPA subsequently advised the Respondent that this was not a proper designation and an amended Part A application was then filed showing that Brown Wood was the owner and operator of the facility. Subsequently, a follow-up notification and request for information was sent to the Respondent, and all others similarly situated, by EPA asking [redacted] to clarify whether or not they were a TSD facility or

owned a TSD facility. Brown Wood thinking that there was still some question about the actual ownership of the facility marked the box that they were a TSD facility.

With that background there now transpires a rather Byzantine series of notifications and interpretations by EPA and the State of Alabama as to the nature of the Respondent's facility and to what extent the various portions of its treatment regime are governed by RCRA and its associated regulations.

At several times between 1980 and the present, the Respondent asked that its Part A application be withdrawn since it did not consider itself to be a regulated facility. The Respondent's rationale for this assertion was that they only generate K001 sludge and that they do so in the sand filter which is a rectangular structure set in the ground with wooden sides and a clay bottom. They took the position that inasmuch as this structure met the definition in the regulations of a "tank", they were, therefore, not subject to regulation under RCRA. They also asserted, on numerous occasions, to both the State of Alabama and the EPA that they were exempt from regulation inasmuch as they were a small quantity generator as that term is defined in the regulations. These requests were met with statements to the effect that since you are a regulated facility you can not withdraw your Part A application and as to the small quantity generator argument, the governmental entities advised that inasmuch as no supporting data was forthcoming which would substantiate this claim, they could not make any ruling thereon. The record does not reveal that any governmental agency ever advised the Respondent just exactly what sort of information was required in order for them to demonstrate that they were, in fact, a small quantity generator. The regulations seem to suggest that one may become a small quantity generator by merely making the

assertion that it falls into that category and that if somewhere in the future it is determined that they are not, then they must suffer the consequences for their mistake in interpretation.

In any event, while all this was transpiring, the requirements for financial responsibility became due under the regulations and notifications were sent to the Respondent telling it that it needed to provide proof of insurance and financial responsibility to the State of Alabama. The Respondent continued to argue that it was not governed by the provisions of RCRA for the reasons above-stated and these pleas were met with more requests for the financial responsibility documentation.

Somewhere in this time frame, the State of Alabama was relieved of its authorization to administer certain portions of the RCRA program and EPA came into the picture. The Agency then filed its first Complaint which proposed to assess a penalty of $5,000 (five thousand dollars) for the failure of the facility to come forth with the necessary financial and insurance documentation. An Answer was filed which essentially denied that they were governed by RCRA and various settlement conferences between EPA, the Respondent and peripherally the State of Alabama were held. Shortly after one of the major settlement meetings, the Agency moved to amend its Complaint to add the additional violations which it had discovered subsequent to the issuance of the first Complaint. The motion was allowed and the new Complaint was issued which now charged the Respondent with violating not only the financial responsibility aspects of the regulations but also the failure to have in place groundwater monitoring systems for the three regulated units and other administrative and internal documentation which the regulations require that such a facility have in place.

The record reveals that at no time did the Respondent, nor the wood processing industry generally, understand that the spray fields which were installed pursuant to the Clean Water Act and, in some cases, the storage ponds as well were regulated units under RCRA. This state of affairs was not clearly enunciated to the Respondent until or shortly before the bringing of this action. In order to fully understand the Agency's rationale in regard to this facility, as well as others in the wood preserving industry, a review of certain internal memoranda is required.

Apparently as early as May or June of 1983, the State of Alabama, which at that time had the authority to administer RCRA in that State, had some questions about the applicability of RCRA to certain facilities in the wood treating industry. This concern was communicated to Region IV EPA and by letter dated March 13, 1984, Mr. James H. Scarbrough, Chief, Residual Management Branch, wrote a letter to Mr. Bernard Cox, Chief of the Industrial and Hazardous Waste Section of the Alabama Department of Environmental Management (hereinafter "ADEM"). This letter contained two scenarios which in essence described two different treatment systems at two separate facilities and then answered questions relative to the application of RCRA to them. The first scenario describes essentially what is found at the Brown Wood facility with the exception that the scenario suggests that there is both creosote and pentachlorophenol treatment of the wood involved. The record in this case suggests that at all relevant times Brown Wood never used pentachlorophenol as a treatment method but only used creosote. The first question addressed by Mr. Scarbrough was: "Is the wastewater which drains from the filter beds a listed hazardous waste because it comes from the treatment of a listed hazardous waste?" Mr. Scarbr[illegible] answer was: "Yes, the water is a regulated hazardous waste" and [illegible]sed this opinion on the definition of a

hazardous waste which includes a leachate. He suggests that since leachate is defined in 40 C.F.R. § 260.10 as "any liquid, including any suspended components in the liquid that has percolated through or drained from hazardous waste" that therefore the water which drains through the sand bed filter and the K001 sludge contained therein must of necessity be a leachate and as such is therefore a listed hazardous waste.

The next question is: "Would the spray field be subject to RCRA if the water is hazardous even though it is regulated by the Water Division which requires reporting to them?" The answer is: "Yes, since the water from the sludge filter beds would be regulated as a hazardous waste, as explained above, any subsequent treatment, storage or disposal of the water would be subject to the regulation by RCRA. The spray field would be a form of land treatment subject to regulation under Subpart M of Section 265." He further states that regulation under another State program would not exempt a land treatment facility from regulation by the RCRA program.

The third question asked is: "Assuming the water is not hazardous would just the filter beds be regulated because the bottom is clay due the sludge accumulation." The answer was that: "Regardless of the status of the water, the unit where the sludge is accumulated is a regulated unit under Subparts 1 through L or Q depending on the type of construction. He suggests that the sand-gravel beds would probably be regulated under Subpart Q. He also stated that the holding pond would be a regulated surface impoundment under Subpart K and that delisting might be appropriate in some cases for the water of the sand filters.

Although I can understand why the filter beds might be a regulated unit, assuming as Mr. Scarbrough did that the water is not hazardous, one can not understand his reasoning that the holding pond would be a regulated surface

unit under Subpart K because it would not, under the scenario described, contain any hazardous waste.

In any event, this letter from Mr. Scarbrough to the Alabama official which stated that the spray fields, holding ponds and sand pits would all be regulated units was based essentially, at least as to the holding pond or the spray field, on the notion that the water which is discharged from the sand filter is a hazardous waste. It should be noted that this interpretation is contrary to previous decisions by EPA not to consider the wastewater from such facility to be a hazardous waste and it was specifically excluded from regulation under the Federal Register listing which established K001 as a hazardous waste in the first place.

Since the industry and other persons continued to protest this interpretation, concurrence on this issue was requested by Mr. Scarbrough by memorandum dated May 21, 1984. This memorandum was not admitted as an exhibit in the case, but because it provides an essential part of the chronological scenario which gave rise to the admission of follow-up memorandums, it will be made an exhibit in this case as Court's Exhibit No. 1. This memorandum essentially sets forth Region IV's interpretation of its rationale that the holding ponds and spray fields are regulated units and asks concurrence by Headquarters, EPA. In this May 21st memorandum, Mr. Scarbrough states as follows: "The listing K001 includes any sludge formed from wood preserving process waste that uses creosote and/or pentachlorophenol, regardless of where the sludge is formed. If a sludge is formed in the bottom or sides of a surface impoundment, or a sand filter or on a spray field of a land treatment unit, it is K001 sludge. The surface impoundment, the sand filter and the spray filter unit would be subject to all hazardous waste permitting regulations." (Emphasis supplied.) He then goes on to state that

in the case of the sand filter, the water that drains from the filter is a hazardous waste. He then proceeds to repeat his rationale for that conclusion on the basis that the water is a leachate and, therefore, a hazardous waste. The reason the Court sought this memorandum and included it as an exhibit, in addition to the reasons immediately above stated, is that the reply to this memorandum from Mr. John Skinner, Director of the Office of Solid Waste in Washington, D.C., contains language which suggests that there is an assumption in the request that sludge is generated in the pond and the spray field. The memorandum from Mr. Scarbrough to Washington, D.C. seeking concurrence states as a condition of his hypothesis that a sludge is formed both in the surface impoundment and the spray field.

The memorandum in reply to this request for concurrence, which is Respondent's Exhibit No. 36 dated 25 July 1984, states that contrary to Mr. Scarbrough's previous opinion on the subject, the wastewater from the oil water separature tanks and chemical flocculation tanks are not classified as listed hazardous waste, after the listed hazardous wastewater treatment sludges have settled out, even though some flocculated materials is carried along with effluent stream. He goes on to state that when the Agency listed wastewater treatment sludges from wood preserving processes it differentiated between the sludges which settle out from successive treatments of process wastewaters and the wastewater stream itself. He therefore concluded that the wastewater effluents from the two tanks would be subject to regulations only if they met one or more of the characteristics of a hazardous waste as set forth in the regulations. There is no suggestion in this record or elsewhere that the wastewater emanating from the various treatment processes employed by Brown Wood meet any of the "characteristics" as set forth in the regulations.

Mr. Skinner's memo then goes on to state that, although the wastewater emanating from the sand filter is not a hazardous waste, both the sand filter and the holding ponds would be subject to all hazardous waste regulations and permitting standards since they are surface impoundments used to manage a hazardous waste (i.e., the sludge). The memorandum is silent as to how this sludge gets into the holding ponds. He does state that if a sludge is formed in a wastewater treatment tank, filtration device or surface impoundment it is a K001 sludge. Since the May 21, 1984 memorandum from Mr. Scarbrough, wherein he seeks Headquarters concurrence with his opinion on the status of the units involved, states that: "If a sludge is formed it is a K001 sludge." The premise has then now been laid that K001 sludge is in fact found in both the surface impoundment and the spray field as well. Mr. Skinner's memorandum concludes that as to the spray field irrigation field, which is the final step in the wastewater system, no decision has been made by Headquarters as to whether or not that part of the system is a regulated unit. He states that he is currently investigating the status of this unit and that he expects to get back to the Region on this point in the near future.

Therefore, the July 25, 1984 memo, on its face, apparently seems to be of help to the regulated community in as much as it refutes Mr. Scarbrough's earlier contention that since the wastewater emanating from the filter beds is a hazardous waste, therefore, of necessity any holding pond or subsequent treatment facility which manages that waste would be a regulated unit under RCRA. Mr. Skinner's memo then, with no apparent justification, immediately leaps from the decision that the wastewater is not a hazardous waste to the conclusion that the pond which receives this non-hazardous waste will, of necessity, be a regulated unit since it manages the sludge. Just how this sludge which is a listed hazardous waste is generated from a non-hazardous wastewater constituent is not explained at this time.

NO!

The next memorandum in the chronology is from Mr. Skinner to Mr. Scarbrough dated November 23, 1984 which is Respondent's Exhibit No. 44. This memo apparently is a follow-up to the earlier memo which left unresolved the decision as to whether the spray irrigation fields were regulated units under RCRA. Mr. Skinner states that since the last memorandum, he has discussed the issue with the Office of General Counsel and has concluded that such spray irrigation units or other land spreading of wastewaters from wood preserving operations constitute land treatment of a hazardous waste, namely the K001 bottom sediment sludge. Therefore, such land spreading or spraying would be subject to the regulations and The Act. He then describes the basis for this conclusion to the effect that the hazardous waste K001 is formed in the soil in a land treatment unit to which wastewaters from wood preserving processes are applied. The mechanism for forming this sludge, he says, is similar to those operating in trickling filters or at the bottom of surface impoundments where aerobic degradation takes place. He states that biological action taking place in such units will lead to an increase of mass from the accumulation of dead organisms. Contaminates in the wastewater could be absorbed on this biomass and co-precipitate with it. Suspended solids also could be separated from the wastewater by simple filtration while passing through the land treatment unit matrix forming sludges. He then states that some facilities have claimed that no sludges are formed in these units or that no hazardous constituents of concern remain in these units at regulatory significant levels. He states that if a facility is able to demonstrate that no bottom sediments sludge is formed as described above, then the land treatment unit would not be subject to regulation under RCRA. He parenthetically states that: "at the present time we are not able to provide any guidance as to how one would make such a demonstration". He concludes by stating that if

sludges are formed in the land treatment unit but the facility is able to demonstrate that no hazardous constituents remain in an environmentally significant concentrations then the facility would have the option of delisting the sludges pursuant to 40 C.F.R §§ 260.20 and 260.22.

We now have a situation where initially EPA, at the regional level, had decided that all of these portions of the treatment system, i.e., the filter beds, the holding pond and the spray irrigation field, were all subject to RCRA and therefore regulated units for the reason that the water emanating from the filter bed was a hazardous waste. No mention of sludge formation was used as a justification for that initial conclusion. The Agency then at the Headquarters' level concluded that the water emanating from the filter unit was not in fact a hazardous waste but that since sludges, must of necessity, form in both the holding pond and the spray field due to the interaction of the organic constituents with the wastewater with the naturally occurring bacteria that is found in the soil, obviously any such material formed, would under the regulatory scheme, be considered K001 bottom sediment sludges. It is this latter conclusion that causes some concern both on the part of this Respondent and all other members of that industry as well as the American Wood Preservers Institute. They suggest that this internal interpretation of the formation of the sludges anywhere in the treatment scheme, are, of necessity, K001 bottom sediment sludges representing a new regulation, the effect of which is to place portions of the wastewater treatment system under the provisions of RCRA where heretofore the Agency and the regulated community had assumed that they were not regulated since they contain no K001 sludges.

At the Hearing, the Agency, at least at the regional level, took the position that they have always have felt that all of these units were regulated. But a careful reading of the memoranda involved suggests that the

Region's original basis for considering them to be regulated were that they handled a hazardous waste, i.e., the water from the sand filter, and not because K001 sludge was generated therein. Since the Region has been corrected on its assumption that the water was a hazardous waste in of itself, the new theory seems to be that since sludges will inevitably form in these units due to the interaction of the wastewater and naturally occurring bacteria in the soil that such sludges, biomasses or whatever description accurately describes this material is, under the regulation, K001 sludge that they now are regulated on that basis.

During all of this time, the Respondent, Brown Wood, continued to urge its case upon the State of Alabama and the Federal EPA to the effect that: (1) they are small quantity generators; (2) that the sand filter is under the definition in the regulations of a "tank" and, therefore, not a regulated unit; and (3) that the storage pond and spray field are not regulated units since they do not manage a hazardous waste as the industry has historically understood that term. Despite these strongly felt beliefs as to the non-applicability of RCRA to their facility, Brown Wood continued, through its consultants and others, to come into compliance and to satisfy the demands put upon them by various governmental regulatory agencies. At one point in time, the State of Alabama indicated to Brown Wood that if they would replace their wood sand filter device with a concreted one and demonstrate that the pond was not leaking that they could be relieved from the obligation of installing a groundwater monitoring system for those units. Apparently at this point in time, the State of Alabama did not consider the spray irrigation field to be a regulated unit. Pursuant to those instructions, the Respondent removed the wood-sided sand filter and replaced it with a concrete filter which everyone now agrees is a "tank" under even the most stringent interpretation of the

regulation's definition. The Respondent also attempted to satisfy the Agency's concerns about financial responsibility by providing the Agency with a trust agreement which the Agency apparently did not feel to be satisfactory.

Examination of Regulatory Scheme

Since the beginning of this controversy the Respondent has steadfastly argued that its wooden sand filter meets the definition of a tank, a position which the regulatory agencies have just as adamantly denied. Since the status of this unit, in my judgement, plays a crucial role in the application of the RCRA regulations to this facility, some examination of this position is warranted. As discussed above, the original sand filter employed by the Respondent as an essential part of its wastewater treatment system is a device consisting of a 20-by-20-by-15 impoundment with a natural clay bottom and sides constructed of preserved wood, having a depth of approximately five (5) feet. 40 C.F.R. § 260.10 contains the definitions which govern the applicability and the administration of the RCRA program. In that section, a tank is described as: "a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthen materials (e.g., wood, concrete, steel, plastic) which provide structural suppport." Simple mathematical calculations reveal that the original sand filter is constructed primarily of non-earthen materials, that is to say, wood, and that only the bottom is of earthen material. In arriving at its conclusion that this device does not meet the regulatory definition of a tank, the Agency takes the position that in order for it to be a tank, it must maintain its structural integrity when removed from the ground and essentially support itself in mid-air. The Agency's position is that since the bottom of the tank is made of earth and clay materials, it would fall

out if removed from the ground and, therefore, it cannot meet the definition of a tank. See the testimony of complainant's witness, William Gallagher, Jr., at page 254 of the Transcript wherein he says: "For purposes of meeting the definition of a tank, we maintain that if the earth was removed from around this tank, it would support itself. Since it has no bottom, it cannot support itself." Obviously, the Agency's position on this matter is at odds with the written definition of a tank as it appears in the regulations, which are binding upon the Agency. Additionally, two expert witnesses appearing on behalf of the Respondent, who are professors of engineering at their respective universities, also disagreed with the Agency's interpretation thereof. They take the position that if a device is made primarily of non-earthen materials which provide structural support, it meets the definition of a tank. The Agency in its argument has added additional language to the regulations which a careful reading thereof does not support. All of the witnesses agreed that the wood sides of the original sand filter do provide structural support. The Agency's concern seems to be that since the bottom of the filter is made of clay, it cannot, under any circumstances, be considered a tank. If this was the Agency's intent, the definition it provided to the regulated community and to the other governmental regulatory agencies should have been more carefully written to suggest that the bottom of the device has to be made primarily out of non-earthen materials. The Agency attempts to bolster its position on this issue by suggesting that clay is not impervious to all substances and that, therefore, it does not contain "the hazardous waste treated therein". Whether or not the device leaks is not at issue here since the Agency has long since discovered that even tanks consisting of steel will on occasion leak and that whether or not a device is entirely water-proof or impervious to all materials contained therein is not part of

the definition of a tank. This contention is obviously ludicrous since the filter bed is designed with a sump in the bottom from which the wastewater is supposed to drain into the holding pond. If it were constructed in any other fashion, it would not accomplish its required function and would overflow onto the ground. I am, therefore, of the opinion that the original wood-sided sand filter employed by the Respondent as part of its treatment system met the definition of a "tank" as contained in the regulations and that the Agency's attempt to informally re-write the definition contained in their own regulations is an improper exercise of prosecutorial discretion.

All parties agree that a treatment device which meets the definitions of a tank is exempt from certain aspects of the regulatory scheme under RCRA including the necessity to have in place a groundwater monitoring system. As indicated above, the Respondent, shortly prior to the filing of the Amended Complaint, had replaced the wood filter with a concrete device which everyone agrees easily meets the regulatory definition of a tank. The main concern apparently in regard to this portion of the treatment scheme is whether or not the old wood-sided filter bed was closed pursuant to an approved closure plan. Testimony at the Hearing indicates that the Respondent is attempting, through its engineering consultants, to convince the regulatory agencies that the old filter bed was "clean-closed" and that, therefore, it was closed in a manner consistent with the regulations. Since I am of the opinion that the old wood-sided filter bed met the definition of a tank, any further discussion concerning its closure is for purposes of this decision, unnecessary.

Having determined that the old sand filter bed met the regulatory definition of a tank and since everyone agrees that the new concrete filter clearly meets the definition of a tank, additional examination of the regulatory definitions is appropriate to determine the effect of this ruling.

The above-cited section of the Federal regulations which contain the definitions applicable to RCRA define sludge as: "any solid, semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility exclusive of the treated effluent from a wastewater treatment plant." (Emphasis supplied.) Everyone agrees that K001 bottom sediment sludge is generated at several locations in the treatment scheme employed by the Respondent, i.e., at the bottom of the oil waste separator and clearly the material to which the floc has been added which settles out on the surface of the sand gravel filter bed. There is also apparently universal agreement among the parties that the wastewater which leaves the sand bed filter is not a hazardous waste under the regulatory scheme established by the EPA. We then are faced with the baseline question of determining whether or not a K001 sludge is generated by this nonhazardous wastewater at some other portions of the treatment scheme, in this case, primarily the surface holding pond and the spray irrigation field. Although the phrase "wastewater treatment plant" is not defined in the RCRA regulations, there is a definition which seems appropriate, contained in the same section of the Federal Register, that being "wastewater treatment unit". This device is defined as: "(1) as part of a wastewater treatment facility which is subject to regulation under either § 402 or § 307(b) of the Clean Water Act; and (2) receives and treats or stores an influent wastewater which is a hazardous waste as defined in § 261.3 of this chapter, or generates and accumulates a wastewater treatment sludge which is a hazardous waste as defined in § 261.3 of this chapter, or treats or stores a wastewater treatment sludge which is a hazardous waste as defined in § 261.3 of this chapter; and (3) meets the definition of tank in § 260.10 of this chapter." The sand bed filter is a part of a wastewater treat-

ment facility which is subject to regulation under § 402 of the Clean Water Act and it does receive, treat and store a hazardous wastewater treatment sludge and it does meet the definition of tank, as we have previously discussed. Applying all of these definitions to the facts at hand, one arrives to the conclusion that any material produced by the interaction of the non-hazardous wastewater contained in either the storage lagoon or the spray irrigation field with naturally occurring bacteria in the soil is excluded from the regulatory definition of a sludge since this material is a treated effluent from a wastewater treatment plant. This reasoning is supported by the language contained in the footnote to Mr. Skinner's July 25 memorandum. (Respondent's Exhibit No. 36.)

Although I am of the opinion that the analysis presented above is an accurate one as it applies to the situation in this case, one need not rely entirely upon such analysis to come to the conclusion that under the regulations neither the storage pond or spray irrigation field are regulated units under The Act or the regulations promulgated pursuant thereto. As discussed earlier the Agency's decision that these units are regulated units under The Act has its genesis in their unpublished theory that any materials created by the non-hazardous wastewater and soil bacteria is, of necessity, K001 sludge. The existence of such sludge must be demonstrated by something more than mere hypothetical theory on the part of the Agency to subject them to the rigors associated therewith of a RCRA regulated facility. The above-described memoranda from Mr. Skinner contain no data to support the notion that, of necessity, K001 bottom sediment sludge is always present in these units. On the contrary all of the testimony from the expert witnesses presented by the Respondent suggests that to the extent any additional biomass or new material is generated by such interaction it does not constitute K001 bottom sediment

sludge. The Respondent's witnesses uniformly testified that a sludge, as that term is universally accepted in the engineering community, means a visible measurable substance resulting from the treatment or management of some form of waste. Their testimony was that even if some material is generated by the biological action which takes place in the soil, it no longer has the characteristics of the constituents of concern in solution in the non-hazardous wastewater since that is one of the functions of biological treatment. By that it is meant that the bacteria which through evolution or acclimation, have the ability to feed on such organic materials, change its nature by the very act of their interaction with it and that the resulting material no longer has the same chemical make-up that was originally present. The Agency takes the position that the sludge generated in these two units, i.e., the lagoon and the spray irrigation field, may, in fact, be invisible and unmeasurable by normal means, but since they are of the opinion that such material is, in fact, generated, it is, by definition K001 bottom sediment sludge. It is this regulatory leap of faith which is of primary concern not only to this Respondent but to the entire wood treatment industry since it is contrary to the scientific community's previous notion of how these materials are generated.

Mr. James David Hagan II, one of the Agency's primary witnesses on the issue of the presence of K001 sludge in the treatment pond, testified on this issue at some length. It is felt that a recitation of this witnesses testimony is important to determine the validity of the Agency's position on this issue. This witness, who is an inspector and employee of the State of Alabama's Hazardous Waste Division, testified that he saw K001 sludge in the holding lagoon and that was one of the basis for his agency's as well as EPA's assumption that that is certainly a regulated unit. The following dialogue takes place on pages 165, 166, 167 and 168.

"MR. BROWN: Just a few more, Judge.

BY MR. BROWN:

Q. Can you explain what would happen if surface oil was on the pond?

A. Surface oil?

Q. Uh-huh (affirmative).

JUDGE YOST: What kind of oil are we talking about? Just any kind of oil?

MR. BROWN: Right, any kind of oil, oil associated with creosote.

JUDGE YOST: Okay.

THE WITNESS: You're talking about the carry oil or the fractions of creosote?

MR. BROWN: Light fractions.

THE WITNESS: They would float on the surface of the impoundment.

BY MR. BROWN:

Q. Is surface oil K-001 type surface oil that we're talking about?

A. No; it would not be considered to be K-001.

Q. Would it stain the soil along the bank when the wind blew the water around?

A. Possibly.

Q. Okay. Or if the water level dropped some, it would leave that stain?

A. Possibly.

Q. Could the black substance that you saw around the edge of that pond have been a stain rather than a sludge?

A. The black substance that I saw was a sludge. It met the definition of a sludge in the Alabama Hazardous Waste Management regulations. That was the only determination at that point that I was required to make."

"Q. Could it have been a sludge?

A. It was a sludge. A sludge can be a stain; a stain can be a sludge.

Q. What's the difference between a stain and a sludge?

A. I'm not sure there is a difference.

Q. Okay. So, that could have been a stain from oil, couldn't it? I mean you didn't test it to find out if it has any K-001 constituents, did you?

A. It met the definition of a sludge.

Q. Did you test it to see if it had any K-001 constituents?

A. No, but, as I've already described, that's not necessary to meet the listing description for K-001.

Q. What you saw on that bank of that pond could very well have been a stain from an oil residue, couldn't it?

A. It was also a sludge.

JUDGE YOST: Well, I don't understand. You keep referring to this regulation. Does the regulation describe this sludge?

THE WITNESS: Yes, sir; it gives a specific definition for sludge.

JUDGE YOST: Well, what is the definition?

THE WITNESS: It is the —

JUDGE YOST: Something that results from the process that they're engaged in?

THE WITNESS: It's any solid, semi-solid, liquid waste generated from a municipal, commercial or industrial waste water treatment facility, municipal water treatment facility or air pollution control facility, and it's exclusive of the effluent from those facilities.

BY MR. BROWN:

Q. Now, that's the general sludge definition. Is that right? Is that what you're quoting now?

A. Right."

"Q. Okay. Well, you're not claiming that any and every sludge is a hazardous waste, are you?

A. No.

Q. Only sludge — For purposes of this case, only sludge containing K-001 constituents would be a hazardous waste, wouldn't it?

A. No. Sludge generated in a waste water treatment facility from the treatment of waste water that comes from a wood preserving facility that uses pentachlorophenol or creosote is K-001, irrespective of its constituents.

Q. What regulation says that?

A. It's in the identification and listing of the Alabama Hazardous Waste Management regulations, Section 234, 4-234 through 4-235.

Q. Let me ask you this. If what you saw on the side of that pond was an oil stain, do you content that that is K-001 bottom sediment sludge?

A. I have no knowledge of whether that is an oil stain or ——"

The obvious inability of this witness to provide any sort of logical and sensible answers to the questions posed, in my judgement, points out the obvious flaws in the Agency's theory concerning the generation of K001 bottom sediment sludges. At one point the witness states that the dark stain he observed on the edge of the lagoon, if it were surface oil, it would not be considered K001 and yet he then goes to state that if he saw something there, it must, of necessity, be K001 sludge.

Professor Warren S. Thompson, appearing as an expert witness on behalf of the Respondent, discussed the Agency's theory as to the generation of K001 sludge both in the pond and the spray irrigation field at some length. Professor Thompson, who had visited the Respondent's facilities on many occasions, emphatically testified that at no point had he ever observed anything vaguely resembling K001 sludge, either in the holding lagoon or the

spray irrigation field. He agrees that the spray irrigation field is a biological treatment system and it is for that reason that the EPA recommended its use in order to meet the "zero discharge" limitations imposed by the Clean Water Act. He also emphatically stated his opinion that the materials formed in the spray irrigation field by this biological activity can in no way be considered as K001 sludge, as that term is defined in the regulations and as the scientific community has viewed such a sludge. On page 221 of the Transcript he emphasized the Agency's position by quoting from Lewis Carroll's book Through A Looking Glass to the effect that: "When I use a word, Humpty Dumpty said, in a rather scornful tone, it means just what I choose it to mean, nothing more, nothing less." The witness then goes to say:

> "And this is a word that EPA is using, sludge. It can refer to carload quantities, or it can refer literally to monomolecular layers when we're talking about spray irrigation fields. One cannot identify visually or by measurement a K001 sludge on a spray irrigation field.
>
> "So when I say that I disagree with Mr. Skinner, that is the reason, is that he is overlooking his own regulations in that regard."

Professor Thompson testifies again on this question on pages 224 and 225 of the Transcript, upon cross-examination by EPA counsel. When asked: "Isn't it true that biological activity that is going to take place at the top, takes place right at the top layer (discussing the spray irrigation field)?" He answers:

> "There is biological activity that takes place in the upper I'll say 12 inches of the soil, primarily in the top six inches of the soil. Now, this biological activity is activity associated with the breakdown of the dissolved preservative constituents in solution in the waste water, and with the wood sugars — There's still some wood sugars from the wood preserving process that are also in solution, and these are degraded biologically and photo-chemically on the spray irrigation field."

=> also hazardous constituents

"Question: And isn't it true that that biological mass that's breaking down those constituents is considered K001 sludge?

Answer: This is a point where I disagree with that. The fact that there is a biological activity taking place does not necessarily mean that a sludge is forming."

Professor John Ball, also appearing as an expert witness on behalf of the Respondent, addressed both the question of the Agency's interpretation of the definition of a tank and its notion about the formation of K001 sludge both in the holding pond and the spray irrigation field. On page 395 of the transcript, Dr. Ball discusses EPA's contention that the biomass material, which is generated in the spray irrigation field and purportedly generated in the holding pond, constitutes K001 sludge. He states that as to all the sludges that he has ever had anything to do with, he has been able to distinguish them and wood preserving sludges he can easily distinguish. He was asked whether he had ever seen or heard of, prior to the testimony in this case, either an invisible sludge or a sludge you cannot see with the naked eye or a sludge you cannot measure under a standard test. He states that other than before the K001 question came up, "...I never heard or ran across anyone who has claimed that he is working with a sludge that is some sort of sludge that you can't see, invisible type sludge." On page 398 of the transcript, Dr. Ball also discusses the physical and biological changes that occur when bacteria attack and consume organic chemicals, such as naphthalene or other constituents of the wood preserving wastewater. He suggests that you do not end up with the same materials you started with because the bacteria eat into the molecules and it becomes another organic material entirely, which is certainly not K001 sludge.

On page 407 of the transcript, Dr. Ball discusses his opinion concerning whether or not the wooden filter that has now been replaced by the concrete

filter and which is identical to the one still remaining is or is not a tank under the definition in the EPA regulations. He stated he believes, under that definition, that it is a tank. He explained that: "It is made primarily of wood. "And when I think about that, 'primarily' to me means most of it is made of wood, most of the structural part, and it is made of wood. Under the definition it says 'primarily made of non-earthen materials', which to me would mean some of it could be made of earthen materials." On page 408, Dr. Ball continues his discussion about his problems with EPA's extension of the definition of a tank as it appears in the Federal Register and states that he thinks that they are going too far with that regulation in that they would suggest that you take the device in question and suspend it in mid-air and if it is able to hold itself together and maintain its integrity it is a tank and, if not, it is not a tank. It was his opinion that this extension of the written definition is unwarranted and improper. Dr. Ball, who also visited the facility on several occasions and took samples of the material in the holding pond and in the spray field, testified that on numerous occasions he has been there, he has never seen anything in either of those two areas that would vaguely resemble K001 sludge or anything similar. In addition, the testing performed by Dr. Ball at the Respondent's facilities did not reveal the presence of any K001 sludge, or, as to the spray field any of the K001 constituents in any significant quantities which would render them subject to regulation under The Act. Dr. Ball also expressed his vigorous disagreement with Mr. Skinner's (EPA Headquarters) theory about the generation of biomass which would be considered K001 bottom sediment sludge. He suggests such a theory is only that. No data has been presented by EPA or Mr. Skinner to substantiate his theory. His many years of experience in

dealing with wood processing operations and the generation of sludges by that industry, as well as by the petroleum industry, leads him to believe that there is no substance to Mr. Skinner's supposition in this area.

Discussion

As indicated in the letter from Mr. Scarbrough, EPA Region IV, to Mr. Bernard Cox, Alabama Hazardous Waste Management Office, the sole reason, at that time, for the Agency considering the holding pond and the spray irrigation field to be regulated units was that they managed a hazardous waste, i.e., the water emanating from the bottom of the sand filter. Nothing in that letter suggests that Mr. Scarbrough considered these units to be regulated for the reason that there was some K001 sludge generated therein. It was only after the later pronouncements by Mr. Skinner that: (1) the wastewater is not a hazardous waste; and (2) any sludge materials generated in these two units would, of necessity, be K001 bottom sediment sludge that the Agency appeared to change its position as to the rationale for regulating these units. The regulated industry, on the other hand, having read EPA's prior decisions in 1980, to the effect that the wastewater generated by such a filter is not a hazardous waste, never considered facilities such as the holding pond or spray irrigation field to be units regulated under RCRA. It was only upon reading Mr. Skinner's rather novel approach to this issue did they become seriously concerned about EPA's change of position and have, in fact, formally petitioned EPA Headquarters to review and change its opinion on this question about the generation of K001 sludge in surface impoundments and spray irrigation fields. The record indicates that EPA Headquarters is taking this question under advi[illegible] and has not yet issued a reply to the petition for reconsideration.

The record is equally clear that no one from either EPA or the State of Alabama has ever sampled any of the materials in the holding pond or spray irrigation field and subjected such samples to laboratory analysis to determine the presence of either the wastewater constituents of concern or K001 sludge. The Agency's position is that anything generated from the interaction of this non-hazardous wastewater with naturally occurring bacteria is, by definition, K001 sludge, and that if the regulated community wishes to dispute that contention, they must do so by proving the negative to the Agency through a de-listing petition. The Agency has also expressed its position, in writing, that they have no idea of how a regulated facility would make such a demonstration to EPA.

The evidence in this case shows, by a substantial preponderance of the evidence, that the Agency has failed to prove its theory as to the spontaneous generation of a hazardous sludge from a non-hazardous wastewater. On the contrary, the only evidence given on this question by anyone who is qualified by virtue of his education and experience to render such opinions disagrees violently with Mr. Skinner's contention that all new materials created by some biological activity following the sand filter portion of the wastewater treatment device is a regulated hazardous waste, i.e., K001 bottom sediment sludge.

The Agency's position in this matter has placed the regulated community in an untenable position wherein by the expression of a unsubstantiated scientific theory they have required that community to demonstrate to it the non-existence of these materials when they are unable to provide any guidance whatsoever to the regulated community as to how this might be accomplished. Since no one at EPA or the State of Alabama has ever seen, measured, tested or analyzed any such freely occurring sludge, their position in this matter remains solely that of an undocumented theory.

While it may well be true that some wood processing facilities do generate K001 sludge in their holding ponds or spray fields, the record is devoid of any evidence which suggests that such sludge is generated at facilities employing the EPA-recommended treatment system utilized by this Respondent.

I am also of the opinion that the two memoranda sent by Mr. Skinner to Mr. Scarbrough, wherein this new theory is articulated, have no regulatory force or effect since it amounts to an extension of the previously recognized realm of regulated facilities and is, therefore, in violation of the provisions of the Administrative Procedure Act (APA) which clearly require that such pronouncements be the subject of publication, comment and final promulgation in the Federal Register. This argument concerning the invalidity of EPA's attempt to circumvent the provisions of the Administrative Procedure Act through the use of internal memoranda was discussed at some length in the amicus brief filed by the AWPI and the cases cited therein. I am, therefore, of the opinion that even if there were some scientific validity and supportive data to aid Mr. Skinner's new interpretation, it still would have to go through the APA process of notice and comment with the opportunity of the regulated community to scrutinize the scientific basis for such pronouncement.

An excellent discussion of this notion, as it applies to EPA activities, is found in the matter of U.S. Nameplate Company, Respondent, RCRA Docket No. 84-H-0012, issued by the Chief Judicial Officer of EPA on March 31, 1986. That decision concluded by stating:

> "Clearly, these reference were insufficient to give U.S. Nameplate 'effective enough knowledge so that it might easily and certainly assertain the conditions by which it was to be bound.' Based upon these imprecise references, U.S. Nameplate could not have been expected to know, or even suspect, that the Agency considered sludge from the etching from stainless steel to be 'F006 hazardous waste'."

In that case the Agency attempted to hold U.S. Nameplate responsible for managing its sludge from stainless steel etching as a regulated hazardous waste when neither the listing document, the background document nor other materials would suggest to U.S. Nameplate that the sludge that they were generating was included in the definition given in the regulations. The Agency in that case argued that they had, in fact, listed and indexed the documents referred to and that, therefore, that was sufficient under the APA to put the general public on notice as to the requirements. The Administrator disagreed with the Agency enforcement staff on that question and stated that mere publishing and indexing of the materials was not sufficient under the APA to advise the regulated community as to its responsibilities in handling such waste under RCRA.

In the instant case, the Agency has not even accomplished the bare minimums suggested by the APA either through publication, indexing or otherwise. The only notice to the regulated public in this case would be if they happened to get their hands on Mr. Skinner's two memoranda which were internal to the Agency, not publicized, not indexed, and not published in any fashion. Clearly, the attempted use of EPA of the theories contained in Mr. Skinner's internal memoranda do not even approach a threshold compliance with the requirements of the APA.

In this regard, the Agency argues that the pertinent memoranda are merely "interpretive rules" and as such fall within the exception provided by § 553 of the APA. This issue was also addressed in some detail in the Nameplate case, supra. See pages 10-11 of that opinion which quotes Lewis V. Weinberger, 415 F.Supp. 652 (D.N.M. 1976) as follows:

"The IHS contract care policy in dispute should have been published in the Federal Register. It falls within the scope of "statements of general policy or interpretations of general applicability formulated and adopted by the agency" under 5 U.S.C.A. §552(a)(1)(D) (1967).

"Regarding the necessity for publication of the memorandum in the Federal Register versus merely making it available for public inspection and copying, the Court stated:

"In reaching this conclusion, the Court has taken into account the provisions of section 552(a)(2) dictating that 'those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register' need only be available for public inspection and copying. 5 U.S.C.A. §552(a)(2)(B) (Supp. 1976).

"In determining whether particular policy or interpretive statements are required to be published or whether they need only be made available, subsections (a)(1) and (a)(2) of section 552 must be read together: 'statements of general policy must be published; interpretations which have been adopted by the agency must be available and interpretations of general applicability must be published.' K. Davis, Administrative Law Treatise §3A.7 (Supp. 1970) [hereinafter cited as Davis].

"A policy statement is not qualified as 'general' nor is an administrative interpretation deemed to be 'of general applicability' if: (1) only a clarification or explanation of existing laws or regulations is expressed; and (2) no significant impact upon any segment of the public results. See Hogg v. United States, 428 F.2d 274 (6th Cir. 1970); Anderson v. Butz, 37 Ad.L.2d 852 (E.D.Cal. 1975). See generally Davis §§ 3A.7,.9. Therefore, such material need not be published. Also within the availability requirements of §552(a)(2)(B) are statements affecting only an agency's internal or housekeeping operations and adjudicatory opinions which may be relied upon as precedents by the agency. See Hogg v. United States, supra; Davis §§ 3A.7,.9.

"'Statements of general policy or interpretations of general applicability' which fall within the publication requirement of section 552(a)(1) have been variously defined. Generally, however, policy or interpretive statements are deemed to fall within the scope of 552(a)(1)(D), requiring their publication, when they adopt new rules or substantially modify existing rules regulations, or statutes and thereby cause a direct and significant impact upon the substantive rights of the general public or a segment thereof. See Anderson v. Butz, supra."

> "The IHS memo serves as the present authorization for excluding off-reservation Indians' from the class of beneficiaries eligible for contract health care. As such, it is a 'statement of general policy' within the meaning of §552(a)(1)(D)."

Since the effect of these memoranda is to place portions of a wastewater treatment system (i.e., the holding pond and spray field) under the strictures of RCRA, which the regulated community theretofore did not consider to be regulated, they have a "direct and significant impact on the substantive rights" of a segment of the general public. They, therefore, must be published.

The Agency also argues that the regulated comunity should have been put on notice that these units were considered to be regulated under RCRA by reading the relevant "background document". I have carefully read this document and although several very general statements appear which might make one suspect that they are regulated, they lack the precision and completeness which the courts have required.[2] This vagueness is underscored by the Agency's own doubts about the status of the spray fields as evidenced by Mr. Skinner's first memorandum (Respondent's Exhibit No. 36) wherein he told Mr. Scarbrough that his office is currently investigating that issue and will advise him later.

Additionally, the "background document" was not published in the Federal Register, but merely mentioned in the preamble to the Federal Register Notice which originally listed K001. As to this situation, the Applachian Power court held that:

> "Any agency regulation that so directly affects pre-existing legal rights or obligations, Lewis v. Weinberger, 415 F.Supp. 652 (D.N.Mex. 1976), indeed that is 'of such a nature that knowledge of it is needed to keep the outside interest informed of the agency's requirements in repsect to any subject within its competence,' is within

2 Appalachian Power Co. v. Train, 566 F.2d 451 (1977).

the publication requirements. United States v. Hayes, 325 F.2d 307, 309 (4th Cir. 1963). As the substance of a regulation imposing specific obligations upon outside interests in mandatory terms, Piercy v. Tarr, 342 F.Supp. 1120 (N.D.Cal. 1972), the information in the Development Document is required to be published in the Federal Register in its entirety, or, in the alternative, to be both reasonably available and incorporated by reference with the approval of the Director of the Federal Register. 5 U.S.C. §552(a)(1).

"[1 C.F.R.] §51.6(a) requires that the 'language incorporating material by reference shall be as precise and complete as possible,' while §51.7(a) provides that 'each incorporation by reference shall include an identification and subject description of the matter incorporated, in terms as precise and useful as practicable within the limits of reasonable brevity.' The obvious meaning of those two sections is that an incorporation by reference must give one affected enough knowledge so that he may easily and certainly ascertain the conditions by which he is to be bound.

"The agency has failed to comply with either of the requirements. The language of the incorporation by reference is neither precise, nor complete, nor useful."

The Administrator in the U.S. Nameplate case, supra, reviewed the language in the preamble which the Agency argued satisfied the incorporation by reference requirements and held that:

"Here, as previously stated, neither the background document nor the statement contained therein that defines electroplating to include chemical etching was published in the Federal Register. However, the Region does claim that the background document was referenced or 'noted' in the Federal Register at the time 40 CFR §2651.31 (F006) was originally promulgated. 45 FR 33084, 33112, 33113 (May 19, 1980). In response, U.S. Nameplate claims, and the Region does not dispute, that the only references in 45 FR 33084 et seq. (1980) to the background document are as follows:

"[A]mong other things, the docket contains background documents which explain, in more detail than the preamble to this regulation, the basis for many of the provisions of this regulations. 45 FR 33084"

"And at 45 FR 33112 and 33113:

> "Detailed justification for listing each hazardous waste in Subpart D [Subpart D contains the Agency's list of hazardous waste from non-specific sources, i.e., §261.31] is contained in specific background documents and so will not be set forth in this preamble."

> "Clearly, these references were insufficient to give U.S. Nameplate 'effective enough knowledge so that [it might] easily and certainly ascertain the conditions by which [it was] to be bound.' Based upon these imprecise references U.S. Nameplate could not have been expected to know, or even to suspect that the Agency considered sludge from the etching of stainless steel to be 'F006 hazardous waste.'"

The language in the preamble to the regulations listing K001 bottom sediment sludge is equally vague and does not satisfy the requirements set forth above.

For the reasons previously set forth, I am of the opinion that neither the memoranda nor the background document can be legitimately used by the Agency to bolster its case against this Respondent.

I am, therefore, of the opinion that the attempted use by the Agency of the unsupported theories espoused by Mr. Skinner in his two memoranda in an enforcement action such as is before me in this case is clearly unauthorized. In addition, the evidence adduced at the Hearing demonstrates that the basis for Mr. Skinner's scientific theory concerning the spontaneous generation of a hazardous waste sludge from a non-hazardous liquid medium is unsupported and in direct conflict with the sworn testimony of the two expert witnesses presented by the Respondent. The rules of procedure in these matters place the burden of establishig a prima facie case upon the Agency and they have not done so in this case. The mere presentation of unsupported internal memoranda which, in essence, create a new violation under The Act, not heretofore recognized, does not satisfy that burden. To merely come into an

enforcement proceeding with essentially an unsupported enforcement philosophy which has not undergone the scrutiny required by the APA and to use such a theory to boot-strap its position on the validity of its case is not authorized under the rules applicable to these proceedings. Even if one were to take the position that the Agency has satisfied its initial burden of proof as to the validity of its charges, the evidence presented by the Respondent in this case clearly rebutts any such presumption. In any event, the Agency has not sustained its burden with a preponderance of the evidence as required by the rules. (40 C.F.R. § 22.24.)

Based on the discussion above, I am of the opinion that the wood-sided sand filter meets the definition of a "tank" as that definition is expressed in EPA's own regulations and, therefore, that device is not a regulated unit under the provisions of RCRA. In addition to being scientifically unsupported, the Agency's notion about the subsequent generation of this hazardous waste is contrary to the definition of a sludge as heretofore set forth in the regulations and could not stand in any event. As stated above, the definition of a sludge excludes the treated effluent from a wastewater treatment plant and the only definition that approaches an explanation of what a wastewater treatment plant is is defined as a wastewater treatment unit which the facilities employed by the Respondent, in this case, clearly meet.

I am, therefore, of the opinion that, for a variety of reasons, all of which are enunciated above, the Agency has failed to show that the Respondent, Brown Wood Preserving Company, Inc., has violated the provisions of RCRA in the particulars set forth in the initial and Amended Complaint since none of the facilities which they operate are units regulated under RCRA.

Since I am of the opinion that the Agency has failed to sustain its burden of proving that the violations alleged in the Complaint did, in fact, occur there is no need to discuss the appropriateness of the penalty suggested by the Agency in its Complaint.

In addition to the reasons given above, the record also suggests that the Respondent, Brown Wood Preserving Company, Inc., would be entitled to the small quantity generator exemption since the record suggests that although the sand filters in question had been in operation, at least, since the mid-1970's it only generated K001 sludge in an amount considerably less than 2,200 lbs., which is the cutoff limit.* The Agency's observation that the small quantity generator exemption does not apply to this facility was based solely on the notion that the holding pond and spray irrigation fields were regulated hazardous waste management units and, therefore, any exemption to be enjoyed by one who would otherwise qualify as a small quantity generator would not be available to this Respondent. Since I am of the opinion that the Respondent does not, in fact, treat, handle, store or dispose of hazardous waste on its facility, the benefits accruing to one who qualifies as a small quantity generator could certainly be enjoyed by this Respondent should such a determination become necessary in the future.

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*See the testimony of Complainant's witness, James D. Hagan at Pg. 153 of the transcript, wherein he states that the cleanout of the old wooden filter only generated about a wheelbarrow load of K001 sludge.

ORDER[3]

For the reasons herein above stated, I am of the opinion that the original and the Amended Complaint, issued in this matter against the Respondent, Brown Wood Preserving Company, Inc., should be and is hereby dismissed.

DATED: May 30, 1986

Thomas B. Yost
Administrative Law Judge

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[3] 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).

Regulation of Wastewater Treatment Effluent from Processes that Generate K001 and F006 Wastewater Treatment Sludge

Matthew Straus, Acting Chief
Waste Identification Branch (WH-562)

James H. Scarbrough, Chief
Residuals Management Branch
Air and Waste Management Division

This is in response to your questions concerning regulation of wastewater treatment effluent from K001 and F006 processes.

The listing K001 includes any sludge formed from wastewater from wood preserving process wastes that use creosote and/or pentachlorophenol, regardless of where the sludge is formed. If a sludge is formed in the bottom or sides of a surface impoundment, on a sand filter or on a spray field of a land treatment unit, it is K001 sludge. The surface impoundment, the sand filter and the spray field would be subject to all hazardous waste permitting regulations.

The effluent remaining after the sludge settles out is not a listed hazardous waste. It would only be subject to the characteristics.

However, in the case of the sand filter, the water that drains from the filter beds is a hazardous waste.

This is based on the definition of hazardous waste, specifically §261.3(c)(2) which states hazardous waste includes:

> . . . Any solid waste generated from the treatment, storage or disposal of a hazardous waste, including any sludge, spill residue, ash, emission control dust or leachate (but not including precipitation runoff), is a hazardous waste.

The sludge that accumulates on the sand filter beds would be regulated as a listed hazardous waste from a specific souce per §261.32, waste code number K001. The water which drains from the filter beds would be regulated as a hazardous waste since it would be "leachate" generated from the treatment and storage of a hazardous waste (i.e., K001 sludges).

"Leachate" is defined in §260.10 as:

> any liquid, including any suspended components in the liquid, that has percolated through or drained from hazardous waste.

The regulations would apply to F006 sludge exactly the same way as described above for the K001 sludge.

COURT'S EXHIBIT NO. 1

MAY 2 1 1984

Request for Concurrence on Scope of F006 and K001

Chief, Residuals Management Branch
Air and Waste Management Division

Matthew Straus, Acting Chief (WH-562)
Waste Identification Branch

The purpose of this memorandum is to request your concurrence with our interpretation of the listing for F006 and K001.

I am requesting written concurrence. Therefore I have provided our interpretation in a response format. If you agree with our position, please sign the attached memo as soon as possible.

Because we have several permit actions and several enforcement actions including an Order we have issued pending, based on our interpretation, your concurrence is requested within 10 working days; if no response is received, concurrence will be assumed.

If you have any questions please contact Bill Gallagher of my staff at FTS 257-3016.

James H. Scarbrough

bcc: Beverly spagg
WCS
WES
WPS
Mickey Hartnett

This won't cut.

F.1c-204

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV

AL-XX-TSO-204 008

In The Matter Of: KOPPERS COMPANY, INC. Woodward Tar Plant 1835 Koppers Lane Dolomite, Alabama 35061 EPA I.D. No.: ALD085765808, Respondent.	Resource Conservation and Recovery Act Section 3008(a)(1) 42 U.S.C. §6928(a)(1) Docket No. 85-45-R

RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION FOR AN ACCELERATED DECISION

Complainant, U.S. EPA, hereby responds to and opposes Respondent's Motion for an Accelerated Decision in the above-styled case.

INTRODUCTION

Respondent's Motion seeks dismissal of the claims in the Amended Complaint relative to the oxidation fields (otherwise referred to as spray irrigation field) and an order prohibiting the EPA from requiring Koppers to submit a Part B permit application for the spray irrigation field or any information in support thereof.

The Order of Judge Thomas B. Yost dated July 24, 1986 found that the issue of the Part B application was not before the Court in this proceeding and therefore no authority existed for the issuance of such an order. Complainant will therefore not respond to that portion of the Motion.

The standard for an accelerated decision provides that the Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. 40 C.F.R. §22.20(a).

Denial of Respondent's Motion for an Accelerated Decision is necessary in this case as there exists a genuine issue of material fact.

Respondent, Koppers Company, cites as the basis for its Motion, the decision in In Re Brown Wood Preserving Company, Inc., RCRA-84-16-R (May 30, 1986). Respondent states that the opinion in the Brown Wood case is indistinguishable from the instant controversy and should serve as the basis for dismissal of EPA's complaint against the Respondent relative to the spray irrigation or oxidation fields.

The Brown Wood decision, insofar as the spray irrigation field issue was concerned, was based on EPA's reliance on memoranda issued by EPA Headquarters, i.e, the "Skinner memoranda." However, the Brown Wood decision strongly suggests that the failure of the EPA to collect and analyze samples of materials in the Brown Wood facility spray field to determine the presence of either K001 sludge or the constituents of concern was a key factor in the decision to dismiss the Brown Wood Complaint. In

the present controversy, sludge has been observed on the Koppers' oxidation fields by EPA representatives and samples of sludge, soil and sand from the fields have been collected and analyzed. See Affidavit of William R. Davis and Affidavit of Paul R. Peronard, attached hereto as Exhibits A and B, respectively. The analytical results of the sludge, soil, and sand show high concentrations of K-035 constituents, which form the basis for listing as a hazardous waste the wastewater treatment sludges generated by the production of creosote. (40 C.F.R. §261.32 and 40 C.F.R. §261, Appendix VII.) Groundwater samples from the monitoring wells around the north and south oxidation fields have also been collected and analyzed by the EPA. High concentrations of the K-035 constituents were detected in monitoring wells M-2 and M-3, located south and southwest of the oxidation fields.

In addition to the EPA sampling, the Koppers Company has collected and analyzed samples from the oxidation fields and the groundwater monitoring wells. The Koppers' analytical results also detected high concentrations of the K-035 constituents in the oxidation fields and detected extremely high levels of napthalene, one of the K-035 constituents, in the groundwater monitoring wells. See Koppers' Answers and Objections to Complainant's First Set of Interrogatories, No. 12(a) and 12(b) and No. 13(a), 13(b) and 13(c), attached hereto as Exhibit C. Also, see Respondent's Response to Complainant's First Request for Production of Documents, Exhibits C, D, and F, attached hereto as Exhibit D.

DISCUSSION

Respondent argues that EPA cannot impose RCRA regulation on the spray irrigation field. Respondent argues the Brown Wood decision found the EPA "Skinner" Memoranda to be unenforceable and that EPA cannot rely on unsubstantiated theory in an enforcement proceeding. In this case, EPA is not attempting to rely solely on the "Skinner" memoranda nor an unsubstantiated theory. Rather, Complainant has documented the existence of sludge on the oxidation fields and high concentrations of hazardous waste constituents of concern, both in the oxidation fields and the groundwater underlying the fields.

Respondent appears to argue that the oxidation fields are not and cannot be regulated under the Resource Conservation and Recovery Act because the oxidation fields are a part of the NPDES wastewater treatment system at the facility and therefore regulated by the Clean Water Act. However, the Clean Water Act regulates only the point source discharge from the Koppers' wastewater treatment system, not the separate treatment units or components of the system preceding the point source discharge. Koppers' wastewater treatment system consists of seven separate units of which the oxidation fields are the last treatment unit. The final unit of that system, Flow Monitoring, is not treatment. See Respondents' Answers to Complainant's Interrogatory No. 3(b) and 3(c), attached hereto as Exhibit E.

The Resource Conservation and Recovery Act and the regulations promulgated thereunder do provide certain limited exemptions for Clean Water Act treatment systems, but those exemptions do not apply to Koppers' oxidation fields. The limited exemptions relate to point source discharges controlled by the Clean Water Act and treatment units defined as tanks by the RCRA regulations. The first exemption to be considered is the point source exclusion. Section 1004(27) of RCRA, 42 U.S.C. 6903(27) defines the term "solid waste" to mean "any garbage, refuse, sludge from a waste treatment plant. . . but does not include . . . solid or dissolved material in . . . or industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, as amended . . ." (emphasis supplied). In the Preamble to the Hazardous Waste regulations promulgated on May 19, 1980, EPA explained that "the purpose of the industrial point source discharge exclusion in Section 1004(27) was to avoid duplicative regulation of point source discharges under RCRA and the Clean Water Act. Without such a provision, the discharge of wastewater into navigable waters would be 'disposal' of solid waste and potentially subject to regulation under both the Clean Water Act and Subtitle C [RCRA]. These considerations do not apply to industrial wastewaters prior to discharge since most of the environmental hazards posed by wastewater in treatment and holding facilities - primarily groundwater contamination cannot be controlled under the Clean Water Act or other EPA statutes" (emphasis supplied). 45 Fed. Reg. 33098 (May 19, 1980).

Next, the RCRA regulations, at 40 C.F.R. §261.4, Exclusions, provide: "(a) Materials which are not solid waste.[1] The following materials are not solid wastes for the purpose of this part:

. . .

"(2) Industrial wastewater discharges that are point source discharges subject to regulation under Section 402 of the Clean Water Act, as amended.

"[Comment: This exclusion applies only to the actual point source discharge. It does not exclude industrial wastewaters while they are being collected, stored, or treated before discharge, nor does it exclude sludges that are generated by industrial wastewater treatment.]

...."

The RCRA regulations also provide an exemption from RCRA regulation for portions of a wastewater treatment system. The exemption is restricted to a wastewater treatment unit as defined at 40 C.F.R. §260.10.[2] The key to the exemption is that

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[1] A solid waste is any discarded material that is not excluded by by §261.4(a) or that is not excluded by variance granted under §§260.30 and 260.31. (40 C.F.R. §261.2)

[2] "Wastewater treatment unit" means a device which: (1) Is part of a wastewater treatment facility which is subject to regulation under either Section 402 or Section 307(b) of the Clean Water Act; and (2) Receives and treats or stores an influent wastewater which is a hazardous waste as defined in §261.3 of this chapter, or generates and accumulates a wastewater treatment sludge which is a hazardous waste as defined in §261.3 of this chapter; and (3) Meets the definition of tank in §260.10 of this chapter. (40 C.F.R. §260.10)

such wastewater treatment unit must be a tank, also defined in 40 C.F.R. §260.10.[3]/

One of the products produced by Koppers at the Organic facility is creosote. On May 19, 1980 EPA promulgated its Lists of Hazardous Waste, which included a listing for K-035, Wastewater treatment sludges generated in the production of creosote. (40 C.F.R. §261.32.) Koppers operates its NPDES wastewater treatment system to treat the process wastewaters resulting from its creosote production. Each unit of its treatment system performs a specific and necessary step in the wastewater treatment process. (See Koppers Answer to Interrogatory No. 3(b) and 3(c), Exhibit E.) Each unit of Koppers' wastewater treatment system that is used for treatment of the wastewaters and that generates a sludge is subject to regulation by RCRA, unless exempted.

In order for Kopper's oxidation fields to be exempt from RCRA regulation on the basis of their status as part of the NPDES wastewater treatment system, the fields would have to qualify as tanks or as "point sources." There is nothing in the record to suggest such exemptions for the oxidation fields.

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[3]/ "Tank" means a stationary device, designed to contain an accumulation of hazardous waste which is constructed primarily of non-earthern materials (e.g., wood, concrete, steel, plastic) which provide structural support.

In the instant case, the Koppers' oxidation fields receive and treat wastewaters containing K-035 constituents. Sludge has been observed on the fields and photographed. See Affidavit of Paul R. Peronard and Exhibits, attached hereto as Exhibit B. Samples of the sludge, soil and sand on the oxidation fields have been collected and analyzed by EPA to determine if K-035 constituents were present. See Affidavit of William R. Davis and Exhibits, attached hereto as Exhibit A. K-035 constituents are identified as creosote, chrysene, napthalene, fluoranthene, benzo (B or K) fluorathene, benzo (a) pyrene, indeno (1,2,3-cd) pyrene, benzo (a) anthracene, dibenzo (a) anthracene, and acenapthalene. (40 C.F.R. 261, Appendix VII, Basis for Listing Hazardous Waste). On March 18-19, 1986, four sludge, soil and sand samples were collected from the north and south oxidation fields, by William R. Davis, EPA. All of the samples contained high concentrations of benzo (B or K) fluoranthene, ranging from 23,000 ug/kg to 41,000 ug/kg, chrysene, ranging from 8,800 ug/kg to 15,000 ug/kg, and benzo (a) pyrene, ranging from 19,000 ug/kg to 37,000 ug/kg. In three out of the four samples, all of the K-035 constituents, with the exception of napthalene, were found. (See Davis Affidavit, Table, EPA Sample Results, South and North Oxidation Fields, Exhibit 2)

Similar findings were made regarding the groundwater monitoring wells. On March 18, 1986, five groundwater monitoring wells were sampled by William R. Davis, EPA. The analysis of the groundwater samples detected concentrations of all of the K-035 constituents in Sample Nos. K-3 and K-4, Monitoring Wells

M-3 and M-2, located south and southwest of the oxidation fields. Sample No. K-5, Monitoring Well M-1, contained five of the K-035 constituents, including napthalene in a concentration of 3,200 ug/l. (See Davis Affidavit, Table, EPA Sample Results, Groundwater Monitoring Wells, Exhibit 3.)

A report of the EPA investigation entitled "Waste Stream Investigation and Groundwater Monitoring Evaluation, Koppers Company, Inc., Dolomite (Birmingham), Alabama, EPA I.D. No. ALD085765808, ESD Project No. 86-199," is attached as Exhibit 1 to Affidavit of William R. Davis, Exhibit A hereto.

CONCLUSION

In the Brown Wood decision, relied upon by Respondent, Judge Yost stated "[t]he existence of such sludge [K001] must be demonstrated by something more than mere hypothetical theory on the part of the Agency to subject them [Brown Wood] to the rigors associated therewith of a RCRA regulated facility." (Slip op. at 20) In this case, Complainant can demonstrate by testimony and analytical results the existence of sludge on the Koppers oxidation fields and high concentrations of the very constituents which formed the basis for the listing of the hazardous waste, K035 wastewater treatment sludges generated in the production of creosote.

For the foregoing reasons, Respondent's Motion for dismissal of the allegations contained in the Amended Complaint relative to the land treatment units, i.e, the oxidation fields, should be denied.

Dated: 8-4-86

Respectfully submitted,

ANNE L. ASBELL
Associate Regional Counsel
U.S. EPA - Region IV

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Response in Opposition to Respondent's Motion for an Accelerated Decision was served on Sandra A. Beck, Regional Hearing Clerk, U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, N.E., Atlanta, Georgia, 30365, service made by hand delivery; and that true and correct copies were served upon:

Honorable Thomas B. Yost
U.S. Environmental Protection Agency
345 Courtland St., N.E.
Atlanta, Georgia 30365
(service made by hand delivery)

and by placing copies thereof in the U.S. Mail with adequate postage thereon, addressed to:

Stanley M. Spracker, Esquire
Weil, Gotshal & Manges
1615 L Street, N.W.
Suite 700
Washington, D.C. 20036

Jill M. Blundon, Esquire
Koppers Company, Inc.
Room 1400
Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219

Dated: 8-4-86

Janice E. Riley
JANICE E. RILEY

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

This is the latest order it has Judge Yost's input of Brown Wood

OFFICE OF THE ADMINISTRATOR

IN RE	)	
	)	RCRA-85-45-R
KOPPERS CO., INC.	)	
	)	ORDER ON MOTION
Respondent	)	

By motion dated July 8, 1986, Respondent seeks an accelerated decision dismissing all claims made in the Complaint with respect to the spray irrigation field at its Dolomite, Alabama facility. The motion also sought an order prohibiting the Complainant from requiring the Respondent to submit a Part B RCRA Permit Application for the above-mentioned spray field.

By motion dated July 21, 1986, the Complainant sought an extension of time in which to respond to the motion. By Order dated July 24, 1986, the Court granted the extension. In that Order, the Court also stated that it had no authority to issue an order relative to the Part B issue since it was not an element of the case before it.

The Complainant filed its response in oppositon to the motion on August 4, 1986.

The Respondent based its motion to dismiss on a recent decision by this Court, styled Brown Wood Preserving Company, Inc., RCRA 84-16-R (decided on May 30, 1986). Based upon the entire record, developed at a hearing on that case, this Court dismissed the complaint. One of the basis for that decison involved a finding that several internal memoranda of the EPA were of no force and effect as a basis for an enforcement action against the Respondent, Brown Wood. In that case, the Agency used

those memos to support its opinion that Brown Wood's holding pond and spray fields were treatment facilities covered by RCRA. The Respondent herein alleges that its facility and the issues presented in this case are the same as in the Brown Wood case and thus the dismissal should issue.

In its response, the Complainant argues that: (1) the Respondent's facility is not the same as Brown Wood's; and (2) that unlike the Brown Wood case, where no evidence of sludge was shown to be present in or on the spray field, in this case the Agency has analyzed samples taken from the spray field and the groundwater monitoring wells associated therewith. Such analysis shows the presence of many of the chemical constituents which caused the Agency to decide that wastes, such as those generated by one who engages in the type of business as does the Respondent, were hazardous in the first place.

The Court, in the Brown Wood case, also stated on page 30 that:

> "While it may well be true that some wood processing facilities do generate K001 sludge in their holding ponds or spray fields, the record is devoid of any evidence which suggests that such sludge is generated at facilities employing the EPA-recommended treatment system utilized by this Respondent."

The Court also made it clear that the holding in that case was limited to the facts developed therein and may not apply to all facilities that use spray fields.

Other than its bare assertion that this case and Brown Wood are "indistinguishable", no evidence is presented by the Respondent which would compel the Court to share that belief. On the contrary, the Complainant has presented evidence, in the form of affidavits and official reports, which show the presence of sludge in the spray fields.

Based upon the record before me, I am of the opinion that the issuance of an accelerated decision pursuant to 40 C.F.R. § 22.20(a) is not warranted.

Accordingly, it is hereby ordered that the motion is denied in its entirety.

DATED: August 6, 1986

Thomas B. Yost
Administrative Law Judge

HONORABLE THOMAS B. YOST
U.S. ENVIRONMENTAL PROTECTION AGENCY
345 COURTLAND STREET
ATLANTA, GA 30365

404/347-2681, Comm. 257-2681, FTS

CERTIFICATION OF SERVICE

I hereby certify that the original of the foregoing was received by me as Regional Hearing Clerk, USEPA Region IV; and that true and correct copies were served on: Anne L. Asbell, Esquire, U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, Atlanta, Georgia 30365 (service by hand-delivery); David R. Berz, Esquire, Stanley M. Spracker, Esquire, and Robert C. Sexton, Esquire Weil, Gotshal & Manges, 1615 L Street, N.W., Suite 700, Washington, D.C. 20036; and Jill M. Blundon, Esquire, Koppers Company, Inc., Room 1400 Koppers Building, 436 Seventh Avenue, Pittsburgh, Pennsylvania 15219 (service by certified mail return receipt requested). Dated in Atlanta, Georgia this 6th day of August 1986.

Sandra A. Beck
Secretary to Judge Yost