

11/25/93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

| | | |
|----------------------------|---|----------------------------|
| In the Matter of |) | |
| |) | |
| Hawaiian Western Steel, |) | Docket No. RCRA-IX-87-0006 |
| Limited, Inc., and |) | |
| The James Campbell Estate, |) | |
| |) | |
| Respondents |) | |

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INITIAL DECISION

This is a proceeding under section 3008(a) of the Solid Waste Disposal Act, as amended by the Resource, Conservation and Recovery Act (RCRA) (42 U.S.C. § 6928). The proceeding was initiated on July 9, 1987, by the issuance of a Determination of Violation, Compliance Order and Notice of Right To Request A Hearing (complaint) charging Respondents, Hawaiian Western Steel (HWS) and the James Campbell Estate (Estate) with violations of the Act and applicable regulations, specifically operation of a hazardous waste disposal unit or facility (a landfill) without a permit in violation of section 3005(a) of RCRA and 40 CFR § 270.1(c). The complaint sought a penalty totaling \$522,000 and, inter alia, cessation of storage of hazardous waste and submission of a closure plan. The Second Amended complaint for which leave to file was granted by an order, dated April 26, 1990, reduced the proposed penalty to \$141,636, and contained a Compliance Order requiring Respondents to, inter alia, submit a closure plan, perform closure and post-closure, to provide financial assurance for closure, etc.,

in accordance with all applicable RCRA regulations and within specified time periods from the effective date of the order.

HWS and the Estate, having agreed to the entry of an order requiring closure of the landfill in accordance with applicable RCRA requirements, an Initial Decision/Order, hereinafter "Order," adopting with only a minor alteration,^{1/} the Compliance Order requiring closure in the Second Amended Complaint, was issued on December 3, 1992. The "Order," which recites that it was effective upon service,^{2/} states that the only matter remaining for resolution is the claim for penalties against HWS.

Under date of January 11, 1993, HWS has filed a "Consent To Entry Of Order Regarding Penalties," consenting to an order assessing the full amount of the penalty sought in the Second Amended Complaint, that is, \$141,636, against it.^{3/} The consent

^{1/} Findings that prior submissions by HWS did not comply with RCRA regulations were deleted.

^{2/} "Order," note 5 at 8. This was based upon Rule 22.27(c) (40 CFR Part 22), which provides that the initial decision shall become the final order of the Environmental Appeals Board (EAB) within 45 days after its service upon the parties and without further proceedings unless (1) on appeal is taken to the EAB by a party to the proceedings, or (2) the EAB elects sua sponte to review it. Although the Certificate of Service by the RHC, dated December 15, 1992, refers to Complainant's Motion For Amendment of Order, it is understood that the reference was intended to be to the "Order" and that the "Order" was served on Respondents by mail on December 15, 1992. A copy of the "Order" was furnished the EAB by a memorandum from the Hearing Clerk (Headquarters), dated December 16, 1992.

^{3/} The "consent" was among enclosures to a letter from counsel for HWS, dated January 11, 1993, wherein HWS sought "technical clarifications" to the "Order." These clarifications were
(continued...)

was conditioned upon a reservation by HWS, which filed for protection under Chapter 11 of the Bankruptcy Code on November 29, 1991, of its right to have EPA's claims classified, subordinated, discharged and otherwise dealt with as part of a plan of reorganization. The consent states that "HWS consents to an order which provides that as long as the HWS bankruptcy proceeding is pending and the automatic stay under 11 U.S.C. § 362 is not modified or lifted as to EPA, EPA will not enforce against HWS or property of the bankruptcy estate the money judgment to be entered pursuant to this consent." The proposed order attached to the consent contains substantially identical language.

Counsel for Complainant objected to the conditions sought by HWS, contending that the ALJ lacked authority to condition the manner in which the United States may enforce a penalty order and that the bankruptcy court was the proper forum for resolving issues such as whether the penalty judgment is subordinated to the claims of other creditors.^{4/} These and other matters were discussed in a telephone conference call on January 13, 1993, and counsel for HWS agreed to delete the conditions to HWS's consent to the entry of a

^{3/}(...continued)
requested notwithstanding the fact, HWS had opposed Complainant's Motion To Amend Order, dated December 11, 1992, which sought to include additional conclusions of law.

^{4/} Letter to the ALJ, dated January 12, 1993. Complainant also objected to the "technical clarifications" sought by HWS. In a telephone conference call of January 13, 1993, counsel for HWS was informed that requests for clarifications and interpretations of the "Order" would have to be addressed to EPA personnel overseeing closure.

penalty order. Confirming this position, HWS, under date of January 13, 1993, has filed a proposed order constituting HWS's unconditional consent to entry of a penalty order in the amount of \$141,636.

HWS has consented to the entry of an order assessing a penalty of \$141,636 against it and I conclude that it is appropriate to enter such an order. Findings to support the order are contained in the "Order," dated December 3, 1992, and these findings are incorporated by reference. Among those findings is that HWS operates a landfill located approximately at the intersection of Malokole Road and Hanua Street in Campbell Industrial Park, Ewa Beach, County of Oahu, Hawaii. This is the landfill described in the Second Amended Complaint. Other findings in the "Order" are that the landfill was in existence on November 19, 1980, the effective date of RCRA regulations, and that HWS deposited baghouse dust at the landfill containing concentrations of lead and cadmium equal to or in excess of EP toxicity limits specified in 40 CFR § 261.24. From the foregoing and other findings, conclusions of law follow that the landfill was and is a hazardous waste storage or disposal unit or facility, that HWS is an operator of said facility as defined in 40 CFR § 260.10 and subject to RCRA regulations applicable to generators of hazardous waste (40 CFR Part 262) and

owners and operators of hazardous waste treatment, storage and disposal facilities.^{5/}

O R D E R

It having been determined that Hawaiian Western Steel, Limited, Inc. violated the Resource, Conservation and Recovery Act and applicable regulations as charged in the Second Amended

^{5/} 40 CFR Parts 264 and/or 265 as applicable. This reasoning and the resultant conclusions, which are equally applicable to the Estate as owner of the land upon which the landfill is located, indicate that the amendments to the "Order" sought by Complainant are unnecessary to its enforceability and the Motion To Amend is denied. The only matter remaining for resolution is the effective date of the December 3 "Order." Asserting that the "Order" was served on December 15, 1992, and adding five days to the response time permitted by Rule 22.07((c) where service is by mail and two additional days, because thus computed, the 20-day appeal period commenced and expired on a Sunday (December 20, 1992, and January 10, 1993, were Sundays), HWS asserts that the "Order" became final [and thus effective] on January 11, 1993 (letter to the ALJ, dated January 15, 1993; Proposed Order). Although Complainant has stated that it reserves the right to contend that service occurred on an earlier date, its real position is that the "Order" was served and became effective not later than December 20 (letter to counsel for HWS, dated January 14, 1993). The Compliance Order in the Second Amended Complaint stated that all days are consecutive days from the effective date of the complaint, which, absent a timely answer, would be 30 days after filing of the complaint (Supplemental Rule 22.37(a)(4). Because filing a timely answer suspends the effective date of the complaint until the proceeding is resolved, e.g., issuance of an initial decision and expiration of the appeal period or a decision on any appeal, HWS's position that "effective date" and the date the "Order" became final are identical is reasonable. Complainant has acknowledged this in part by agreeing with the applicability of the five day additional response time permitted by Rule 22.07(c) where service is by mail.

Complaint, a penalty of \$141,636 is assessed against it in accordance with section 3008(a) of the Act.^{6/} Payment of the penalty shall be made within 60 days of the date of this order by sending a cashier's or certified check in the amount of \$141,636 payable to the Treasurer of the United States to the following address:

Regional Hearing Clerk
EPA - Region IX
P.O. Box 360863M
Pittsburgh, PA 15251

Dated this 25th day of January 1993.


Spencer T. Nissen
Administrative Law Judge

^{6/} This order will become the final order of the Agency (EAB) in accordance with 40 CFR § 22.27(c).