

5/29/96

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
NIBCO, INC., NACOGDOCHES DIV.,	)	DOCKET NO. RCRA-VI-209-H
	)	
	)	
RESPONDENT	)	

ORDER GRANTING IN PART MOTION FOR  
PARTIAL ACCELERATED DECISION AND  
MOTION TO STRIKE AFFIRMATIVE  
DEFENSES

The complaint, findings of violation, and compliance order in this proceeding under section 3008 of the Solid Waste Disposal Act, as amended (RCRA) (42 U.S.C. § 6928), issued on December 18, 1992, charged Respondent, NIBCO, Inc., Nacogdoches Division, a division of NIBCO, Inc. of Indiana (NIBCO), with violations of the Act and applicable regulations, and violations of the Texas Solid Waste Disposal Act and regulations thereunder. Specifically, NIBCO was charged (Count I) with treatment of hazardous waste (refuse sand) without a permit or interim status; Count II, failure to make a hazardous waste determination prior to treatment of hazardous waste (refuse sand); Count III, failure to notify EPA or TWC of hazardous waste management activities regarding refuse sand on or before October 29, 1990; Count IV, failure to provide EPA with notification and treatment of characteristic waste (refuse sand); Count V, offering hazardous waste (refuse sand) for disposal at an unpermitted facility, i.e., the Nacogdoches Municipal Landfill; Count VI, failure to comply with manifest recordkeeping and reporting requirements for

hazardous waste (refuse sand); Count VII, treatment of hazardous waste at a municipal landfill without a permit or interim status; Count VIII, failure to make a hazardous waste determination prior to treatment (hydrofilter dust); Count IX, failure to properly label containers of hazardous waste (zinc oxide baghouse dust); Count X, failure to complete manifests for shipments of hazardous waste (zinc baghouse dust); Count XI, failure to make a hazardous waste determination (cutting oil); Count XII, failure to make a hazardous waste determination (fork lift cleaning wastes); Count XIII, failure to make a hazardous waste determination (spent solvents); Count XIV, failure to make a hazardous waste determination (floor sweepings); Count XV, failure to make a hazardous waste determination (used motor oil); and Count XVI, failure to make a hazardous waste determination (paint waste and spent solvents). For these alleged violations, it was proposed to assess NIBCO a penalty totaling \$2,567,893.00.<sup>1/</sup>

NIBCO answered, denying, among other things, that "refuse sand" constituted a spent material or a solid waste, denying that refuse sand hydrofilter sludge/baghouse dust shipped to the municipal landfill constituted a hazardous waste, denying that hydrofilter dust and fines constitute a solid or hazardous waste, denying that zinc oxide baghouse dust was a solid waste, admitting that used cutting oil was a solid waste, but alleging that it was

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<sup>1/</sup> Complainant has withdrawn Count III, thus reducing the proposed penalty by \$290,640. Additionally, the parties have agreed on a schedule by which NIBCO will be in conformance with the compliance order.

recyclable and therefore not fully regulated, denying the allegation that it had not made a hazardous waste determination for fork lift cleaning waste, spent solvents, floor sweepings, used motor oil, and paint waste and spent solvents. NIBCO alleged affirmative defenses including estoppel, res judicata, collateral estoppel, waiver and laches and contested the proposed penalty as inappropriate and excessive. NIBCO requested a hearing.

The parties have exchanged prehearing information in accordance with an order of the ALJ. Under date of October 20, 1995, Complainant filed a motion for an accelerated decision as to liability on Counts I, IV, V, VI, VII, IX and X and a motion to strike NIBCO's affirmative defenses. Complainant alleged that there is no dispute of material fact as to these counts and that it is entitled to judgment as a matter of law. NIBCO has opposed the motion, asserting, inter alia, that there are material issues of fact, precluding summary judgment on Counts I, IV and VII. NIBCO admits partial liability for Counts V, VI, IX and X, but states that certain facts are in dispute which may have a material bearing on the appropriateness of the penalty.

Count I--During the Period November 9, 1985, Through the Time of an EPA Inspection on April 27, 1992, NIBCO Processed (Treated) Hazardous Waste (Refuse Sand) Without a Permit or Interim Status

Complainant says that the elements required to establish NIBCO's liability for Count I are: (1) shaker screen sand is a solid waste; (2) shaker screen sand is a hazardous waste; (3) NIBCO

treated the shaker screen sand; (4) NIBCO did not have a permit for the treatment of hazardous waste; and (5) NIBCO did not qualify for interim status authority to treat hazardous waste.<sup>2/</sup> NIBCO agrees with this statement of the issues, but adds a sixth element: that NIBCO did not qualify for an exemption or exclusion from the permit or interim status requirements (Response to Motion, dated November 16, 1995, at 4).

These elements will be considered seriatim:

- (1) Whether shaker screen or refuse sand is a solid waste.

A description of NIBCO's operation, which is essential to an understanding of this controversy, follows.<sup>3/</sup>

NIBCO manufactures brass valves in two foundries at its Nacogdoches facility (Unit I) and (Unit II). In order to cast the valves, NIBCO must first produce sand molds and sand cores. Molds are formed from a mixture of silica sand, clay, carbonaceous materials and water. Silica sand is generally composed of approximately 98 percent used sand and 2 percent new sand.<sup>4/</sup> NIBCO

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<sup>2/</sup> Memorandum in Support of Motion at 4. Complainant has indicated that "refuse sand" and "shaker screen sand" refer to the same sand and this practice will be followed herein.

<sup>3/</sup> Unless otherwise noted, facts stated are lifted from the parties Agreed Statement of Uncontested Facts.

<sup>4/</sup> According to NIBCO, sand is removed from the used mold sand periodically, not because the sand is contaminated, but because the addition of new sand means that excess sand builds up in the mold system over time (Surreply, dated January 10, 1996, at 6).

explains that approximately 98 percent of the mold sand is reused in the mold making process, and that the remaining two percent is sent to the dry ballmill/separator system for recovery of metal for reuse in the production process (Response at 5). Cores are formed from a mixture of new silica sand and resin binders. Molten brass is poured into the molds and around the cores. After the metal cools, castings are pushed onto oscillating conveyors and are separated from the molds by hand (Unit I). Moldings and core sands are placed on the "shakeout" conveyor. In Unit II, the molds and castings are run through a tumbler machine for separation.

After the castings are initially separated from the molds, the core butts, used molds, mold sands and pieces of metal are passed through a series of conveyors and shaker screens for break-up and separation. Mold and core sand passing through the shaker screen system are returned to the sand storage hopper for recirculation and reuse in the molding process. Larger pieces of metal are collected for remelting in the furnaces. Smaller metal pieces and mold and core sands passing over the top of the shaker screen are collected in open-top containers and transported to the Separator System Building. This combination of used foundry sand and metal material is referred to as "shaker screen sand". At the separator system, referred to as the dry ballmill/separator system, metal is recovered from the shaker screen sand for remelting in the furnaces or for sale as scrap. Prior to and at the time of the EPA inspection (April 27-29, 1992) shaker screen sand that remained after the metal was removed was usually discarded. In a few

instances, the remaining shaker screen sand was returned to the sand storage hopper for recirculation and reuse in the molding process.

NIBCO added iron dust to shaker screen sand on the screen in the separator system and added iron dust to fines and dust in the hydrofilter open top settling tanks. During the EPA inspection, samples of shaker screen sand were collected from open top containers identified as Stations 103, 105 and 106, located in the Dry Ballmill/Separator System Building prior to the shaker screen sand being dumped into the separator system. TCLP analytical results for these samples revealed lead concentrations of 16.0 mg/l, 62.0 mg/l and 45.7 mg/l, respectively. TCLP analytical results on the split samples retained by NIBCO were substantially the same, showing lead concentrations of 16.0 mg/l, 68 mg/l and 32 mg/l, respectively.

Complainant asserts that there are two aspects of NIBCO's foundry operations involving the handling of silica sand: the mold-making process, which is a production process; and the mold-reclamation process, which is a waste management process. Because the used molds contain contaminants and must be processed prior to being used to make new molds, Complainant contends that the used molds and molding sands are "spent materials" as defined in the regulation, 40 CFR § 261.1(c)(1), which are solid wastes when reclaimed (§ 261.2(c)(3)).<sup>5/</sup> NIBCO disputes this characterization

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<sup>5/</sup> Memorandum at 5,6. Section 261.1(c)(1) defines a spent material as follows: A "spent material" is any material that has  
(continued...)

of its operation, alleging that the operations described by Complainant are, in fact, a single, unified production process for the making of sand molds (Response at 4). According to NIBCO, there are two "loops" within its foundry process, in one loop, metal in the form of ingots and scrap is melted, poured into molds, cooled, and removed from the molds as brass valve castings. The castings are then cleaned, machined, assembled, and tested. Metal from the casting and machining process is returned to the furnace to be remelted. In the other loop system, sand is mixed with clay, water, adhesives, and new sand, then formed into molds, poured with molten brass, and separated from the valve castings.

#### Discussion

NIBCO denies that the mold sand, after separation from the castings, is a spent material and denies that it is a solid waste. The issue here is whether the sand is contaminated and can no longer serve the purpose for which it was produced without processing and thus is a "spent material" within the meaning of section 261.1(c)(1) (supra note 5). Complainant emphasizes that the sand contains calcined sand, fines, core butts, tramp metal, and brass pieces and alleges that these materials must be removed in order to maintain the quality of the sand (Memorandum at 10).

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<sup>5/</sup> (...continued)

been used and as a result of contamination can no longer serve the purpose for which it was produced without processing. Section 261.2(c)(3) provides that spent materials are solid wastes when reclaimed.

NIBCO disputes this allegation, asserting that the sand continues to serve the purpose for which produced, i.e., the making of new molds. Although NIBCO acknowledges that the "core butts" must be pulverized before being used to make new molds, it says that "calcined sand" and fines do not materially affect the quality of the sand used to make molds and that, in fact, these materials are always present to some extent in the final sand mixture used to make the molds (Response at 6, 7).

The term "contamination" is not defined in the regulations and it must be presumed that the common or usual meaning of the term was intended. NIBCO says that in common usage, "contamination" entails the addition of an impurity to a substance and cites the Oxford Unabridged Dictionary definition: to render impure by contact or mixture; to corrupt, defile, pollute, sully, taint, or infect (Response at 13). Similarly, "contamination" is simply defined as an "impurity". As indicated, NIBCO denies that any of the constituents listed by Complainant are contaminants. A perhaps slightly broader definition of "contaminate" is contained in Webster's Third New International Dictionary (1989 ): to soil, stain, or infect by contact or association; to make inferior or impure by admixture; to make unfit for use by the introduction of unwholesome or undesirable elements. The "core butts" and other materials described here could perhaps be regarded as "undesirable elements". If the sand is, in fact, reusable without the removal of these materials, such a finding is clearly not required. As for the metal pieces, NIBCO asserts they are removed and returned to

the production process, not because they are contaminants, but because the pieces are valuable. According to Complainant, the reason for the removal is irrelevant. This argument assumes the matter at issue, i.e., that the mold sand is contaminated and thus a spent material.

Section 261.1(c) provides in pertinent part: (4) A material is "reclaimed" if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents. Additionally, section 261.2(c)(3) provides: (3) Reclaimed. Materials noted with a "\*" in column 3 of Table 1 are solid wastes when reclaimed. Column 3 of Table 1 includes spent materials and by-products listed in 40 CFR Subparts 261.31 or 261.32. It excludes, however, by-products exhibiting a characteristic of hazardous waste. Section 261.1(c)(3) provides: A "by-product" is a material that is not one of the primary products of the production process and is not solely or separately produced by the production process. Examples are process residues such as slags or distillation column bottoms. The term does not include a co-product that is produced for the general public's use and is ordinarily used in the form it is produced by the process.

NIBCO contends that the sand is a by-product material exhibiting a characteristic of hazardous waste, which, in accordance § 261.2(c)(3), [assuming it was reclaimed] is not a solid waste when reclaimed (Surreply at 9). It points out that the definition of "by-product" is in two parts: (1) the material is not

one of the primary products of the production process, and (2) the material is not solely or separately produced by the production process. Because the primary product of the production process at its facility is brass valves, not used mold sand, NIBCO says that it clearly complies with the first part of the definition of by-product. Moreover, NIBCO asserts that mold sand and recovered brass are not solely produced by the production process, nor is the production of mold sand and recovered brass separate from the entire process by which the molds are made. Therefore, NIBCO contends that the mold sand clearly complies with the definition of a by-product.

Complainant cites In re Lee Brass Company, RCRA (3008) Appeal No. 87-12, 2 EAD 900 (CJO, August 1, 1989), and alleges that the decision is controlling. In Lee Brass, which involved the regulatory status of used foundry sand, the CJO adopted an Agency interpretation of American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987). The court, in American Mining Congress (AMC), held that the Agency had no authority under RCRA to regulate materials destined for immediate reuse in an ongoing production process, because the materials were not "discarded" and thus not solid wastes as defined in the Act (42 U.S.C. § 6903(27)). The Agency interpretation of AMC, which was adopted by the CJO in Lee Brass, was that the court's decision had no affect on regulations categorizing spent materials as solid wastes when reclaimed, because by definition these materials were no longer usable and must first be restored to usable condition (53 Fed. Reg. 522,

January 8, 1988). According to the Agency, these materials are no longer available for use in a continuous, on-going manufacturing process.<sup>6/</sup> The only exception to this rule is where the reclamation involves a closed, continuous process, the reclaimed materials are returned directly to the initial manufacturing process, the entire operation is connected by pipes or other comparable means of conveyance and there is no element of disposal involved, such as storage in a surface impoundment (Id.). The caveat that there be no element of disposal involved appears redundant, if the operation is connected by pipes or other comparable means of conveyance. A narrower form of this exception was in the regulation (40 CFR §261.4(a)(8)) prior to AMC as among exclusions to materials which are solid wastes.<sup>7/</sup>

Significantly, the CJO in Lee Brass did not rely on the fact that respondent did not meet the terms of the exclusion, but pointed out there was an element of disposal involved, because the used foundry sand was placed on liners on the ground where it

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<sup>6/</sup> This statement is accurate only if the reclamation process is separate from the production process. Moreover, as will be seen infra, the bright line of demarcation between a spent material and a by-product, which the Agency assumes to exist, is not apparent.

<sup>7/</sup> 51 Fed. Reg. 25471, July 14, 1986. Section 261.4, entitled "Exclusions", provides in pertinent part: (a)...(8) Secondary materials that are reclaimed and returned to the original process or processes in which they were generated where they are reused in the production process provided: (i) only tank storage is involved, the entire process through completion of reclamation is closed by being entirely connected with pipes or other comparable enclosed means of conveyance;....

remained for a day or two before entering the reclamation process.<sup>8/</sup> The CJO emphasized the lack of continuity between the production and the reclamation process. Disposal, broadly defined, means any placement of solid or hazardous waste so that hazardous waste, or any constituent thereof, may enter the environment (42 U.S.C. § 6903(3); 40 CFR § 260.10).

In the proposed modification to its rules in response to AMC, the Agency stated that "(t)he court's opinion also compels the exclusion [from RCRA jurisdiction] of certain types of reclamation processes that closely resemble on-going production activities", because materials being recycled in these ways are not being "discarded" (53 Fed. Reg. 520, January 8, 1988). Despite the breadth of this language, the Agency made it clear that reclaimed materials entitled to the exclusion were limited to "sludges" and "by-products" specifically listed in sections 261.31 or 261.32 or to "sludges" and "by-products" exhibiting a characteristic of hazardous waste. These exclusions were in the regulation prior to AMC (50 Fed. Reg. 614, January 4, 1985). In the proposal for revisions to the regulation, the Agency explained that the exact classification [demarcation] is between secondary materials which are previously used, and are used up and no longer usable ["spent materials"] and previously unused residual materials ["sludges and

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<sup>8/</sup> The used foundry sand, if a waste, was a "pile" as defined in 40 CFR § 260.10: Pile means any non-containerized accumulation of solid, nonflowing hazardous waste that is used for treatment or storage and that is not a containment building.

by-products"]<sup>9/</sup> Sludges and by-products were considered more likely than spent materials to be involved in an on-going manufacturing process and were to be classified as solid wastes on a case-by-case basis based on factors which distinguish on-going manufacturing from waste management.<sup>10/</sup> Although this proposal was

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<sup>9/</sup> 53 Fed. Reg. 522. If it were intended that a material must be previously unused in order to be a "by-product" as defined in § 261.1(c)(3), it seemingly would have been a simple matter to so state. Indeed, whether a material is a "by-product" or a "spent material" does not turn on whether further processing is required to make the material usable. See the preamble to the revised regulation (50 Fed. Reg. 618, January 4, 1985): "By-products" are defined essentially the same way as in the existing regulation to encompass those residual materials resulting from industrial, commercial, mining, and agricultural operations that are not primary products, are not produced separately, and are not fit for a desired end use without further processing. The term includes most secondary materials that are not spent materials or sludges. Examples are process residues from manufacturing or mining processes, such as distillation column residues or mining slags.

<sup>10/</sup> A proposed amendment to section 261.3 lists the factors as follows: (3) Reclaimed. (i) Materials noted with "\*" in column 3 of Table 1 are solid wastes when reclaimed. Sludges and by-products will be designated by EPA as solid wastes by listing in § 261.31 or § 261.32 based on consideration of the following factors no one of which shall be determinative: (A) Whether the sludge or byproduct, on an industry-wide basis, is typically recycled rather than disposed of; (B) Whether the sludge or byproduct is replacing a raw material when it is reclaimed (i.e., whether it is reclaimed in a primary rather than a secondary process); (C) Whether the reclamation practice is closely related to the principal activity of the reclamation facility; (D) Whether the sludge or byproduct is stored before being reclaimed in a manner designed to minimize loss (for example, by utilizing storage practices that do not involve placement on the land) and (E) other appropriate factors. (ii) The ultimate object in applying these factors is to determine whether the sludges or byproducts are being utilized in an on-going, continuous manufacturing process. However, when the sludges or byproducts contain significant concentrations of toxic constituents not normally found in the raw materials they are replacing, which toxic constituents are not replaced by the process, the process may be waste treatment rather than reclamation. In addition, if a byproduct or a sludge has actually been designated as a solid waste (continued...)

limited to sludges and by-products and has never been finalized,<sup>11/</sup> the listed factors should be equally applicable in determining whether a recycling activity is manufacturing or waste management. It is, of course, recognized that the validity of the regulation is not at issue herein. Nevertheless, AMC, the Agency's acknowledgments in the wake thereof (ante at 12; supra note 11) and Lee Brass require that there be an element of disposal involved before RCRA jurisdiction attaches. At the very least, any doubts in the matter must be resolved in NIBCO's favor and the issue is singularly inappropriate for resolution on summary judgment.

On this record, it is not clear that NIBCO's operation may be readily separated into a production process and a waste management process as alleged by Complainant. Indeed, if the factors utilized to determine whether a recycling activity involving sludges and by-products is production or waste management

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<sup>10/</sup> (...continued)  
pursuant to this provision, an individual generator may nevertheless demonstrate that his sludge or byproduct is being reclaimed in an on-going, continuous manufacturing process based on the factors used by the Agency. This demonstration is self-implementing; but under paragraph (f) of this section, the burden of proof is on the generator making the demonstration. The Agency will not accept demonstrations where there is storage involving placement on the land.

<sup>11/</sup> Portions of the proposed rule relating to petroleum refining were finalized in 1994 (59 Fed. Reg. 38536, July 28, 1994). Although the Agency acknowledged that the court's decision in AMC meant that the Agency had no authority over materials that are recycled and reused in an on-going manufacturing process, because the materials were not "discarded", it indicated that revisions to the definition of solid waste were being considered in an on-going study: RCRA Implementation Study Update: The Definition of Solid Waste, EPA530-R-92-021, July 1992.

(supra note 10) were applied here, the conclusion that NIBCO's recycling was the former rather than the latter would be difficult to avoid.

Although, as noted previously, it may be possible to find that shaker screen sand is "contaminated", because it contains undesirable elements, and is thus a "spent" material, such a finding is by no means required. Moreover, under Complainant's view, mold sand is a spent material and thus a solid and a hazardous waste as soon as the castings are separated therefrom. Yet, the complaint is directed at the two percent of the mold sand which is shaker screen or refuse sand. NIBCO contends that activities in the dry ballmill/separator system, including the addition of iron dust to the sand, are production processes and that the material is not a solid waste until it exits that system. NIBCO cites a ruling by the Texas Natural Resource Conservation Commission (TNRCC) to the effect that the ballmill is part of the production system and that the activities therein are not hazardous waste processing (Response at 8, 9; Surreply at 5). The Arkansas Department of Pollution Control and Ecology assertedly made a similar finding with respect to a dry ballmill/separator at another NIBCO facility. Although Complainant cites alleged admissions made by NIBCO in correspondence with the TNRCC and its predecessor agencies and in NIBCO's response to an EPA information request, NIBCO counters that Complainant simply does not understand its operation and that the alleged admissions, if made, are taken out

of context.<sup>12/</sup> It should be noted that the "open top" containers by which NIBCO transports shaker screen sand to the Separator System Building are more analogous to the slag in "storage bins", cited by the Agency as an example of materials deemed not to be discarded (53 Fed. Reg. 527), than to the waste pile situation in Lee Brass. This lends support to NIBCO's contention that there is no disposal until material exits the ballmill.

For the foregoing reasons, it is concluded that Complainant has not demonstrated entitlement to an accelerated decision as to the first element required for a finding of liability on Count I, i.e., shaker screen sand is a spent material and thus a solid waste.<sup>13/</sup> Although this conclusion requires denial of Complainant's motion as to Count I, the other elements required for a finding of liability on this count will be briefly discussed.

## (2) Shaker Screen Sand Is A Hazardous Waste

Because hazardous waste is a subset of solid waste, a material cannot be a hazardous waste until it is shown to be a solid waste, i.e., it is disposed of or discarded. Assuming the sand is a waste, the allegation that it is hazardous is based upon

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<sup>12/</sup> Surreply at 7-9. The ALJ has not parsed the record to determine the validity of the parties' contentions in this regard.

<sup>13/</sup> The controlling criterion for considering motions for summary judgment was well stated by the Third Circuit: "If there is any evidence in the record from any source from which a reasonable inference (in the nonmoving party's) favor may be drawn, the moving party simply cannot obtain summary judgment." In re Japanese Electric Products Antitrust Litigation, 723 F.2d 238 (3rd Cir. 1983), reversed on other grounds, sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

samples drawn from open-top containers at the Shaker System Building which indicate that the sand is a characteristic hazardous waste, because it exceeds the 5.0 mg/l concentration (EP toxicity) for lead specified in section 261.24. If activities at the ballmill are not part of a production process as contended by NIBCO, i.e., the sand is a waste, there appears to be no dispute that the sand is a characteristic hazardous waste for the reason stated. NIBCO denies that material exiting the ballmill, i.e., after iron dust is added, exhibits the characteristic of toxicity.

(3) NIBCO Treated the Shaker Screen Sand

NIBCO acknowledges adding iron dust to the shaker screen sand in the ballmill (Response at 12). If the sand is a hazardous waste, this activity would constitute treatment as defined in section 260.10.<sup>14/</sup> In its response to the Agency's request for information, NIBCO asserted that iron dust was not added to the shaker screen sand as such, but to the separation process which is part of the production process to recover brass for reuse (§ 16). This is a matter upon which the evidence should be heard before a decision is rendered.

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<sup>14/</sup> Section 260.10 defines treatment as follows:

Treatment means 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 recover energy or material resources from the waste, or so as to render such waste non-hazardous, or less hazardous; safer to transport, store, or dispose of; or amenable for recovery, amenable for storage, or reduced in volume.

(4) NIBCO Did Not Have A permit For the Treatment of Hazardous Waste

There is no dispute that NIBCO did not have such a permit.

(5) NIBCO Did Not Qualify For Interim Status Authority To Treat Hazardous Waste

NIBCO points out that it submitted a Notification of Hazardous Waste Activity on August 15, 1980, a second Notification on September 14, 1983, and a third Notification on October 1, 1992 (Agreed Statement of Uncontested Facts). The 1980 submission stated NIBCO's position that it was exempt from notification, while the 1983 Notification stated that NIBCO generated, treated, stored or disposed of F002 wastes from non-specific sources and toxic characteristic wastes. On November 15, 1983, NIBCO submitted a Part A permit application to the then Texas Department of Water Resources and on May 21, 1984, NIBCO submitted a Part A permit application to EPA. The latter document indicated that NIBCO generated, stored, and disposed of 4,610,000 pounds annually of D008 waste sand (sand/silica waste containing leachable lead equal to or greater than 5.0 mg/l) in unlined ponds or lagoons, open surface landfills, and waste pile storage areas on its facility. Accordingly, NIBCO asserts that it obtained interim status for its facility and that such status has never been revoked.

NIBCO contends that Complainant should be estopped to deny that NIBCO has interim status (Response at 20, 21, 30; Response to Motion to Strike at 6). NIBCO cites letters from TNRCC

and EPA, dated April 2, and May 17, 1985, respectively, wherein NIBCO was informed that it could close its waste piles, surface impoundments, and landfill under interim status in lieu of submitting a Part B permit application for such activities. NIBCO says that additional evidence of TNRCC and EPA involvement in its decision to withdraw its permit application will be provided by testimony at the hearing. Accordingly, NIBCO contends that EPA and TNRCC are directly responsible for NIBCO's withdrawal of its application and [loss of] interim status.

Complainant points out that the precise activities at issue here were not in existence on November 19, 1980, and because NIBCO did not amend its application to include such activities, it could not have acquired interim status therefor. Pertinent to the question of whether or when NIBCO should have amended its permit application, is the fact that Agency regulations changing the definition of solid waste were not effective until July 14, 1985 (50 Fed. Reg. 614, January 4, 1985). Although NIBCO's assertion that interim status has never been revoked appears to overlook RCRA § 3005(e)(2),<sup>15/</sup> and the showing necessary to invoke estoppel against the government includes evidence to support a finding of

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<sup>15/</sup> Section 3005(e)(2), added to the Act by HSWA, provides, with respect to land disposal facilities granted interim status prior to November 8, 1984, that interim status shall terminate not later than twelve months after November 8, 1984, unless the owner or operator applies for the issuance of a final determination regarding the issuance of a permit under subsection (c) of this section and certifies that such facility is in compliance with all applicable groundwater monitoring and financial responsibility requirements.

affirmative misconduct, it is concluded that whether NIBCO had, or should be treated as if it had, interim status are issues upon which all the evidence should be heard before a decision is rendered. Additional support for this conclusion may be found in the fact that the same evidence will be relevant to the determination of any penalty.

(6) Whether NIBCO Qualifies For An Exclusion From Permit Requirements

These issues relate to whether NIBCO is entitled to accumulate hazardous waste on-site for 90 days without a permit or interim status pursuant to 40 CFR § 262.34 and whether it is entitled to the exemption from hazardous waste regulation for wastes treated in a "totally enclosed treatment facility" as defined in section 260.10<sup>16/</sup> in accordance with 40 CFR §§ 264.1(g)(5) and 265.1(c)(9). The 90-day accumulation period exclusion [from permitting requirements] is subject to certain provisos, e.g., storage in containers, marking with the date accumulation began and labeling with the words "Hazardous Waste", with which NIBCO does not appear to have complied. With regard to the "totally enclosed treatment facility" exemption, the open-top

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<sup>16/</sup> Section 260.10 defines totally enclosed treatment facility as follows:

Totally enclosed treatment facility means a facility for the treatment of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during treatment. An example is a pipe in which waste acid is neutralized.

containers by which shaker screen sand is transported to the ballmill/separator system appear to preclude NIBCO's claim to this exemption. A detailed description of the process at the point at which iron dust is added appears to be lacking, however, and it is concluded that the evidence should be heard before a decision as to NIBCO's entitlement to this exclusion is rendered.

Count IV--Failure To Provide Notification And Certification Of Treatment Of Characteristic Waste (Refuse Sand)

In this count, NIBCO is charged with violation of land disposal restrictions, specifically 40 CFR § 268.9(d) (1992), which requires, for characteristic wastes that are no longer hazardous, that the Regional Administrator or authorized state be notified of each shipment of such waste to a subtitle D facility.<sup>17/</sup> Section 268.7(a)(7) requires that generators retain on-site a copy of all such notices, certifications, waste analysis data and other documents. The notification must include a description of the waste as generated, applicable EPA hazardous waste numbers, and the applicable treatment standards. As might be expected, NIBCO defends upon the ground that it did not generate a solid waste that exhibited a hazardous waste characteristic, it did not treat any solid wastes to meet a treatment standard and it did not ship any treated solid waste to a disposal facility (Response at 36).

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<sup>17/</sup> This was subsequently changed to a one-time notification unless the process generating the waste or the facility receiving the waste changes, in which case updating of the notification is required (54 Fed. Reg. 37194, August 18, 1992).

Therefore, NIBCO contends that it was not required to send any notifications or certifications to the Regional Administrator. Because Complainant's motion as to Count I will be denied for the reason that Complainant hasn't demonstrated that shaker screen sand is a spent material and thus a solid waste, the motion here will be denied for the same reason.

Count V--Offering Hazardous Waste (Refuse Sand) For Disposal  
At An Unpermitted Facility (Nacogdoches Municipal Landfill)

Count VI--Failure To Comply With Manifest Recordkeeping and  
Reporting Requirements (Refuse Sand)

These counts are based upon the fact that NIBCO transported by dump truck discarded shaker screen sand and iron dust that passed through the shaker screen system to the Nacogdoches Municipal Landfill from May 8, 1987, until December 21, 1992. The Landfill is not a permitted hazardous waste disposal facility and did not have an EPA identification number. In connection with closure activities, NIBCO treated lead-bearing sludges, wastes, and soils from on-site disposal facilities with iron dust and hauled these "closure wastes" to the Landfill in dump trucks for disposal. NIBCO entered into an operating agreement with the City for this purpose on May 8, 1987. From May 8, 1987 through June, 1988, NIBCO disposed of closure wastes and foundry wastes, including shaker screen sand, in Cell No. 1 at the Landfill, which had been constructed for NIBCO's exclusive use; from July, 1988 through August, 1989, NIBCO disposed of closure and

foundry wastes in an expanded portion of Cell No. 1 known as Cell No. 2; and during excavation activities for a new pit (Cell A), which the City contracted to construct for NIBCO'S exclusive use, NIBCO disposed of foundry waste in a "mini-pit" excavated into existing Cell No. 1. Approximately 1,000 cubic yards of foundry waste were disposed of in the mini-pit between August, 1989 and December, 1989.

On August 6, 1989, City personnel collected one grab sample of foundry waste which NIBCO had disposed of in the mini-pit. Results of EP Toxicity analysis of this sample by Core Laboratories, received by the City on October 25, 1989, indicated that it contained 32.4 mg/l of leachable lead. On January 3, 1990, NIBCO collected six samples from the mini-pit and sent four of the split samples for analysis by three independent laboratories, i.e., Core Laboratories, EIS laboratory and Analab. EP Toxicity analytical results of these samples reflected that all but one of the samples analyzed by Core, which analyzed all six samples, exceeded the 5 mg/l standard for leachable lead, while EIS and Analab each reported that two of the four split samples exceeded that standard.<sup>18/</sup>

On January 3, 1990, NIBCO collected samples of foundry waste which it had deposited in Cell A and sent split samples to the previously identified laboratories. On Sample No. A-1N, Core

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<sup>18/</sup> The only sample which all three laboratories reported as exceeding the toxicity standard for lead was No. 10, Core reporting 11.2 mg/l, EIS reporting 7.6 mg/l and Analab reporting 12 mg/l.

reported less than 0.1 mg/l leachable lead, EIS reported 2.6 mg/l and Analab reported 3.8 mg/l and 4.2 mg/l, the latter figure an average of duplicate analyses of 3.5 mg/l and 4.8 mg/l. On Sample No. A-2S, Core reported less than 0.1 mg/l, EIS reported 3.3 mg/l and Analab reported 6.9 mg/l and 4.4 mg/l, the latter figure an average of duplicate analyses of 6.3 mg/l and 2.4 mg/l. According to NIBCO, EP Toxicity results for lead in the 1989 mini-pit sampling and the 1990 Landfill sampling were due to variations in production and waste handling processes at its facility. Iron dust percentages in these samples were less than three percent. NIBCO had, however, established a lower limit of eight percent iron which was required to be present in its wastes before these materials were disposed of in the landfill.

#### Discussion

NIBCO acknowledges that on some occasion between August 1 and August 6, 1989, it shipped an unknown quantity of waste to the mini-pit at the Landfill which exceeded the toxicity characteristic of 5 mg/l leachable lead and was therefore a hazardous waste (Response at 46). NIBCO also acknowledges that this unknown shipment or shipments did not comply with manifest, recordkeeping or reporting requirements as alleged in Count VI of the complaint (Id. 47). To this extent, NIBCO says that it consents to the entry of a partial accelerated decision finding liability on these counts.

NIBCO asserts, however, that there is a genuine issue of material fact as to whether any shipments to the Landfill after August 6, 1989, involved the transfer of hazardous waste. NIBCO avers that Complainant has failed to meet its burden of proof. It points out that the evidence in this regard is circumstantial, being based on the fact the percentage of iron dust in samples taken in 1989 and 1990, referred to above, was less than three percent as opposed to the optimal eight percent. NIBCO argues that this does not establish toxicity by a preponderance of the evidence, nor does it establish that every shipment before, after, or between these events contained hazardous waste. Moreover, NIBCO emphasizes that the samples upon which Complainant relies were not taken in accordance with "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (EPA Publication SW-846) and that the analytical results are inconsistent and inconclusive.

Complainant counters these arguments by pointing to alleged "undisputed fact" No. 17 to the effect that from August, 1989, through December, 1989, an insufficient amount of iron dust was added to foundry waste prior to disposal to ensure that it would leach less than 5 mg/l lead. This alleged undisputed fact is based upon NIBCO's statement that EP Toxicity results for lead in the samples referred to above were caused by variations in its production and waste handling processes and upon a NIBCO inter-office memorandum (C's Preh. Exh. 23). The cited statement does not establish that production and waste handling other than that represented by the samples were affected by the variations and for

all that appears the inter-office memorandum is simply based upon the referenced analytical sample results. Moreover, Complainant's argument that SW-846 is inapplicable, because the issue is leachable lead concentrations of the waste as it left NIBCO's facility and as offered at the Landfill, rather than in the Landfill, would have some force if there were direct evidence of leachable lead concentrations in these shipments, e.g., of the waste in dump trucks. Such evidence being lacking, it is concluded that a material issue of fact exists as to whether samples referred to herein were representative of wastes delivered to the Landfill during the period August, 1989, through December, 1989. This precludes granting Complainant's motion other than to the extent NIBCO has acknowledged liability for these counts.

Count VII--Treatment Without A Permit Or Interim Status At The Municipal Landfill

This count results from the fact that after receipt of the analytical results referred to above on the samples collected from the Landfill on January 3, 1990, NIBCO mixed additional iron dust with foundry waste in mini-pit and Cell A on February 13 & 14, 1990. This was done with the concurrence of the Texas Department of Health (TDH), which at that time had primary responsibility for the regulation of municipal landfills in the State of Texas (Uncontested Facts ¶ 58). NIBCO asserts that iron dust was added to the waste as a precautionary measure and denies that this "preventive action" constitutes proof that the material so treated

was a hazardous waste (Response at 41). Additionally, NIBCO points out that there are no analytical results of samples from each truckload of foundry sand delivered to the Landfill showing how many, if any, of these loads contained leachable lead in excess of 5.0 mg/l (Response at 43). Accordingly, NIBCO contends that the facts are inadequate to support the allegation that inadequate amounts of iron dust were added to foundry sand during the entire period from August through December, 1989.

NIBCO did not submit a notification to TNRCC or EPA prior to engaging in the mentioned treatment activities at the Landfill, did not obtain an EPA identification number prior to engaging in such activities and did not apply for or submit a Part A permit application for such treatment activities (Uncontested Facts ¶¶ 62, 63 & 64). NIBCO points out, however, that these statements are based upon the presumption that foundry sand in the mini-pit area of Cell 1 and Cell A at the Landfill was a hazardous waste (Response at 44). It notes that lead levels greater than 5.0 mg/l were only detected in two limited sampling events, and that analysis for five of the eight samples taken showed lead levels below 5.0 mg/l or showed inconsistent results. NIBCO contends that it is not possible to determine from these limited samples that foundry sand at the Landfill was a hazardous waste. It reiterates that EPA has an approved method for making this determination (SW-846), but that this method was not followed.

Because there appear to be substantial variations and inconsistencies in analytical results on the same samples and there are factual questions as to the manner of drawing the samples and whether the samples are representative of material treated at the Landfill, it is concluded that Complainant has not demonstrated entitlement to an accelerated decision on this count.

Count IX--Failure To Properly Label Containers Of Hazardous Waste (Zinc Oxide Baghouse Dust) and Count X--Failure To Complete Manifests With Shipments Of Hazardous Waste (Zinc Oxide Baghouse Dust)

NIBCO acknowledges that zinc baghouse dust, which is collected in air pollution control facilities at its plant, is a sludge exhibiting a characteristic of hazardous waste (Response at 48). It asserts, however, that prior to the issuance of the complaint it was of the good faith belief that the firm to which the dust was sold "reclaimed" the material and that it was therefore excluded from being a solid waste by 40 CFR § 261.2(c) (Table 1). NIBCO states that it has since learned that the baghouse dust is used to make fertilizer and acknowledges that as a material "applied to land" the dust is a solid waste in accordance with 40 CFR § 261.2(c)(1)(B) and a hazardous waste by virtue of the characteristic of toxicity. Accordingly, NIBCO consents to the issuance of an accelerated decision finding liability on these counts.

Motion To Strike

NIBCO's answer contained 21 affirmative defenses. Complainant has moved to strike 13 of these defenses upon the ground that the defenses are insufficient as a matter of law, immaterial and/or frivolous (Motion at 69). While recognizing that motions to strike are not favored, Complainant says legitimate motions to strike "do not cause delay, but expedite the administration of justice." (Id.) This assertion may have some validity in the abstract, but is inaccurate here because, even assuming that NIBCO's defenses are not bars to liability, the same evidence will be relevant to the determination of any penalty. Moreover, Complainant's motion to strike assumes that its motion for an accelerated decision has been granted, which, with the exception of counts where NIBCO has admitted liability in whole or in part, is not the case. NIBCO has cited authority, e.g., Oliner v. McBride's Industries, Inc., 106 F.R.D. 14, 17 (S.D.N.Y. 1985), for the proposition that where the sufficiency of a defense depends upon disputed issues of law or fact, a motion to strike will be denied (Response to Motion to Strike at 2). NIBCO contends that such is the case here and argues that the motion to strike should be denied.

A brief discussion of the defenses at which the motion is directed follows:

1. "Totally Enclosed Treatment System" Exemption

(Defense No. 1)

NIBCO alleges that both TNRCC and EPA have made statements that its facility qualified for the "totally enclosed treatment" system exemption from permit requirements (Response at 5, 6). NIBCO says that it has identified documents and witnesses which will support this claim. One of the documents cited, a TNRCC letter, dated April 9, 1986 (Uncontested Facts ¶ 39), indicates that the conclusion that the addition of iron dust in the wet ballmill/separator system qualified for the "totally enclosed treatment" facility exemption was based upon NIBCO's description of its process.<sup>19/</sup> Obviously, whether NIBCO's descriptions were entirely accurate and whether its change from the wet to the dry ballmill/separator would change the conclusion that its system qualified for the "totally enclosed treatment" exemption are questions of fact. Even if the facts were as NIBCO alleges, it is unlikely that a finding completely relieving NIBCO of liability for Count I could be made. Nevertheless, the motion will be denied, because the same evidence will be heard on penalty issues and the validity of the defense to liability can be determined based upon such evidence.

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<sup>19/</sup> Prior to early 1987, NIBCO added iron dust to water-borne slurry consisting of water and shaker screen sand from which metal had been removed at the wet ballmill/separator system (Uncontested Facts ¶ 39).

2. Withdrawal of Interim Status and RCRA Permit Application  
(Defense No.2)

NIBCO says it will present documentary and testimonial evidence at the hearing to the effect that EPA and/or TNRCC advised and counseled it to withdraw its permit application then pending before the TNRCC (Response at 6,7). Because EPA has now determined that NIBCO is in violation of the regulations, NIBCO asserts that such advice, which may have caused it to forfeit interim status, constitutes "affirmative misconduct". NIBCO argues that Complainant should be estopped from pursuing this enforcement action. At the very least, NIBCO avers that there are issues of law and fact regarding the circumstances of the withdrawal of its permit application which preclude granting the motion to strike. Although NIBCO appears to have overlooked RCRA § 3005(e)(2) which provides circumstances under which interim status terminates (supra note 15), its arguments are sufficiently colorable as to require that the evidence be heard before a decision is rendered. In any event, evidence such as that referred to by NIBCO is relevant to penalty mitigation. It follows that the motion to strike this defense will be denied.

3. Notice of Activities (Defense No. 5)

In this defense, NIBCO claims that EPA and/or TNRCC were fully informed of the processes at its facility and that, accordingly, Complainant should be estopped from prosecuting alleged violations based on a lack of notice. The requirement that

notification of hazardous waste activity be filed with the Administrator or with an authorized State is imposed by the Act (RCRA § 3010) and it is unlikely that Complainant can be estopped from enforcing this requirement. Nevertheless, the extent to which EPA and/or TNRCC were informed of NIBCO's processes and activities at the facility is relevant to penalty mitigation and the motion to strike this defense will be denied.

4. Unclean Hands (Defense No. 10)

In this defense, NIBCO asserts that it intends to present documentary and testimonial evidence that Complainant has acted in bad faith and taken acts of retaliation and affirmative misconduct, which if true, would bar the instant enforcement action (Response at 10). NIBCO points out that for the purpose of deciding the motion, its allegations must be accepted as true. NIBCO further points out that Complainant has acknowledged that facts supporting [a finding of] affirmative misconduct on the part of the government would raise an issue as to NIBCO's liability. In view thereof, and because the evidence relating to these allegations is, in any event, relevant to penalty mitigation, the motion to strike this defense will be denied.

5. Admission of Interim Status (Defense No. 15)

In this defense, NIBCO claims that Complainant has admitted that NIBCO had interim status. This claim centers around alleged advice from EPA that NIBCO could close certain waste

management units at its facility under interim status rather than completing the permit application process for those units (Response at 11). Recognizing Complainant's argument that interim status can only be achieved by complying with the Act (RCRA § 3005(e)), NIBCO asserts that, if Complainant recognized NIBCO's interim status, Complainant should be precluded from claiming that it did not have such status. NIBCO's contentions in this regard have sufficient merit as to require that the evidence be heard before a decision is rendered. Once more, the evidence is clearly relevant to penalty mitigation and the motion to strike this defense will be denied.

6. Laches, Estoppel and Waiver (Defense No. 16)

It is well settled that laches and estoppel do not normally operate against the government. This is especially true where the enforcement of statutes for the protection of public health and the environment is concerned. Although there is no doubt that the government may be held to have waived the right to enforce certain provisions of contracts to which it is a party, the principles counseling against ready invocation of laches and estoppel against the government apply with equal force to arguments that there has been a waiver of the enforcement of a statute or certain provisions thereof. Notwithstanding the foregoing settled principles, evidence relating to such defenses will be heard because such evidence is relevant to the determination of a penalty. The motion to strike Defense No. 16 will be denied.

7. Preemption (Defense No. 20)

This defense is based upon the assertion that an authorized state has exercised reasonable and appropriate action to administer the same regulations which Complainant alleges were violated and that Complainant's action is therefore "preempted" (Response at 14). NIBCO explains that this is not a case of EPA "overfiling" where an authorized state fails to act [or takes inadequate action], but rather EPA is acting directly contrary to the position adopted by the State of Texas, specifically that NIBCO was entitled to the "totally enclosed treatment system" exemption. Although this appears to be a distinction without a difference as to cases where EPA claims the right to "overfile" because the state action is considered to be inadequate, it is concluded that the evidence will be heard on this issue and that the motion to strike will be denied.

8. Complainant Is Barred By the Doctrines of Estoppel, Laches, Res Judicata and Collateral Estoppel From Enforcing Interpretations of State Laws and Regulations Inconsistent with the State's Interpretation (Defense No. 4)

This is simply a variation of Defense No. 16, NIBCO claiming that Complainant's enforcement action is barred because the State has determined that NIBCO is operating in compliance with the State program and that the alleged violations do not exist (Response at 16). Complainant argues that this defense is inadequate as a matter of law, because RCRA § 3009 prohibits states

from imposing requirements which are less stringent than those authorized under the Act. Under RCRA, federal standards for the handling and disposition of hazardous waste were intended to be the minimum necessary for the protection of human health and the environment. This was to encourage uniformity among the states as to the regulation of hazardous waste and to prevent states from seeking to attract business by more lenient regulation. See House Report No. 94-1491, September 9, 1976, at 30, 31, reprinted U.S. Code Cong. & Adm. News at 6268, 6269 (1976). A state program, in order to be authorized under RCRA § 3006, is not required to be identical to the federal program, but need only be "equivalent". It is concluded that EPA may not rely on section 3009 to micromanage a state program and "second guess" state interpretations and rulings with which it may disagree. Moreover, Complainant's argument assumes that there is only one reasonable interpretation of the regulation and only one possible conclusion from the evidence.

NIBCO disclaims any contention that EPA may not enforce a more stringent interpretation of the regulations, but insists that the Agency is barred from bringing an enforcement action under the circumstances present here, the authorized State having determined that no violation exists.<sup>20/</sup> Although the bases for the

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<sup>20/</sup> The "more stringent" issue usually arises in connection with arguments as to whether EPA may enforce state laws or regulations which are "more stringent" than federal RCRA regulations. The Agency takes the position that it may enforce "more stringent" state regulations, but not those which have a "greater scope of coverage". See 40 CFR § 271.1(i) and In re (continued...)

dictinctions NIBCO seeks to draw may be difficult to discern, it is concluded that the evidence should be heard and that the motion to strike this defense will be denied.

9. The RCRA Regulations and the Comparable State Statute and Regulations Alleged to Have Been Violated Are Vague, Ambiguous and Do Not Provide Notice of the Conduct Proscribed or Prohibited (Defense No. 14)

NIBCO's response to the motion to strike leaves no doubt that this defense questions whether RCRA and the comparable Texas statute and regulations are constitutional (Id. 17, 18). NIBCO argues that this is not an issue appropriate for decision on a motion to strike. While there is loose language in some court and agency decisions to the effect that constitutional issues are beyond the purview of administrative agencies, these statements stem from the failure to distinguish between the power to declare a statute or regulation unconstitutional, which is generally reserved for the courts, and the power to determine whether constitutional requirements have been satisfied in the context of a particular proceeding, e.g., whether a respondent has been given adequate notice and thus accorded due process. See, e.g., In re Turner Brothers Trucking, Co., RCRA-VI-505-H (Opinion and Order Denying Motion for Accelerated Decision, February 4, 1986). See

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<sup>20/</sup> (...continued)

Hardin County, OH, RCRA (3008) Appeal No. 93-1 (EAB, April 12, 1994).

also In re K.O. Manufacturing, Inc., EPCRA Appeal No. 93-1 (EAB, April 13, 1995). It is concluded that the motion to strike will be granted to the extent that Defense No. 14 seeks to question whether RCRA and the regulations thereunder are constitutional. NIBCO is free to argue that the regulations, as applied herein, do not give fair notice of the conduct proscribed.

10. Failure to State a Claim Upon Which Relief May be Granted (Defense No. 7)

NIBCO explains that this defense is based upon the contention that it has at all times acted at the direction of EPA and/or TNRCC in determining the requirements related to its industrial processes (Response at 18). NIBCO asserts that there are disputed issues of law and fact in connection with this defense which should only be determined after a full evidentiary hearing and argues that the motion to strike must be denied. Because this defense as explained by NIBCO obviously involves factual issues, the motion to strike will be denied.

11. NIBCO Did Not Withdraw Its Part A Permit Application Nor Did EPA Revoke NIBCO's Interim Status (Defense No. 3)

This defense is based upon NIBCO's contention that it has "constructive interim status" (Answer at 35, Response at 19). Although, as noted previously, NIBCO's arguments in this regard appear to overlook RCRA § 3005(e)(2), which has the effect of automatically revoking interim status unless certain steps are

taken, it is concluded that the evidence should be heard before a decision is rendered thereon. In any event, evidence relating to the circumstances under which NIBCO allegedly withdrew its Part A permit application is clearly relevant to determining a penalty. The motion to strike this defense will be denied.

12. The Proposed Penalties are Unjust, Inequitable and Violate the Due Process Clause of Fifth Amendment to the Constitution (Defense No. 17) and the Proposed Penalties Violate the Due Process Clause Because Fair Warning of Conduct Proscribed or Required was Not Given (Defense No. 18).

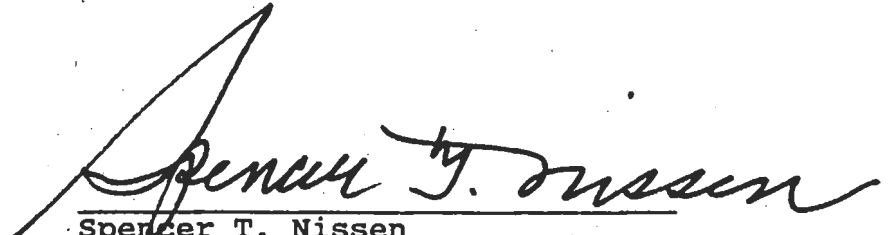
Defense No. 17 appears to be based upon the contention that the proposed penalties are so excessive that they constitute a "taking" of NIBCO's property and Defense No. 18 appears to be based upon the absence of fair warning in the regulations of conduct required or proscribed. Be that as it may, evidence relevant to penalty mitigation will clearly be admissible and there is little to be said for the motion to strike these defenses. Accordingly, the motion in these respects will be denied.

#### ORDER

Complainant's motion for an accelerated decision is denied except for Counts V, VI, IX, and X where NIBCO has admitted partial liability. The motion to strike is denied except insofar

as Defense No. 14 seeks to question the constitutionality of RCRA and its implementing regulations.<sup>21/</sup>

Dated this 29<sup>th</sup> day of May 1996.

  
Spencer T. Nissen  
Administrative Law Judge

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<sup>21/</sup> After this order was substantially drafted, NIBCO submitted a motion for Leave to Supplement Administrative Record. Specifically, the motion, dated May 14, 1996, referred to a letter from the Director of Solid Waste, EPA, to the Washington Representative of the American Foundrymen's Society, dated April 22, 1996, which indicated that the Agency was currently engaged in an effort to change RCRA regulations governing hazardous waste recycling. Options under consideration would affect the regulatory status of foundry sand and, inter alia, exclude from the definition of solid waste recycling processes which are considered "ongoing manufacturing" even if it necessitated reclamation steps such as separating and screening. Also enclosed with the motion was a portion of a final rule, "Land Disposal Restrictions Phase III", 61 Fed. Reg. 15566 - 15668 (April 8, 1996), which stated that a proposed rule prohibiting the addition of iron dust to spent foundry sand was not being finalized, but was still under study (Id. 15569). These documents merely reinforce the conclusion previously reached that Complainant's motion for an accelerated decision as to Count I be denied. NIBCO's motion to supplement the record is granted.

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER GRANTING IN PART MOTION FOR PARTIAL ACCELERATED DECISION AND MOTION TO STRIKE AFFIRMATIVE DEFENSES, dated May 29, 1996, in re: NIBCO, Inc., Nacogdoches Division, Dkt. No. RCRA-VI-209-H, was mailed to the Regional Hearing Clerk, Reg. VI, and a copy was mailed to Respondent and Complainant (see list of addressees).

*Helen F. Handon*

Helen F. Handon  
Legal Staff Assistant

DATE: May 29, 1996

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