BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	
Dearborn Refining Company	RCRA (3008) Appeal No. 03-04
Docket No. RCRA-05-2001-0019	

FINAL ORDER

I. *INTRODUCTION*

Before us is an appeal of an Initial Decision issued by Administrative Law Judge Barbara A Gunning ("ALJ") in an administrative enforcement action brought by U.S. EPA Region V (the "Region"). The action was brought against Dearborn Refining Company ("Dearborn") for violations of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, and its implementing regulations for the management of used oil and hazardous waste found in the Michigan Administrative Code ("MAC") Rules 299.9813 and 299.9502.[1] Dearborn owns a six-acre site in

[1] Pursuant to RCRA subsections 3006(b) and (h), the State of Michigan was granted final authorization by EPA to administer its own hazardous waste program in lieu of the federal RCRA program in 1986. 42 U.S.C. § 6926(b), (h). Additional rules regarding Michigan's used oil management requirements became effective on June 1, 1999. 64 Fed. Reg. 10,111 (Mar. 2, 1999). Upon approval of Michigan's program, the State's program became a requirement of RCRA, and, as such, is enforceable by both EPA and the State. *See* 42 U.S.C. § 6928.

MAC Rule 299.9813(3) specifically incorporates federal requirements for used oil into Michigan's program.

Dearborn, Michigan where it blends and markets lubricating and metal-working products primarily from virgin oil but also receives, stores, and processes used oil.

In an eight-count complaint, filed on September 28, 2001, the Region alleged various violations of Michigan and federal regulations, including: 1) failure to have adequate secondary containment for existing aboveground tanks used to store or process used oil; 2) failure to label aboveground tanks and containers used to store or process used oil with the words "Used Oil;" 3) failure to store or process used oil in aboveground tanks and containers in good condition; 4) failure to have an adequate communications system; 5) failure to have an adequate contingency plan; 6) failure to adequately maintain emergency equipment; 7) failure to have a written analysis plan; and 8) failure to have an operating license for the storage or disposal of hazardous waste.

The Region sought a compliance order and a civil penalty of $2,910,524.94 against Respondent.[2] The ALJ held a five-day evidentiary hearing on this matter and, on August 15, 2003, issued an Initial Decision finding Dearborn liable for all counts of the complaint and assessing a $1.25 million penalty. The ALJ

[2] In calculating the penalty, the Region considered the statutory factors in section 3008(a)(3) of RCRA as well as utilizing the Agency's 1990 RCRA Civil Penalty Policy. 42 U.S.C. § 6928(a)(3); RCRA Civil Penalty Policy (Oct. 1990).

also issued a Compliance Order specifying steps that Dearborn must take in order to come into compliance with the regulatory provisions under which it had been found liable.

On September 26, 2003, Dearborn filed a timely appeal of the Initial Decision before the Environmental Appeals Board (the "Board") in which it contests both the liability and penalty determinations. *See* Brief on Appeal (Sept. 26, 2003)("Appeal"); Alternative Findings of Facts and Conclusions of Law (Sept. 26, 2003)("Alternative Findings"). The Region filed a response on October 8, 2003.[3] *See* Complainant's Response Brief (Oct. 8, 2003) ("Region's Response"). With the Board's permission, Dearborn filed a reply to the Region's Response on December 2, 2003. *See* Dearborn Refining Company's Reply Brief ("Dearborn's Reply Brief") (Dec. 2, 2003). On liability, Dearborn contests the ALJ's findings and conclusions on each of the eight counts. With regard to the penalty determination, Dearborn alleges that the ALJ erred in concluding that Dearborn failed to establish that it did not have the ability to pay the proposed penalty.[4,5]

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[3] The Region has not appealed from any portion of the Initial Decision.

[4] Significantly, this case proceeds under a statute that does not include ability to pay as part of the complainant's burden of proof. *See* RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3). We have held in the past that in RCRA penalty cases ability to pay may be raised, but only as an affirmative defense upon which respondents bear the burden of proof. *In re Carroll Oil Co.*, 10 E.A.D. 635, 663 (EAB 2002) ("[B]ecause it is not part of the (continued...)

Dearborn raises no other objections to the penalty calculation.

The Board held oral argument in this matter on July 29, 2004.[6]

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[4](...continued)
Agency's required proof, 'ability to pay,' in order to be considered, must be raised and proven as an affirmative defense by the respondent.") (citing 2A *Moore's Federal Practice Manual* 8-17a (2d ed. 1994)). Here, the ALJ, considering the facts and testimony before her, concluded that Dearborn had failed to meet its burden in proving inability to pay a penalty. *See* Initial Decision at 58-63. We find no error in this conclusion.

[5] During the hearing before the ALJ and before this Board, Dearborn has claimed certain financial data related to its ability to pay the penalty as confidential business information ("CBI"). As a result, the ALJ issued two versions of her Initial Decision, one containing CBI and the other with CBI redacted and made available to the public. Similarly, in responding to Dearborn's appeal in this matter, the Region has submitted two versions of its response brief to the Board, one containing CBI and the other with CBI redacted. In compliance with the Board's obligations related to CBI, none of Dearborn's financial data has been included in this Final Order. Further, the Initial Decision attached hereto and all citations to the Initial Decision and Region's Response herein are to the redacted versions of these documents. The un-redacted versions, as well as the financial data claimed as CBI, will not be included in the Board's public file in this matter.

[6] Because data related to Dearborn's ability to pay the proposed penalty were claimed as CBI, the oral argument was bifurcated. Specifically, following completion of the argument on liability and penalty (except for the ability to pay issue), the courtroom was cleared and all video conferencing was terminated. The argument then reconvened as a closed, non-public hearing on issues related to Dearborn's ability to pay the proposed penalty. In addition, the court reporter was instructed to prepare a separate transcript not available to the public for this portion of the argument. *See* Order Bifurcating Oral Argument (July 23, 2004).

II. *DISCUSSION*

Upon careful review of the record on appeal, including the parties' submissions and statements at the July 29, 2004 oral argument, the Board affirms the Initial Decision in its entirety. *See* 40 C.F.R. § 22.30(f) ("[The Board] shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the [Initial Decision]. * * * [The Board] may adopt, modify or set aside any recommended compliance order * * *."). Accordingly, this Final Order does not include a detailed recitation of the findings of fact, conclusions of law, or background in this matter. Instead, readers are referred to the Initial Decision.

III. *CONCLUSION*

The Initial Decision is affirmed in its entirety. For the reasons stated in that Decision, Dearborn is directed to satisfy the terms of the Compliance Order issued by the ALJ.[7] In

[7] Footnote 73 of the Initial Decision states: "If the EPA has in fact determined that Respondent rebutted the presumption that the used oil in Tanks 5, 12, 17, and 59 is a hazardous waste as of October 2001, those tanks would not be subject to this section." Initial Decision at 71 n.73. This footnote relates to an issue discussed extensively both in the Initial Decision (*see id.* at 41-49) and in the briefs (*see* Appeal at 4-5, 9; Alternative Findings at 5-6; Region's Response at 58-70; Dearborn's Reply Brief at 4-5), concerning whether certain tanks were used to store hazardous waste (i.e., waste oil contaminated with hazardous substances). It is uncontested that testing in 1999 demonstrated that the tanks in question should be treated as
(continued...)

addition, for the reasons stated in the Initial Decision, and pursuant to RCRA section 3008(a)(3), 42 U.S.C. § 6928(a)(3), a civil penalty of $1.25 million is assessed against Dearborn. Dearborn shall pay the full amount of the civil penalty within thirty (30) days after the filing of this Final Order, unless, prior to that date, Dearborn and the Region negotiate an arrangement pursuant to which Dearborn will pay the penalty in more than one installment,[8] in which case payment shall be made pursuant to the negotiated payment schedule. Payment(s) shall be

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[7](...continued)
presumptively containing hazardous waste. *See* MAC Rule 299.9809(2)(b) (used oil containing more than 1,000 parts per million total halogens is presumed to be hazardous waste). Significantly, Dearborn has not seriously challenged the 1999 sampling data. While later testing data from these same tanks in 2001 proved negative for certain hazardous constituents, *see* Memorandum from Sue Rodenbeck Brauer, Regional RCRA Used Oil Expert, to File, Re: Review of Analytical Data from E&E's Reports and Paragon Data for Dearborn Refining Company (Jan. 9, 2003) (Respondent's Exhibit 23), and the 2001 data are certainly relevant to the question of what the tanks contained in 2001, they do not, by themselves, invalidate the 1999 data. The presence of hazardous waste in 1999 thus triggered certain hazardous waste management obligations that could only be extinguished through proper closure. As the Region states, "[E]ven if the Respondent had rebutted the presumption as of October 2001 that does not relieve the respondent of having to manage the tanks that contained hazardous waste * * *." Region's Response at 62 n.40. Accordingly, this footnote in the Compliance Order should be disregarded. Closure of the tanks is in order pursuant to the positive test results in 1999.

[8] At oral argument, the Board asked counsel for the Region whether, in view of the size of the penalty relative to the scale of Dearborn's operation, the Region would be amenable to an installment approach to paying the penalty. Counsel did not rule out such an approach. Oral Argument Transcript (Closed Session) at 28.

made by forwarding a certified cashier's check payable to the Treasurer, United States of America, at the following address:

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Sonja R. Brooks
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So ordered.[9]

ENVIRONMENTAL APPEALS BOARD

Dated: Sept. 10, 2004

By: /s/
Scott C. Fulton
Environmental Appeals Judge

[9] The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Final Order in the matter of Dearborn Refining Company, RCRA Appeal No. (3008) 03-04, were sent to the following persons in the manner indicated:

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/s/
Annette Duncan
Secretary