UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	RCRA VIII-85-02
CENTRAL PAINT AND BODY SHOP, INC.	)	
	)	
Respondent	)	

1. Resource Conservation and Recovery Act - Summary Determination - Where the answer filed essentially admits the facts comprising the violations alleged in the complaint, a motion for the issuance of an order establishing Respondent's liability should be granted. Alternatively, a stipulation of fact submitted by the parties can support such a finding.

2. Resource Conservation and Recovery Act - Penalty Calculation - Where the Agency has demonstrated that the proposed penalty was calculated in accordance with the final penalty policy, it will b considered as prima facie correct.

3. Resource Conservation and Recovery Act - Penalty Calculation - Once a prima facie case of the correctness of the penalty calculation is made, the burden shifts to the Respondent to show that either it was not correctly calculated or that mitigative factors are present which would cause such penalty to be reduced. Absent such a showing, the penalty, as proposed, should be assessed.

Appearances:

Lorraine M. Ross, Esquire
For Complainant, U.S. Environmental Protection Agency
Denver, Colorado

Richard D. Miller, Esquire
For Respondent
Casper, Wyoming

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. On March 27, 1985, the U.S. Environmental Protection Agency, Region VIII ("EPA") issued a Complaint, Compliance Order, Consent Agreement and Notice of the Right to Request a Hearing, charging the Respondent, Central Paint and Body Shop, Inc. ("Central Paint"), with violation of certain requirements of RCRA. Specifically, the Complaint charged Central Paint with violations relating to the failure to notify the Agency that they were a generator of hazardous wastes under § 3010 of The Act and storing hazardous wastes without having first obtained a permit or been granted interim status for such activity in violation of § 3005(a) of The Act.

After having been granted a motion extending the time to file an Answer, Respondent, through his counsel, filed an Answer which essentially admitted the elements comprising the violations set forth in the Complaint and by way of defense alleged that shortly after the inspection giving rise to the Complaint in this matter, the Respondent had complied with the provisions of the Compliance Order attached to and part of the Complaint and that, therefore, he felt that no penalty should be assessed.

Following the prehearing exchange, the matter was set for Hearing in Casper, Wyoming on March 4, 1986. Shortly prior to the holding of the Hearing, counsel for the Complainant filed a motion for an accelerated decision on the question of liability since the Answer had, in essence, admitted the elements which comprise the violations alleged in the Complaint. Since this motion came at such a late date, the Court advised the parties that it would not rule on the motion by way of a written decision, but would rather discuss

the matter of the question of liability at a short prehearing conference to be had immediately prior to the holding of the Hearing.

At the Hearing in Casper, Wyoming, the Court suggested to the parties that they enter into a stipulation of fact concerning the elements of the Complaint which were admitted by the pleadings and that the Hearing would then proceed on the question of the amount of penalty, if any, to be assessed. The parties agreed to this procedure and a stipulation of fact was prepared and filed with the Court shortly after the Hearing, which stipulation is accepted and will hereinafter be adopted as findings of fact in this matter.

Following the Hearing, proposed findings of fact and conclusions of law were submitted by the parties with briefs in support thereof. In rendering this Initial Decision, I have carefully considered all of the information in the record. Any proposed finding of fact or conclusions of law inconsistent with this decision are rejected.

Factual Background

The following facts are hereby found as expressed in the stipulation of facts entered into between the parties:

1. Complainant has jurisdiction of this matter under Section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928.

2. Respondent, Central Paint and Body Shop, Inc., operates an automobile body shop at 510 North Lennox, Casper, Wyoming.

3. Respondent generates waste paint solvents and sludges which are hazardous wastes because they exhibit the characteristic of ignitability, as defined in 40 C.F.R. § 261.21.

4. On February 11, 1985, EPA personnel inspected Respondent's automobile body shop.

5. During the inspection, EPA inspectors observed approximately thirty-five (35) fifty-five (55) gallon drums stored in an alley outside of Respondent's shop.

6. During the inspection, Mr. Robert Garner, President of Central Paint and Body Shop, Inc., stated that approximately fifteen (15) of the drums contained waste paint solvents.

7. Mr. Garner stated that he had been storing the drums for over one year.

8. Respondent had never qualified for interim status.

9. Respondent had never received a permit to store hazardous waste.

10. Respondent filed a Notification of Hazardous Waste Activity dated April 17, 1985 with EPA.

11. Respondent shipped twenty-four (24) drums of hazardous waste to Oil and solvent Process Company on April 30, 1985.

12. Respondent sent a copy of the Uniform Hazardous Waste Manifest from the April 30, 1985 shipment of drums to EPA.

The stipulation of facts set out above clearly show that the Respondent has violated the provisions of The Act as specified in the Complaint and, therefore, a ruling that the Respondent has, in fact, violated the provisions as set forth in the Complaint is hereby made.

There only remains the question of the amount of the penalty to be assessed.

Mr. Marvin H. Frye, appearing for the Complainant, testified that he calculated the penalty as proposed in the Complaint in this matter. Mr. Frye indicated that in doing so, he utilized the Agency's final penalty policy applicable to these matters in computing the proposed penalty. The penalty computation work sheet which reflects his work appears as Complainant's Exhibit No. 4 in the record. As indicated in that Exhibit, the Agency deter-

mined that the potential for harm represented by storing wastes without a permit was moderate and the extent of deviation was also moderate and that by referring to the matrix cell range, the range for such a violation would be from $5,000 to $7,999. The Agency chose the mid-range of that number which is $6,000. The Agency determined not to assess a separate penalty for the first violation.

In describing how he arrived at the moderate range for the two elements of violation under the penalty policy, the witness stated that he considered the nature of the waste which was a flammable solvent and also the quantity of the waste involved. The record indicates that there were approximately fifteen (15) drums sitting outside the facility's building--that the drums were unprotected and some appeared to be opened drums which indicates some potential for exposure and being a flammable material sitting outside, some potential for release through fire. The witness went on to state that from examining the pictures in the file, taken by the inspectors, he noticed that some of the drums did have a product label on them which indicated that their contents would be flammable and felt that some of the requirements of the regulations had been met, but not all of them which led him to conclude that the mid-range for deviation from the regulations and the mid-range for potential for harm was present. Since the witness indicated in his Answer that he sort of lumped together both elements of the penalty policies in coming to his conclusion, that being potential for harm and extent of deviation, the Court asked him to separate them out and to explain how he arrived at the conclusion as to each of these factors. The witness stated that as to the potential for harm, he noted that considering the condition of the drums and the amount of waste in the areas where they were stored and that some of them were open and the rain could cause the drums to overflow and therefore there was some potential of release of the waste to the environment and that since

they were in an area adjacent to an alley they could also be susceptable to being knocked over by a vehicle, once again exposing the environment to the waste contained therein. Considering all of these factors the witness suggested that a moderate potential for harm was appropriate.

As to the extent of deviation, the witness stated that the material was in drums and that some of them appeared to be in fairly good condition which would indicate a moderate range of penalty in terms of deviation from their requirements. He, once again, mentioned the fact that there were product labels on some of the drums which would warn persons that there was flammable materials contained therein.

The witness also stated that he made no adjustments to the penalty for good-faith or lack thereof, degree of willfulness, history of non-compliance, or other unique factors as authorized by the statute and the penalty policy. He made no other adjustments to the penalty, such as: the assessment of a multi-day penalty or economic benefit of non-compliance adjustments. His total suggested penalty was derived solely by determining that there were a moderate potential and a moderate extent of deviation from the regulations and the dollar amount reflected by that calculation is the final penalty which he proposed to be placed in the Complaint.

On cross-examination, counsel for the Respondent attempted to show that the Agency, in calculating its penalty, made no adjustment for good faith efforts to comply, which in this case had to do with the fact that the Respondent, after having been advised that he was in violation did arrange to have the hazardous waste removed from his property by a licensed transporter and taken to an approved landfill for disposition. The witness tried to explain to Respondent's counsel that matters taken after the issuance of the Complaint in an attempt to come into compliance with the Order have no bearing on the initial penalty calculation done since, of course, at that time the

Agency had no information as to the fact that the Respondent would or would not take a certain action in the future. The witness also testified that his understanding of the policy is that efforts to come into compliance following the issuance of a complaint are not legitimate factors to be used in reducing the penalty initially proposed in the complaint. He stated, however, that failure to comply with the terms of the compliance order would not raise the penalty, but could be the subject of a separate enforcement action.

Counsel for the Respondent also questioned the Agency's witness as to whether or not the financial information which was submitted following the issuance of the Complaint had any bearing on his assessment of the penalty. The question obviously must be answered in the negative since the witness did not have this informaiton when the penalty was calculated. Upon further examination by the Court and on re-direct by the Agency's counsel, the witness stated that the financial information that was subsequently given to him by the Respndent was submitted to the financial experts at the Agency for review and they advised him that the material contained in the financial statement was not of sufficient quality and quantity for them to make a determination as to the future viability of the Respondent nor the effect the payment of the proposed penalty would have on his ability to stay in business.

Mr. Frye was the only witness presented by the Agency and upon conclusion of his testimony, the Agency rested its case.

The only witness for the Respondent was Mr. Robert Garner, who is the owner of the Respondent's facility. He testified that at some time in the past a company which is in the business of picking up wastes such as generated by this Respondent and hauling it to a licensed disposal facility contacted him and asked if he had any material which needed to be picked up. He advised that he did and some time later the truck came by but since it was

rainy and the alley was muddy and the condition of the barrels was not of a high order, the company refused to pick up his barrels at that time. Subsequent to the filing of this Complaint, the Respondent finally realizing that the materials he had stored on his premises were hazardous wastes, made several contacts in an attempt to have them hauled away and this was ultimately done. Mr. Garner testified that at no time prior to the inspection was he aware that the spent solvents that he had been storing on his property for some time were considered to be hazardous waste by the Government. No one, either from a governmental agency nor a trade association to which he had ever belonged, ever advised him that the storage of such materials on his property was a violation of The Act.

The witness then testified as to the financial condition of his business which he indicated was poor due to the fact that the oil and gas industry, which essentially supports the economy in and around Casper, has collapsed for all practical purposes and that his business has dropped off considerably. The witness further testified that that assessment of a $6,000 penalty against him would in all likelihood close him down and that he could not pay the penalty under any circumstance.

The testimony of this witness concluded the Hearing.

Discussion and Conclusion

In its post-hearing brief, the Respondent made essentially three (3) arguments. The first one being that the Respondent was unaware that the materials he stored were considered hazardous and that their continued storage on his premises without a notification or the obtaining of a permit was required by the Government. He also argues that the action by his client in getting the hazardous waste shipped off his premises as soon as he could have

it done, constitutes good-faith effort to comply and that the Agency failed to take that into consideration in assessing the penalty involved. His third argument is that the financial condition of his client is such that the assessment of the penalty proposed would put him out of business and that therefore it is contrary to the intent of the law that such an occurence result.

In its reply brief, the Agency addressed two of these factors and argued that, obviously, ignorance of the law is no excuse and that hazardous waste activities have been regulated under the law since 1976 and that Mr. Garner's failure to ascertain the applicability of RCRA to his activities is no defense to his action. The Agency further directs the Court's attention to the penalty policy which addresses the issue of whether the violator knew of the legal requirements which were violated. Under that section the penalty policy states: "It should be noted that this last factor, lack of knowledge of the legal requirements, should never be used as a basis to reduce the penalty. To do so would encourage ignorance of the law. Rather, knowledge of the law should serve only to enhance the penalty." The Agency argues that the policy was properly applied and that since no knowledge of the law was alleged the penalty was not enhanced as it could have been. As to the issue of the fact that the Respondent came into compliance after the Complaint was issued, the Court's attention was directed to page 17 of the penalty policy where it is stated that: "No downward adjustment should be made if the good-faith efforts to comply primarily consist of coming into compliance." The Agency argues that this statement covers Respondent's actions in this case, since the record is clear that prior to the inspection and the issuance of the Complaint, the Respondent took no action whatsoever to comply with the requirements of The Act.

Neither the initial nor the reply brief of the Complainant addresses the question of whether or not a Respondent's ability to pay should influence the amount of penalty to be assessed.

This issue is addressed on page 20 of the penalty policy and essentially states that the Agency generally will not request penalties that are clearly beyond the means of the violator and that, therefore, EPA should consider the ability of the violator to pay a penalty. The policy then goes on to state that in appropriate circumstances the Agency reserves the right to seek penalties that might put a company out of business. Such situations are stated to involve a situation where the violator has a long history of previous violations or where he refuses to correct a serious violation. The record in this case does not reveal any prior violation by this Respondent nor is there any refusal on the part of this Respondent to correct the violation promptly when it was brought to his attention.

The policy then goes on to state that the burden of proving of inability to pay always rests upon the Respondent and that he has the burden of coming forward with any evidence that supports this contention and if the Respondent fails to provide sufficient information, the Agency should disregard this factor in adjusting the penalty.

The policy also states that if the payment of the penalty or a portion thereof would preclude the violator from achieving compliance or carrying out remedial measures which the Agency deems to be more important than the deterrence effect of the penalty, for example, proper closure or post-closure, the following options could be considered: (1) delayed payment schedule, (2) installment payment plan with interest, and (3) straight penalty reduction as a last recourse. In this case, since the Respondent is merely a generator of waste and he has removed the waste from his premises and will continue to

have such waste removed within the ninety (90) day period allowed by the regulations, no future costs such as closure or post-closure are relevant to this matter. Therefore, the only thing that remains to be determined is whether or not the Respondent has produced sufficient documentation to demonstrate his inability to pay the proposed penalty.

Respondent's Exhibit No. 4 is financial statements for the periods ending April 30, 1985 and June 30, 1984, prepared by a firm of certified public accountants. The cover letter to this report states that the CPA firm has compiled the balance sheets and the related statements of income and the accumulated deficits in accordance with the standards established by the American Institute of Certified Public Accountants. The firm then states that: "A compilation is limited to representing in the form of financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them." The compilation shows that for the year ending June 30, 1984, the Respondent had sales of over $405,000 and a gross profit of $127,725. And for the ten (10) months ending April 30, 1985, the Respondent had sales of over $359,000 and a gross profit of $128,517. This statement of income and accumulated deficit shows that for the period ending June 30, 1984, the Respondent has an accumulated deficit at the end of year of $25,413; and for the ten months ending April 30, 1985, an accumulated deficit of $31,746. The CPA's report concludes by stating that the company and its stock holders have elected to have the Federal Income Tax on the corporate earnings paid directly to its stock holders as provided for under Subchapter S of the Code, and as a result no income tax provision has been made on the income statement or balance sheet as this is a personal obligation of each stock holder. It is, therefore,

impossible from a reading of this compilation of financial statements to determine the actual financial position of the Respondent corporate owners since it is not directly reflected thereon. However, the statement of income and accumulated deficit, hereinabove referred to, shows an expenditure of $92,000 for 1984, and $106,000 for 1985 for general and administrative expenses. Since the cost of sales has already been expressed elsewhere in this report, one must assume that a large portion of these numbers represents salaries or profits paid to the owners of the corporation for which they are required to file individual income tax returns. Such income tax returns for Mr. Garner or other officers of the corporation were not presented and one can, therefore, only speculate as to what they would show.

As indicated by the Agency's sole witness, Mr. Frye, these documents were presented to the Agency's financial experts and they, like the Court, were unable to determine from the material contained therein the actual financial condition of the individuals who are the sole owners of the Respondent's business.

Since I am of the opinion that the Agency properly calculated the proposed penalty in accordance with the directives of the penalty policy which this Court has on prior occasions accepted such calculation is prima facie proper. Given that fact, it then is encumbent upon the Respondent to present evidence or testimony which either demonstrates that the Agency had improperly calculated the penalty or that there were certain mitigating factors, which are present, that the Agency improperly failed to consider. The penalty policy and common sense both dictate that the burden is upon the Respondent to come forward with infonnation of any sort which would tend to mitigate the proposed penalty. His failure to do so would cause the Government and the Court

to disregard any such arguments. In the instant case, my review of the financial documentation presented by the Respondent is insufficient to demonstrate that the penalty suggested should be reduced on the basis of Respondent's alleged inability to pay.

Since the Respondent has been unable to persuade the Court that the penalty was initially improperly calculated or that certain mitigative factors, perhaps not known to the Agency at the time that the penalty was calculated, should cause the penalty to be reduced, I have no basis for reducing the penalty proposed by the Agency in the Complaint.

If the Respondent is able to demonstrate to the Agency that his financial condition is such that the payment of the penalty herein assessed in a lump sum would be virtually impossible, then arrangements could certainly be made for the payment of the penalty in installments or on a deferred basis. I am not suggesting, however, that the Agency must pursue this course of action, but merely call its attention to the fact that should the circumstances prove that such a procedure might be appropriate, they are certainly free to follow these suggestions.

ORDER[1]

Pursuant to the Solid Waste Disposal Act, Section 3008, as amended, 42 U.S.C. 6928, the following order is entered against Respondent, Central Paint and Body Shop, Inc.:

1. A civil penalty of $6000.00 is assessed against the Respondent for the violations of the Solid Waste Disposal Act found herein.

2. Payment of the full amount of the civil penalty shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States. This payment shall be forwarded to the following address:

EPA - Region VIII
(Regional Hearing Clerk)
Post Office Box 360859M
Pittsburgh, PA 15251

Thomas B. Yost
Administrative Law Judge

DATED: June 6, 1986

[1]Unless an appeal is taken pursuant to 40 C.F.R. § 22.30, or the Administrator elects to review this Decision on his own motion, the Decision shall become the Final Order of the Administrator. See 40 C.F.R. § 22.27(c).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VIII
ONE DENVER PLACE — 999 18TH STREET — SUITE 1300
DENVER, COLORADO 80202-2413

IN THE MATTER OF:	)	
CENTRAL PAINT AND BODY SHOP, INC.	)	DOCKET NO. RCRA VIII-85-02
Respondent.	)	

CERTIFICATION OF SERVICE

In accordance with §22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties . . . (45 Fed. Reg., 24360-24373, April 9, 1980), I hereby certify that the original of the foregoing Initial Decision issued by Honorable Thomas B. Yost, was served on the Regional Hearing Clerk, EPA, 999 18th Street, Denver, CO 80202-2413, by certified mail, return receipt requested; that a copy was served on Mr. Lee M. Thomas, Administrator, EPA, 401 M Street, S. W., Washington, D. C. 20460, by certified mail, return receipt requested; that a copy was hand-delivered to counsel for complainant, Lorraine M. Ross, Office of Regional Counsel, EPA, 999 18th Street, Denver, CO 80202-2413; and that a copy was served by certified mail, return receipt requested on counsel for respondent, Richard D. Miller, 109 Eagle Court, 4100 Sweetbrier, Suite 109, Casper, WY 82604.

If no appeals are made (within 20 days after service of this Decision), and the Administrator does not elect to review it, 45 days after receipt, this will become the Final Decision of the Agency (45 F.R. §22.27(c), and §22.30).

Dated in Denver, Colorado, this 13th day of June, 1986.

Jo Lynn Meacham
Regional Hearing Clerk

cc: Honorable Thomas B. Yost