UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
American Ecological Recycle Research Corporation,	)	Docket No. RCRA-VIII-82-4
	)	
and	)	
	)	
Donald K. Gums,	)	
	)	
Respondents	)	

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1. RCRA - Listed Wastes - Solvents which have been used and are no longer fit for use by the original user are spent solvents and hazardous wastes, if they are listed in 40 CFR 261.31, even though they still may have a use as solvents.

2. RCRA - Interim Status Standards - Violations found of the standards relating to the management of containers (40 CFR Sections 265.171, 173 and 174), of the standards relating to the management of tanks (40 CFR Sections 265.192 and 194), of the requirement that Respondents establish financial assurance for closure of their facility (40 CFR Section 265.143), and the requirement that Respondents adequately secure their facility (40 CFR Section 265.44).

3. RCRA - Interim Status Standards, 40 CFR Sections 265.31 and 265.171 - Storing hazardous waste in drums and tanks in poor condition may violate both 40 CFR Section 265.31 and Section 265.171, but only one penalty may be assessed since both violations are based on the same facts.

4. RCRA - Interim Status Standards, 40 CFR Section 265.143 - An estimate of zero closure costs rejected where it was not shown to be based on facts from which it could be reasonably inferred that there would be zero closure costs.

5. RCRA - Penalty of $8,000 assessed for violations found.

Appearances:

Larry Edelman, Assistant Regional Counsel, United States Environmental Protection Agency, Region VIII, Denver, Colorado, for Complainant.

Gary E. Parrish, and Daniel E. Scheid, Popham, Hack, Schnobrich, Kaufman & Doty, Ltd., Denver, Colorado, for Respondent.

INITIAL DECISION

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, (hereafter "RCRA"), Section 3008, 42 U.S.C. 6928 (Supp. V 1981), for assessment of a civil penalty and issuance of a compliance order because of alleged violations of the Act.[1/] A complaint and compliance order was issued against Respondents, American Ecological Recycle Research Corporation and Donald K. Gums by the United States Environmental Protection Agency ("EPA") on July 21, 1982. The complaint alleged that Respondents operate a facility in Jefferson County, Colorado which has received RCRA interim status authorization to store hazardous waste, and that they are thereby subject to the Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities, 40 CFR Part 265. It was further alleged that Respondents have violated said Interim Status Standards in the following respects:

1. Respondents have stored hazardous waste in drums that are leaking, bulging, stressed or otherwise not in good condition in violation of 40 CFR 265.170 - 265.174;

2. Respondents have stored hazardous waste in tanks having structural cracks and with less than two feet of freeboard (the distance between the top

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1/ Pertinent provisions of Section 3008 are:

Section 3008(a)(1): "(W)henever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subtitle [C] the Administrator may issue an order requiring compliance immediately or within a specified time period . . . ."

Section 3008(g): "Any person who violates any requirement of this subtitle [C] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation."

Subtitle C of RCRA is codified in 42 U.S.C. 6921-6931.

of the tank and the surface of the waste), do not have a waste analysis of the stored wastes and have not made a weekly inspection of the tank construction materials, all in violation of 40 CFR 265.190 - 265.199;

3. Hazardous wastes stored at Respondents' facility have been improperly disposed of in that they have spilled or leaked from their containers in violation of 40 CFR 265.31;

4. Respondents have not established financial assurance for the closure of the facility as required by 40 CFR 265.143;

5. Respondents have failed to have the facility secured so as to restrict access to the facility as required by 40 CFR 265.14.

A penalty of $25,000 was proposed for these violations. The compliance order included in the complaint directed Respondent to correct the violations, to submit Part B of the application for a RCRA permit, and to cease and desist from any addition of hazardous waste to the present inventory at the facility unless and until a RCRA permit is issued.[2/]

Respondents answered and denied the violations and asserted as defenses that the complaint is barred by the doctrines of estoppel, waiver or release, that the complaint was invalid because Respondents were not given notice of the alleged violations and a 30-day opportunity to comply before the complaint was issued, that Complainant (the Director of Air and Waste Management Division, Region VIII) had no authority or standing to bring the complaint and compliance order, that the financial responsibility requirements are invalid and

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2/ A Part B application must be submitted to obtain a final RCRA permit (as distinguished from interim status authorization) and contains considerably more detailed information than that required to obtain interim status. See 40 CFR 122.25.

Complainant is estopped from asserting that they have been violated, and that Complainant knew or should have known that Donald K. Gums is not the owner or operator of the facility. A hearing was requested.

Thereafter, a hearing was held in Denver, Colorado on December 6, 7, and 8, 1982. Following the hearing, the parties submitted briefs on the legal and factual issues. On consideration of the entire record and the briefs of the parties, a penalty of $8,000 is assessed. The opinion which follows sets out the factual findings and legal conclusion on which this decision is based. Findings proposed by the parties which are inconsistent with this decision are rejected.

Findings of Fact

1. Respondent, American Ecological Recycle Research Corporation (AERR Co.) is a Colorado corporation engaged in the business of storing, recycling and selling waste chemical products. EPA Exhibit B; Transcript ("Tr") 208, 212, 393-94.[3/]

2. Respondent Donald K. Gums is the President and the principal owner and operator of AERR Co. Tr. 193-94, 205;

3. AERR Co. owns and operates a facility at 17100 Highway 72, Jefferson County, Colorado, hereafter referred to as the "Rocky Flats facility." Respondents' answer. Currently, Respondents use this facility to store waste products and to recycle some of the stored products into salable commodities. Small research projects are also conducted from time to time at the facility. Tr. 212;

4. The AERR Co. Rocky Flats facility has RCRA "interim status" authorization for storage of hazardous waste, and is subject to the Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage

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3/ The word "recycling" is used to refer generally to using, reusing, reclaiming or recycling waste products.

and Disposal Facilities (hereafter referred to as "Interim Status Standards"), 40 CFR Part 265. EPA Exhibit B; Tr. 16-17.

5. On January 11 and 12, 1982, and on June 21, 1982, authorized EPA inspectors conducted inspections of the AERR Co. Rocky Flats facility. EPA Exhibits F, H. Tr. 69, 103.

6. At the times of the EPA inspections, AERR Co. had in storage 55-gallon drums containing the following spent solvents listed as hazardous wastes in 40 CFR Section 261.31:

a) Solvents containing either 1, 1, 1 - trichloroethane or trichloroethylene, listed under EPA Hazardous Waste No. F001, or F002 (depending upon whether the solvent had been used in degreasing operations.) EPA Exhibit F, page 3. Exhibit L; Tr. 72, 76.

b) Drums of Freon, a halogenated solvent listed under EPA Hazardous Waste No. F001. EPA Exhibit F, page 3; EPA Exhibit K (Slide 16); EPA Exhibit L; Tr. 72.

c) Mixed solvents containing Methyl Ethyl Ketone (MEK), toluene, and Methyl Isobutyl Ketone (MIBK). The Methyl Isobutyle Ketone solution is listed under EPA Hazardous Waste No. F003, and the other two products are listed under EPA Hazardous Waste No. F005. EPA Exhibit F, page 3-4; EPA Exhibit L; Tr. 76.

7. At the times of the EPA inspections, AERR CO. had in storage 55-gallon drums containing the following wastes classified as hazardous wastes because they exhibit one of the characteristics of hazardous waste identified in 40 CFR Part 261, Subpart C:

a) Acids having Hazardous Wasie No. D002 because they exhibit the characteristic of corrosivity, as described in 40 CFR 261.22. EPA Exhibit F, page 3; EPA Exhibit L; Tr. 75.

b) Cyanide having Hazardous Waste No. D003 because it exhibits the characteristic of reactivity as described in 40 CFR 261.33. EPA Exhibit F, page t; EPA Exhibit L; Tr. 174.

Not all this "characteristic waste" was being recycled. Tr. 328, 392-93.

8. At the times of the EPA inspections, there were 55-gallon drums containing hazardous wastes listed in 40 CFR 261.31, as well as drums containing characteristic waste which were leaking, bulging, stressed or otherwise not in good condition. EPA Exhibits F, H, and K; Tr. 106-119.

9. At the times of the EPA inspections, many of the drums containing hazardous waste stored at the AERR Co. facility could not be inspected because the drums were stacked too closely together. EPA Exhibit H; Tr. 119, 299-301.

10. At the time of the EPA inspections, there were two acid tanks at the facility. These tanks contained waste having a pH of less than or equal to 2, making them hazardous wastes having the characteristic of corrosivity. EPA Exhibit F, p. 6; Tr. 108; 40 CFR 261.22. The liquid waste in one tank, the North tank, was also hazardous in that it contained chromium, mercury, cadmium, lead and silver in amounts sufficient to give it the characteristic of EPA toxicity under 40 CFR 261.24. Tr. 327-28.

11. At the time of the EPA inspections, the acid tanks had structured cracks and less than two feet of freeboard. EPA Exhibits H, K (Slides 1-4 South Tank; Slides 5-8 North Tank); Tr. 107-12. These tanks did not have a containment structure, a drainage control system or diversion structure to control the dispersion of waste that spilled or splashed over the sides of the tanks. Tr. 306.

12. Respondents by July 6, 1982, had not established financial assurance for properly closing the Rocky Flats facility as required by 40 CFR Section 265.143. As of the date of the hearing, Respondents still had not submitted

to the EPA the evidence required by Section 265.143 to show that they had established the necessary financial assurance for closure of the facility. Tr. 382, 394.

13. At the times of the EPA inspections, the facility was not fenced along the southwest boundary. A portion of the fence along the southeast boundary was leaning, indicating that the fence was not in good repair. EPA Exhibit K (Slide 28); Tr. 125, 158-61.

14. The Director, Air and Waste Management Division, United States Environmental Protection Agency, Region VIII, is authorized on behalf of the Administrator to issue complaints and compliance orders relating to violations under RCRA and the applicable regulations. EPA Exhibit N; Tr. 331-39.

Discussion and Conclusions

The EPA, charging Respondents with numerous violations of RCRA and the Interim Status Standards promulgated thereunder, seeks a $25,000 penalty. Respondents in defense contend that the EPA's position is factually unjustified, does not take into account either Respondent's good faith efforts to comply with RCRA and the Interim Status Standards or that by recycling and reclaiming hazardous waste into useful products, Respondents are furthering the goals of RCRA, and that the proposed penalty is beyond Respondents financial ability to pay. Before getting into the merits of these contentions, two procedural objections raised by Respondents can be disposed of.

The first objection is to my having allowed the EPA after it had concluded its case-in-chief to introduce evidence establishing the authority of Complainant (the Director, Air & Waste Management Division of Region VIII) to issue the complaint, instead of granting Respondents' motion to dismiss for failure to prove such authority. Complainant's asserted lack of authority to issue the complaint had been raised as defense in Respondents answer. The EPA, however, did not put in evidence showing the delegation of authority as part of its case-in-chief because of its good faith, although mistaken belief that my earlier denial of Respondents' motion to dismiss on the pleadings made such evidence unnecessary.[4/]

Respondents are correct that since the issue was raised, the proof that authority had been duly delegated is properly a part of Complainant's case.[5/] The EPA, however, has shown good cause why it did not present the evidence as part of its case-in-chief. The issue was also one which could be readily

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4/ See Tr. 181-82, 186-92, 331-32.

5/ Proof, of course, could have been dispensed with if it were proper to take official notice of the contents of the relevant portions of the Delegations Manual, a question which I need not decide, since official notice was not used.

resolved without delaying the proceeding, since all that was required was the production of the relevant portions of the EPA's Delegations Manual. Finally, Respondents, despite their broad allegations of prejudice, have not shown that the introduction of the evidence did in fact prejudice them in their ability to defend against the charges in the complaint. Under these circumstances, Respondents' contention that allowing the evidence was unfair and deprived them of due process is found to be without merit.[6/]

Respondents second procedural objection has to do with the EPA's procedure in issuing its complaint and compliance order. These were issued without first giving Respondents notice of the violations and a 30-day period to bring itself into compliance. Respondents argue that this procedure was invalid because it had not been adopted through notice and comment rulemaking. The EPA modified its Rules of Practice, 40 CFR 22.37, to no longer require that a respondent be notified of a violation and be given a 30-day period for compliance prior to the issuance of a complaint and compliance order, when such requirement was deleted from RCRA, Section 3008, by the Solid Waste Disposal Amendments of 1980.[7/]

Respondents argue that the only effect of the amendment to RCRA, Section 3008, was to change a mandatory requirement to a discretionary requirement, but that under 5 U.S.C. 553, the exercise of discretion in having complaints issued immediately and without affording a respondent any notice of violation

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6/ The Agency's rule of practice, 40 CFR 22.24, cited by Respondents does not preclude the Administrative Law Judge from reopening the case-in-chief and allowing the presentation of additional evidence when the interest of justice require it. Rather, discretion to reopen the case-in-chief would seem to be within the Administrative Law Judge's specific authority to admit or exclude evidence, as well as within the broader authority to take all measures necessary for the efficient, fair and impartial adjudication of issues. See 40 CFR 22.04(c).

7/ See 45 Fed. Reg. 70808 (December 2, 1980).

or an opportunity to comply must be done by notice and comment rulemaking.

I do not agree with EPA's position that the argument is barred by the preclusive review provisions of RCRA, Section 7006, 42 U.S. 6976. An objection to enforcement procedures appears to be the kind of question which can appropriately be raised in an enforcement proceeding.[8/] The argument is found to be without merit, however, because what is involved is an Agency rule of procedure or practice which, pursuant to 5 U.S.C. 553(b)(3), may be promulgated without notice and comment unless notice or comment is required by statute. There is no requirement in RCRA that rules governing the procedures used in administrative proceedings to enforce the Act must be adopted by notice and comment. Of course, even though a rule is labeled as "procedural", the notice and comment procedure must be followed if the rule materially affects substantive rights. Since one charged with a violation has no fundamental or basic right to escape liability by complying after the violation has been uncovered, and since RCRA no longer confers such right, it is also clear that the Agency's action does not have the "substantial impact" upon parties such as Respondents, which the courts have held would require that the rule be adopted pursuant to notice and comment.[9/]

A. Respondents' Operations and the Applicability of RCRA and the Interim Status Standards to Them

AERR Co. stores and recycles used chemicals. Respondent Donald Gums, described the operation thus: "We will take anything that somebody thinks they should throw away, that we can figure out a way to make it useful again

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8/ See Transportation, Inc., Docket No. CAA (211)-27 et al (February 25, 1982) at 8, cf., Chrysler Corp. v. EPA, 600 F. 2d. 904, (D.C. Cir. 1979) (Enforcement procedures under the Noise Control Act of 1972, are not reviewable on Judicial review of the rule).

9/ See Commonwealth of Pennsylvania v. United States, 361 F. Supp. 208, 220-22 (M.D. Pa.), aff'd mem., 414 U.S. 1017 (1973).

and still make a buck.[10] AERR Co. has two facilities, the Rocky Flats facility, and a main office facility on Federal Boulevard in Denver. The Rocky Flats facility, during the period involved here, was being used to store used chemicals, and also for doing some recycling of chemicals and for small, short term (one or two days) research projects.[11]

Certain hazardous wastes which are recycled rather than being discarded are at the present time regulated by the EPA with respect to their transportation and storage prior to being recycled.[12] The hazardous wastes so regulated and the hazardous waste management regulations applicable to them are set out in 40 CFR 261.6. With an exception not pertinent here, they are the wastes listed in 40 CFR 261.31 and 261.32.

The composition of the chemicals stored at the Rocky Flats facility at the time of the inspections is fully established by the tests performed for Respondents by the Rhinehart laboratories, as well as by information furnished by Mr. Wayne Gums during the inspection.[13] Some of these chemical substances were used solvents containing the ingredients listed in 40 CFR 261.31. If properly classified as "spent solvents", their storage prior to recycling must be managed as required by 40 CFR 251.6(b).

Respondents at the hearing did not really dispute the classification of their solvents as spent solvents. After the hearing, however, they moved for

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10/ Tr. 208.

11/ Tr. 212.

12/ In determining to regulate the transportation and storage of hazardous waste prior to actual recycling, the EPA pointed out that during these stages of the waste handling process, wastes present essentially the same hazards and should therefore require essentially the same management, irrespective of whether they are destined for disposal or for reuse and recycling. See 45 Fed. Reg. 33093 (May 19, 1980).

13/ See EPA Exhibits D, E, F and L.

a stay of decision on the ground that they had not disputed the classification because they had been misled by the wording of 40 CFR 261.6(b). That section had been amended after this case had been tried to make clear that the chemical substances listed in 40 CFR Section 261.33 by generic name were not hazardous wastes subject to RCRA's regulatory requirements unless they were discarded.[14/] Respondent's arguments are summarized and my reasons for rejecting them are set out in my order denying the stay issued on May 19, 1983. The nub of Respondents' argument is that their used solvents should be listed under 40 CRR 261.33, rather than as spent solvents under 40 CFR 261.31, and that they should be given the opportunity to show this to the Agency before any decision is given. In rejecting that argument, and the stay, I concluded that Respondents in their papers had presented no new facts or arguments about their products that made it likely that the Agency would change its mind about Respondents' solvents being "spent solvents".[15/] What is said here is in further support of my rejection of the stay.

There is really no dispute that Respondents' solvents are products which would have been discarded by their original user if Respondents had not acquired them in the expectation or hope that they still have a use or can

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14/ See 48 Fed. Reg. 2530 (January 20, 1983).

15/ Order denying stay at 8.

be made useful through recycling.[16] The used solvents, therefore, clearly fall within the broad class of "solid wastes" from which the more narrowly defined group of "hazardous wastes" are drawn.[17] They also can be accurately described as "spent solvents" in the hands of the original users since by becoming contaminated through use they are no longer fit for use by the original users.[18]

16/ The used condition of Respondents' solvents was admitted in some instances by Mr. Wayne Gums. See Mr. Gums' description of "Mixed Solvents and Resins (Lot #8)", and "Resins and Solvents (Lot #1)", as well as his reference to "used forge lube", EPA Exhibit F at 4, 5, 7. The general nature of AERR Co.'s operations in used products that would otherwise be discarded is attested to by Mr. Donald Gums. Tr. at 208. In addition, official notice may be taken of Respondents' description of its solvents in its motion for a stay. The solvents identified therein as "can liner", "forge lube", "Freon", "Paint Solvents", and "Chlorinated Solvents" are all described as having been used and no longer fit for use by the original user. One solvent, "Methanol", is described simply as being rejected as "off-specification for electrical grade requirements." It is unclear whether in this instance Respondents were using the term "off-specification" to describe an unused product, listed only under Section 261.33, or whether they were using "off-specification" in the same sense that they used it to describe their other solvents, i.e., a used product which contained some contaminant making it unfit for its original intended use. Also unclear is whether the methanol referred to in the motion as rejected by Hewlett-Packard is the same methanol shown on the record as having been received from Arapahoe Chemicals Co., or from Coors. See EPA Exhibit F, at 3, 7. It is unnecessary to resolve these questions as the used character of the other solvents stored by Respondents is clearly established. Instead, methanol will be disregarded in determining whether Respondents have violated RCRA's regulatory requirements.

17/ A "solid waste" is defined to include any "solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining or agricultural operations . . . which . . . [h]as served its original intended use and sometimes is discarded . . . ." 40 CFR 261.2. There are certain exceptions from this definition of solid waste which are not pertinent here. See 40 CFR 261.40.

18/ The regulations currently do not define the word "spent". The common meaning would appear to be "used up" or "worn out", see Websters New World Dictionary of the English Language, (College Edition). These qualities would certainly apply to the solvents in the original user's hands.

On the other hand, the chemicals in 40 CFR 261.33, are the unused chemicals listed by their generic name, and intended for commercial or manufacturing use.[19/]

Respondents, in their submission to the Agency, which they attached to their motion for a stay, argued that the exemption should also apply to their products because they claim that there is no real difference between their solvents and rejected off-specification generic chemicals listed in Section 261.33. There is, however, the distinct difference that Respondents' solvents are used solvents and contain contaminants that affect their use as solvents and would not be found in off-specification solvents. This difference coupled with the reasons given by the Agency for its amendment to Section 261.6(b), dispel any inference that the amendment was intended to exclude Respondents' products from regulation.[20/]

19/ See 40 CFR 261.33, especially the comment following 261.33(d). See also the Agency's explanation of its treatment of the chemical products listed in Section 261.33, where it states that the list was intended to include products having the generic names listed therein which are sometimes discarded in their pure form. 45 Fed. Reg. 33115 (May 19, 1980).

20/ See 48 Fed. Reg. 2531. A letter from Respondents' counsel dated May 9, 1983, states that Region VIII has rendered its opinion that the stored materials of AERR Co. are "spent solvents". Region VIII apparently based its position on the Agency's definition of "spent materials" in the Agency's proposed regulations dealing with recycling operations. See 48 Fed. Reg. 12507, 14508 (April 4, 1983) (proposing to define a "spent material" as "any material that has been used and has served its original purpose.") The definition is discussed at 48 Fed. Reg. 14476. Respondents take issue with Region VIII's interpretation of the proposed definition, but no useful purpose would be served by attempting to resolve a dispute over a definition which has not yet become final. Suffice it to say that there is nothing stated by the Agency in giving its reasons for the proposed definition which would be inconsistent with the conclusion reached here that solvents become "spent" for regulatory purposes when they are no longer fit for use by the original user.

B. The Substantive Violations

(1) The Violation of the Interim Status Standards Relating to the Management of Containers.

Complainant contends that Respondents have violated the following provisions of 40 CFR Subpart I (Sections 265.170 - 265.177), relating to the use and management of containers:

> Section 265.171 Condition of containers.
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> If a container holding hazardous waste is not in good condition, or if it begins to leak, the owner or operator must transfer the hazardous waste from this container to a container that is in good condition, or manage the waste in some other way that complies with the requirements of this Part.
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> Section 265.173 Management of containers.
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> (a) A container holding hazardous waste must always be closed during storage, except when it is necessary to add or remove waste.
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> (b) A container holding hazardous waste must not be opened, handled, or stored in a manner which may rupture the container or cause it to leak.
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> Section 265.174 Inspections.
>
> The owner or operator must inspect areas where containers are stored, at least weekly, looking for leaks and for deterioration caused by corrosion or other factors.

The evidence does show that listed hazardous waste was being stored in drums which could reasonably be found to be "not in good condition", because

they were leaking, bulged or corroded through or were without covers.[21] Respondents contend that there is no proof that the specific drums found in poor condition contained hazardous waste since no analysis had been made of their contents.[22] The argument is without merit. At the time of the inspections, Respondents had segregated the drums into lots separating potentially incompatible chemicals from each other, in accordance with a consent decree that had been entered in a proceeding brought against Respondents by the United States at the request of the EPA.[23] Mr. Wayne Gums, during the inspections, told the EPA inspectors what each lot of drums contained.[24] Mr. Gums' identification in

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21/ EPA Exhibits F, H and K; Tr. 114 - 16. The hazardous waste stored in those drums included spent solvents containing 1, 1, 1 trichloroethane, trichloroethylene, Freon, methyl ethyl ketone, methyl isobutyl ketone and toluene. On the basis of the descriptions given in the investigational reports, these would include solvents stored in Lot Nos. 1, 2, 4, 6, 8, 9 and 13. The product identified as "chlorothene NU" appears to be a grade of 1, 1, 1 - trichloroethane. See Tr. 116 (referring to EPA Exhibit K, Slide 18); see also The Condensed Chemical Dictionary, 208 (Van Nostrand Rheinhold Co., 8th ed.), a reference work of which I may take official notice.

One of the drums with a hole in it contained cyanide which no longer had any resalable value as cyanide. Tr. 113. The evidence is inconclusive that the cyanide had any other legitimate recyclable use, (see Tr. 328, 393; EPA Exhibit F). It is found therefore, that this product was not being held for recycling. The partial exemption for recyclable materials being in the nature of an exemption to the general requirements for managing waste, the burden of proving that a product has a legitimate recyclable use is on Respondents. See United States v. First National Bank, 386 U.S. 361, 366 (1967).

22/ Respondents' closing brief at 12.

23/ United States v. American Ecological Recycle Research Corp., No. 80-A-811 (D. Col. 1980). See EPA Exhibit A; Tr. 12.

24/ EPA Exhibit F.

itself would have been reliable evidence of the contents of the drums, since he knew where the material had come from and what it had been used for.[25/] In this instance, however, there was other evidence to confirm that Mr. Gums knew what was in the drums. The EPA in order to satisfy itself that the drums had been properly segregated in accordance with the consent decree had had Respondents take samples from each lot of drums and have them analyzed, and the EPA had also done a more limited sampling and an analysis. These analyses confirmed that the contents of the drums placed in each lot were in general as described by Mr. Wayne Gums.[26/] Respondents state that Mr. Wayne Gums placed drums in RCRA categories if there was any reason to suspect they contain RCRA materials.[27/] The evidence shows, however, that Mr. Wayne Gums was operating on a much surer ground than mere suspicion, and that it was most unlikely that drums identified by Mr. Gums as containing materials classified as hazardous waste under RCRA, may have contained some other non-hazardous substance instead.

Respondents contend, however, that they should not be held responsible for the conditions found at the Rocky Flats facility. They argue that the problems with the facility go back to a fire there in 1979, when the facility was being operated by a lessee. As a result of the fire, Respondents became saddled with

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25/ Tr. 257, 304.

26/ EPA Exhibits D and E; Tr. 41, 46.

27/ Respondents' closing brief at 12.

the task of cleaning up the facility which the lessee had left in a very disorganized condition.[28/] Respondents say they have expended several thousand dollars and a considerable amount of effort to bring the facility into compliance with Federal and local requirements.[29/] Their work in cleaning up the drums, however, Respondents claim has been hindered by the fact that on August 20, 1981, Respondents were notified by the EPA that laboratory tests had disclosed the presence of high levels of PCBs on the facility, and were told that they were not to move or dispose of any drums in lots 4, 8, and 13. Subsequently the EPA found that its tests were in error, but not until April 14, 1982, about eight months later, did the EPA lift the restrictions.[30/] Mr. Wayne Gums who did the actual work in cleaning up the Rocky Flats facility stated that because of bad weather conditions he was unable to work at the facility until June 1982.[31/]

Complainant does not really address the question of how the EPA's restriction may have affected Respondents' compliance with respect to the three lots of drums. It is true that violations were also found with respect to

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28/ Tr. 213-14, 216, 246.

29/ Tr. 222 - 28; 234 - 38; 251 - 54.

30/ Tr. 253 - 54, 293, 317 - 19; Respondents' Exhibits 17, 18.

31/ An argument could be made that Respondents should have applied to the EPA for permission to repackage the content of drums in poor condition notwithstanding the restrictions placed on handling the drums. The record shows that Respondents did tell the EPA inspectors during the January 1982 inspection that the poor condition of the drums could be attributed to the EPA's restriction. See EPA Exhibit F at 5; Tr. 91. Nevertheless, the EPA still took about four months to lift the restriction and apparently did so only after the EPA had retested the contents of the restricted lots and discovered that there were no PCBs present. Tr. 320-21. Consequently, it seems unlikely that Respondents would have been permitted to repackage the restricted drums even if they had asked the EPA for permission to do so.

drums in the unrestricted lots, contrary to what Respondents contend. During the January 1982 inspection, for example, leaking, bulged or corroded drums were noted in Lot Nos. 6 and 9. Again, at the June 1982 inspection, damaged and leaking drums of hazardous waste were found in Lot Nos. 1, 2, 6 and 9.[32/] Respondents cannot rely on the EPA's restriction to excuse such violations. It does seem, however, that Respondents cannot be held entirely responsible for the poor condition in which the drums in Lots 4, 8 and 13 were found at the time of the inspections.

Respondents further contend that leaking drums were a matter of continuing concern, and, presumably to show their good faith efforts to control the problem, assert that the EPA inspections never revealed a single instance where a leaking drum on one inspection was still unattended on a subsequent inspection.[33/] Nevertheless, what the EPA did notice was the persistent condition of hazardous waste being stored in drums in poor condition. If this situation was inherent in the use of drums for storage, then it was incumbent on Respondents to use some more secure means of storage. Indeed, Respondents assert that they do intend to store the material which they cannot immediately use into large tanks but complain that this cannot be done "overnight".[34/] Respondents overlook the fact that they had eighteen months between the June 1982 inspection

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32/ EPA Exhibits F, H.

33/ Respondents' closing brief at 12.

34/ Tr. 289.

and the time the Interim Status Standards first became effective to bring themselves into compliance with the Interim Status Standards.[35/]

The record also discloses that Respondents have stacked their drums so close together in piles that many drums could not possibly be handled or inspected without being moved by a fork lift so as to create the danger of rupturing the drums.[36/] It is also reasonable to infer from the condition in which the drums have been stacked that although Respondents may have inspected the drum areas from time to time for leaks and corrosion, inspection of the drums themselves was not being done on a weekly basis.[37/]

It is accordingly concluded, for the reasons stated above, that Respondents have violated the Interim Status Standards, 40 CFR 265.71, 265.173, and 265.174, relating to the management of containers.

35/ The Interim Status Standards were published on May 19, 1980, to become effective on November 19, 1980. 45 Fed. Reg. 33154 (May 19, 1980). Respondents submitted a notification of hazardous waste actively in August 1980, and filed a Part A permit application in November 1980, thereby subjecting themselves to the Interim Status Standards. Tr. 16; EPA Exhibit B.

Mr. Wayne Gums testified that he has been constantly repackaging the materials at the facility, but could not concentrate on the "hazardous waste categories of drums" because he would not be generating usable material that would produce revenue for AERR Co. Tr. 267. That testimony, however, is inconsistent with the testimony of Mr. Donald Gums and Mr. Richard Gums, that virtually all materials Respondents handle are recyclable or resalable. Tr. 368, 392.

36/ EPA Exhibit H. Tr. 119, 265, 299-301. The testimony indicates that the close stacking was the general condition of the lots of drums and was not limited to the three restricted lots, which presumably Respondents felt they could not move. It is to be noted that Mr. Wayne Gums in admitting that some of the piles of drums shown in the photographs which comprise EPA Exhibit K, were closely stacked, did not limit his testimony to the drums in the restricted lots. Many of the photographs taken appear to be of drums in lots which were not restricted. See e.g. slides 9-17.

37/ Tr. 299-301.

(2) The Violation of the Interim Status Standards Relating to the Management of Tanks.

Complainant alleges violations of the following requirements of the Interim Status Standards relating to the management of tanks:

Section 265.192 General Operating Requirements

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(c) Uncovered tanks must be operated to ensure at least 60 centimeters (2 feet) of freeboard, unless the tank is equipped with a containment structure (e.g., dike or trench), a drainage control system, or a diversion structure (e.g., standby tank) with a capacity that equals or exceeds the volume of the top 60 centimeters (2 feet) of the tank.

Section 265.193 Waste Analysis and Trial Tests.

(a) In addition to the waste analysis required by Section 265.13, whenever a tank is to be used to:

(1) Chemically treat or store a hazardous waste which is substantially different from waste previously treated or stored in that tank; or
(2) Chemically treat hazardous waste with a substantially different process than any previously used in that tank; the owner or operator must, before treating or storing the different waste or using the different process:
(i) Conduct waste analyses and trial treatment or storage tests (e.g., bench scale or pilot plant scale tests) . . . .

Section 265.194 Inspections.

(a) The owner or operator of a tank must inspect, where present:

(4) The construction materials of the tank at least weekly, to detect corrosion or leaking of fixtures or seams 38/

38/ At the end of Section 265.194, is a comment which states as follows: "As required by Section 265.15(c), the owner or operator must remedy any deterioration or malfunction he finds."

Respondents do not deny that the acid tanks contained less than two feet of freeboard. Respondents contend, however, that there was a containment structure in the form apparently of a catch basin near one of the acid tanks toward which any spills or overflow from the tanks would naturally flow.[39/] The purpose of containing or diverting spills and overflows from the tank is to prevent the dispersion of the waste into the environment or to keep it from injuring persons. Relying simply on the slope of the land to carry-off any spills or overflow is too uncertain to constitute the kind of drainage control system which clearly seems contemplated by Section 265.192(c). For one thing, as shown in the slides of the area where the tanks are located there is no guarantee that the pathway between the tank and the catch basin would always be unobstructed so as to allow the unimpeded flow of the liquids to the catch basin.[40/] Respondents in an effort to minimize the seriousness of the insufficient freeboard state that there was no intake to the structures which might cause them to overflow.[41/] The argument overlooks the danger of the pit overflowing because of too much material being dumped into it or because of heavy rains.[42/] Respondents' also point out that while cracks may have been found in the outside concrete wall, none were observed in the bricks which lined the inside of one pit. The evidence indicates, however, that there was seepage of liquid through the cracks in the outside concrete wall discoloring the concrete around the cracks and the

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39/ Respondents closing brief at 14; Tr. 277, 306.

40/ See EPA Exhibit K (Slides 1-8).

41/ Respondents' closing brief at 13.

42/ See. e.g. Tr. 269, 275.

adjacent ground.[43/] The EPA was justified in assuming that the liquid had come from the tank, since there is no evidence that it could have come from a different source.

Complainant also contends that Respondents should have conducted a waste analysis of the material in the tank as required by Section 265.193. Respondents argue that there is no evidence that the tank was being used to treat wastes which were substantially different from each other or that they were using substantially different processes to treat the waste. It is true, as Respondents argue that the purpose of requiring waste analysis and tests of material treated in the tanks is to ensure that the operator is sufficiently informed about its wastes that it will not mix waste when doing so may harm the container or cause reactions that could create a hazard.[44/] There is no evidence that Respondents were intermingling substances in the tanks which would be harmful to the interior of the tanks. Also, in view of what the record shows about Respondents' knowledge of the chemical properties of the materials they handled, it cannot be simply assumed, as Complainant appears to do, that Respondents are haphazardly mixing substances that could interact in some hazardous way.

Accordingly, it is found that Respondents have violated 40 CFR Sections 265.192 and 265.194, but not Section 265.193.[45/]

43/ See EPA Exhibit K (Slides 5 - 8); Tr. 97, 112.

44/ Respondents closing brief at 13.

45/ The inspectors did note that on the January inspection there was no waste analysis plan, inspection schedule or written log of inspections. Tr. 73. These deficiencies would constitute violations of 40 CFR 265.13 and 15. Such violations were not charged in the complaint and cannot be said to have been put in issue or tried in this proceeding.

(3) Respondents' Asserted Failure to Prevent Spills and Leakage of Hazardous Wastes.

Complainant claims that Respondents have been careless about preventing spills and leaks of hazardous waste, and have thereby violated 40 CFR Section 265.31, which provides as follows:

> Section 265.31. Maintenance and Operation of facility.
>
> Facilities must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment.

Complainant relies on tests of soil samples which showed "relatively high concentrations of chromium, copper and barium with a pH of three." According to Complainant's witness, this indicated that the soil could have been contaminated from the spill or leakage of a plating solution.[46/]

There is, of course, the leakage of hazardous waste at Respondents' facility from drums in poor condition and from the inadequately maintained acid tanks. Storing hazardous waste in leaking drums and containers may not only be a violation of the regulations specifically relating to containers and tanks, as already found, but also a violation of Section 265.31. This, however, would not be a basis for assessing a separate penalty.[47/] Consequently, the question

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46/ Tr. 326-27.

47/ Cf., Johnson Chemical Co., I.F. & R. Docket No. II-11C (EPA Notices of Judgement No. 1475, Initial Decision issued October 18, 1975), (Only one penalty imposed under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136l(a) where the same set of facts established two violations).

which will be considered here is whether the evidence shows that aside from storing hazardous waste in defective containers and tanks, Respondents have been careless in other ways in not keeping the wastes contained.

The soil sample does not indicate the spill of "listed" hazardous waste, i.e., a waste listed in 40 CFR 261.31 or 261.32.[48/] While the soil sample did indicate the presence of chromium or barium, there is no evidence that these contaminants were present in concentrations which exceeded the maximum concentrations for the characteristic of EP Toxicity.[49/] The evidence does indicate that the plating solutions being stored on Respondents' premises may also have the characteristics of ignitability (EPA Hazardous Waste No. D001).[50/] Ignitable wastes, however, are excluded from the requirements of the Interim Status Standards if they are legitimately recycled.[51/] The exclusion, of course, would not apply to spilled ignitable waste, so that, the obligations under Section 265.31, would require that soil contaminated with the ignitable waste must be cleaned up if it presents a fire hazard. The record does not disclose, however, enough facts on which to determine whether the contaminated soil does present a fire hazard.

48/ Plating solutions are listed in 40 CFR 261.31, if they are wastewater treatment sludges (EPA Hazardous Waste No. F006), or if cyanide was used in the process (EPA Hazardous Waste Nos. F007, F008, F009). There is no evidence that the plating wastes stored by Respondents met either of these criteria. See EPA Exhibit F, p. 4.

49/ See 40 CFR 261.24. Complainant refrained from introducing the NEIC report on which its witness, Mr. Hathway, relied for his testimony. I can only conclude that the report would not have showed concentrations at the EP Toxicity levels, particularly since the witness was more specific about whether the liquid in the acid tank exhibited the characteristic of EP Toxicity. See Tr. 326-28. Copper, which was also found to be present in soil sample, by itself does not appear to be a hazardous constituent.

50/ See EPA Exhibit F, p. 4; 40 CFR 261.21.

51/ See 40 CFR 261.6(a).

Accordingly, it is found that there is no evidence that Respondents have been maintaining and operating their facility in violation of 40 CFR 265.31, with the possible exception of storing hazardous waste in leaking containers and tanks. As already noted, this would not be a basis for assessing a separate penalty in addition to that assessed for violations of the specific container and tank standards found herein.

(4) Respondents' Failure to Establish Financial Assurance For Closure of Their Facility.

Under 40 CFR Section 265.143, the owner or operator of a facility must establish by July 6, 1982, financial assurance for closure of the facility.[52/] Several methods are specified for meeting this requirement and the owner or operator must submit to the EPA evidence showing that financial assurance has been established through one of the approved methods.[53/]

It is not contested that Respondents on July 6, 1982, had not established any financial assurance for closure of their facility. They say their reason for not doing so was because they had estimated that there would be no costs in closing the facility since all products could be resold. Respondents took the same position in their Part B permit application which they submitted to the EPA in September 1982, stating that in their estimate "there will be no

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52/ Closure must be accomplished in accordance with an approved closure plan. 40 CFR 265.112.

53/ The final financial responsibility standards (40 CFR Parts 264 and 265) were published on April 7, 1982, but were not made effective until July 6, 1982, in order to give owners and operators time to make the necessary financial arrangements. See 47 Fed. Reg. 15033 (April 7, 1982).

closure costs to the government."[54/]

Respondents' argue that if the EPA disagrees with their estimate of zero closure costs, it should do so in connection with processing the Part B application and not by suing them for civil penalties.[55/] The Part B application was submitted in order to obtain a RCRA permit. Respondents to date have been operating on the basis of having obtained interim status and are subject to the Interim Status Standards until a RCRA permit is granted.[56/] Contrary to what Respondents contend, this is the proper forum to determine Respondents' compliance with the Interim Status Standards, including the financial assurance requirements.

It is conceivable that there could be no costs involved in closing a facility. Respondents professed belief that this is the case with their facility, however, has not been shown to be grounded upon facts from which it could reasonably be inferred that there would be zero closure costs. According to Respondents the "worst possible case" that could arise with respect to closing the facility would mean simply giving the hazardous waste to other recyclers.[57/] It would seem, however, that the "worst possible case" more realistically would

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54/ Respondents' Exhibit 20 (Section XV, "Closure Cost Estimate and Financial Assurance); Tr. 376.

55/ Respondents' closing brief at 14-15.

56/ When a RCRA permit is granted Respondents will become subject to the standards for owners and operators of treatment, storage and disposal facilities set out in 40 CFR Part 264. This, will not make any material difference in Respondents' obligation to establish financial assurance for closure of their facility, since the requirements are similar to those contained in the Interim Status Standards. See 40 CFR 264.143.

57/ Tr. 377; see also Tr. 368-69.

be where Respondents could not readily dispose of all their hazardous waste and so would have to dump some part of it. It does not necessarily follow that because Respondents regard the material as recyclable, others will also do so, or will be in need of such material when Respondents desire to dispose of it.[58/] Nor does Respondents' zero cost estimate appear to take into account the costs of cleaning up and properly disposing of spills and leaks of hazardous waste on the site.[59/]

In sum, Respondents' zero cost estimate represents no more than a very superficial appraisal of their financial responsibilities for properly closing their facility and not the good faith effort which the Interim Status Standards require.[60/]

(5) Respondents' Failure to Adequately Secure the Facility.

The last violation of the Interim Status Standards at issue is the standard for securing the facility, 40 CFR 265.14. Under Section 265.14(a), "[t]he owner or operator must prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the active portion of the facility . . . ." The pertinent portion which Respondents are alleged to have violated is Section 265.14(b)(2), which requires that the facility have

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58/ In many cases, it appears that the material must be processed to realize its economic value so that whether there were customers for it would seem to depend on whether there was a market for the reprocessed product at the time. See Tr. 393. Respondents also do not say who would bear the cost of transporting the products to others. Again, some of the material may have lost its recyclable value by reason of having been stored too long. Thus, for example, Respondents have cyanide stored at their facility which no longer can be resold as cyanide. See Tr. 392-93.

59/ Tr. 277-78.

60/ Respondents have now revised their financial assurance arrangement to take into account the costs of disposing of the hazardous waste and the labor and materials needed to clean the site. They have estimated the cost at $20,000, and intend to establish a trust agreement to cover this cost. Tr. 381-82, 394. No opinion is expressed as to whether this trust agreement constitues an adequate assurance of closure.

"[a]n artificial or natural barrier (e.g., a fence in good repair or a fence combined with a cliff), which completely surrounds the active portion of the facility . . . ."[61/]

The evidence shows that the Rocky Flats facility and the adjacent property of Thoro Products Company were enclosed by a continuous fence, except for an opening where a railroad spur enters the Rocky Flats facility at the southwestern corner of the facility. There was no fence, however, at the southwestern part of the facility separating it from Thoro Products' property. There was a fence along the eastern part of the southern boundary of the facility, but it was leaning at what appears to be at a fairly steep incline.[62/]

While the complaint charged a violation based on a portion of the fence being down, three issues, in fact, developed at the hearing with respect to the security of the facility. These were: (1) Whether the unfenced southwestern part was adequately protected by a mutual security arrangement which Respondents assert they made with the adjacent landowner, Thoro Products Company; (2) whether the leaning fence on the southeastern part was in poor condition; and (3) whether the unfenced railroad siding entrance created any security risk.

As to Respondents mutual security arrangement with Thoro Products Company, what seems to be indicated by the arrangement, since Respondents do not furnish any details, is that with the two properties fenced in by a continuous fence, the only persons likely to enter upon Respondents' facility through the unfenced southwestern part, unless they come in over the railroad tracks, would be

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61/ The "active portion" of a facility is that part where treatment, storage or disposal operations are conducted. See 40 CFR 260.10.

62/ EPA Exhibit F (pp. 2, 6, and map of Respondents' facility attached to report); EPA Exhibit K (Slide 28); Tr. 125, 158-61; 210-11, 280-81, 307-09.

persons who were on the property of Thoro Products Company with the consent of Thoro Products. Respondents have offered no reasons why such persons should be given unrestricted and unguarded access to their facility. The facility accordingly, should be secured against the unknowing or unauthorized entry by such persons, and I find, that Respondents' mutual security arrangement with Thoro Products Company does not constitute compliance with Section 265.14.

So far as the leaning fence at the southeastern boundary is concerned, Respondents contend that the fence was "crooked", and still offered adequate protection because of the slope of the ground on the other side.[63/] A more accurate description would appear to be that the fence was bent, possibly as the result of an accident or of just poor construction, so as to cause it to lean, which raises the question of whether if left in that condition the fence would not eventually fall down by its own weight.[64/] Accordingly, it is found that the fence was not in good repair as required by Section 265.14.

Finally, with respect to the lack of a fence or gate where the railroad spur crosses over into the facility, the record shows that the tracks themselves apparently were enclosed by a fence in the vicinity of the facility but that there was a railroad access gate to the spur about 650 yards west of Respondents' facility and that there was unfenced access onto the railroad tracks about three to three and one-half miles away.[65/] The risk of persons or livestock entering

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63/ Respondents' closing brief at 15.

64/ See Tr. 280, EPA Exhibit K (Slide 28).

65/ Tr. 281-82.

the facility by way of the spur does seem a minor one on the facts in this case, but not so remote as to allow the spur to remain unsecured.[66/]

C. The Appropriate Penalty and Order Requiring Compliance

Complainant in this case requests a penalty of $25,000.

RCRA, Section 3008(c), 42 U.S.C. 6928(c), provides that the penalty assessed shall be one which is "reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements."

In support of its proposed penalty of $25,000, Complainant points out that the violations in this case concern substances that are potentially harmful to human health and the environment.[67/] The violations themselves are considered by the EPA to be the kind that present the greatest risk of harm.[68/] The facts generally support these arguments. The full extent of the container violations is not revealed because the drums were stacked in a manner which precluded the EPA inspectors from making a thorough examination of the condition of the drums. Enough has been disclosed, however, to demonstrate that this is not a case where there have been some minor, inadvertent leaks but one in which

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66/ Respondents introduced evidence to show that they were reluctant to put a gate across the spur because the railroad personnel would drive the train through the gate if it were closed. Tr. 282, 284. Presumably, however, Respondents would have the gate open when the spur was being used.

67/ Spilled acids, for example, can react with other materials in the soil to contaminate groundwater or could corrode other containers with which they may come into contact so as to contribute to the release of other hazardous materials. Methyl ethyl ketone, trichloroethylene and trichloroethane are listed for their toxicity and trichloroethylene is also a carcinogen. These three substances being soluble in water and having a density greater than water can rapidly contaminate groundwater with a minimum of water flow. Methyl ethyl ketone is also ignitable. Toluene is another substance listed for its toxicity and has been found as a contaminant of groundwater. Tr. 173-77; 40 CFR 261.33

68/ Tr. 17-18.

Respondents, because of their reluctance or neglect to keep their material properly contained have continued to allow the release of hazardous substances into the environment.

Respondents contend that they have made good faith efforts to comply with RCRA given their limited financial resources, and blame the poor conditions of the drums and tanks at the facility on the restriction which the EPA placed on some of their drums. The restrictions, however, applied to only some of the drums and cannot excuse the generally sloppy and careless way in which Respondents appear to have continued to store their products, nor can the restrictions explain the state of disrepair in which the two tanks were found, the lack of a satisfactory closure plan, and the failure to keep the property secured. Respondents also have not been as conscientious about cleaning up their operation as they would like to appear. Instead of attempting to completely put their facility into a condition so that it would no longer be a hazard to human health or the environment, they appear to have proceeded in a piecemeal fashion in response to pressures brought on them by the EPA and local authorities. Respondents' resistance to any greater effort appears to be attributable in part, to the limited resources they were willing to expend to clean up their operation, and, in part, to their belief that the EPA was requiring measures which Respondents did not regard as necessary. 69/

In arguing the costs of properly storing the materials, Respondents appear to assume that some leakage and spills of their materials should be tolerated until their recycling business generates sufficient income in their opinion

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69/ See Tr. 266, 270, 369.

to properly store the materials. They assert that this has not been the case with their operation in the last three years.[70] Presumably, Respondents believe their position justified because they are recyclers and as such fulfill one of RCRA's goals which is to encourage the recycling of waste materials.[71] Respondents however, infer too much from the legislative history and congressional findings they cite to show Congress' approval of recycling waste as an alternative to dumping it. I find nothing in the legislative history, including that cited by Respondents, to justify the conclusion Respondents seem to reach that recycling of waste is more important than protecting human health and the environment. Indeed, if Respondents can only operate at the expense of a sound environment and of safety to humans, it may well be that Respondents' operations should not be allowed to continue.[72]

Respondents argue, however, that their activities do not add to pollution. They say first that if they were to close their operations, an increased burden would be placed on landfills, which they assert are in short supply.[73]

70/ See Tr. 200-01, 368-69. Respondents introduced data to show that in 1981, they had a gross profit (after deduction of cost of goods sold) of about $148,000 and a net loss of about $8,000, and in 1980, they had a gross profit of $108,000 and a net loss of $27,000. See Respondents' Exhibits 21, 22; Tr. 385-88. Mr. Richard Gums described Respondents' financial condition over the last three years as "stable, but not advancing, and not making enough money." Tr. 390.

71/ See Respondents' closing brief at 1-3, 7-10.

72/ As the EPA stated in its preamble to the regulations:

> Although promoting waste re-use and recovery is certainly one of the goals of RCRA, Subtitle C does not suggest that promoting resource recovery should take precedence over assuring proper management of hazardous waste.
>
> 45 Fed. Reg. at 33092 (May 19, 1980).

73/ Respondents' closing brief at 10.

If landfills are in short supply, I am not persuaded that they remedy is to relax the regulatory standards so as to allow more pollution by recyclers such as Respondents.

Respondents would also appear to be skeptical about whether materials they handle do present any hazard to human health or the environment. The principle hazards to be guarded against are contamination of the soil, pollution of the groundwater, and injury to humans coming into contact with the material. The existence of these hazards not only can be presumed from the hazardous nature of the materials themselves which includes substances found by the EPA to be toxic or carcinogens, but has also been attested to by the EPA's expert witness.[74/] Respondents have not come forward with any credible scientific evidence to show that such hazards are not present in their case.

In sum, Respondents asserted good faith efforts to comply have been very much qualified by a self-interested view of their obligations which has no justification either in law or in fact, and provide no basis for dispensing with a penalty in this case.

Under RCRA, the other factor to be considered in fixing the amount of the penalty besides Respondents' good faith efforts to comply is the seriousness of the violation. This is to be judged by the potential for harm to human health and the environment, since the existence or lack of actual harm may have been the result of good fortune on the part of the violator, and it should not be the policy of the EPA to reward lucky violators by assessing lower fines.[75/] The violations involving the defective drums and tanks, and the failure to provide financial assurance of closure are considered by the EPA to present the greatest potential hazard to human health and the

74/ See Tr. 165-81.

75/ See Cellofilm Corporation, Docket No. II RCRA-81-0114 (EPA, Region II, August 5, 1982.)

environment.[76] This administrative interpretation is entitled to inference.[77]

In mitigation of the penalty, on the other hand, it is to be noted that the violations are not as extensive as Complainant appears to assume. Respondents cannot be held entirely responsible for the poor condition of the drums found in the restricted lots. Respondents were not shown to have been treating different chemicals and using different treatment processes and so to have violated the waste analysis and test requirements relating to tanks as alleged in the complaint. Also the only spillage and leakage of hazardous waste indicated in the record, aside from that which could come from wastes stored in defective containers and tanks, appears to have involved ignitable waste which are recycle exempt. Finally, the security violations appear to have been only minor violations.[78]

Also to be noted, for the reasons already stated above is that the violations have come about not so much because Respondents have acted with what Complainant terms a "general disregard of burdensome regulations" as that Respondents have fallen short of compliance because they have sought to do as little as possible. Hence, the governing consideration should be to assess a penalty that will impress upon Respondents that what is required is prompt, full compliance and not halfway measures.

76/ Tr. 18.

77/ See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

78/ Mr. Wapenski was silent on what classification the security violation would fall under. The EPA's memorandum of July 7, 1981, estabishing these classifications has been furnished by Complainant. In there, it is stated that substantial non-compliance with the security requirements would be a Class I violation. The violation found here with respect to the poorly maintained fence and the absence of a fence over the railroad siding and over part of the property adjoining Thoro Products would appear to be more properly classified as a minor Class II violation.

Taking into account the above factors and also Respondents' financial conditions as evidenced by this record, I conclude that an appropriate penalty is $8,000. I find that this penalty is of sufficiently great magnitude to discourage any further violations by Respondents, and yet is not so large that Respondents would be unable to pay it.[77/]

Also, in recognition of the fact that Respondents are performing a worthwhile function in recycling materials and have not totally ignored their obligations under RCRA, I recommend that the EPA consider remitting this penalty if Respondents can demonstrate to the satisfaction of the EPA that Respondents have fully complied with the compliance order hereinafter entered.[78/] It should be made clear, however, that the penalty assessed here is separate from any penalty that may be assessed for failure to comply with the compliance order and not in lieu thereof.

As to the compliance order, Respondents do not really question the terms of the order proposed by Complainant and claim to be complying with it. They are, however, mistaken in their view of what they need to do under the order, as the following analysis of their comments to each paragraph of the order will show:

77/ RCRA does not contain any provision that a violator's ability to pay must be considered in assessing a penalty. This is in contrast to other statutes administered by the EPA. See, for example, the Toxic Substances Control Act, Section 16(a)(2), 15 U.S.C. 2615(a)(2). Nevertheless, there would be little purpose in assessing a penalty that would be beyond the ability of Respondents to pay. Here, the evidence does show that Respondents do have sufficient assets to pay a penalty of $8,000, although payment will undoubtedly be burdensome. See Respondents' Exhibits 21, 22.

78/ Under the Federal Claims Collection Act of 1966, Section 3(b), 31 U.S.C. 952(b), the head of an agency or his designee may compromise a claim against the United States, if it does not exceed $20,000. This authority includes the compromise of statutory penalties. See 4 CFR 103.5.

Paragraphs 1 and 2 of the proposed order provide as follows:

> 1. Within sixty (60) days of the date of this Order, organize all drums on site to allow for inspection of the condition of drums containing listed or characteristic hazardous wastes;
>
> 2. Within sixty (60) days of the date of this Order, repackage or dispose of properly the contents of all containers of hazardous waste which are presently leaking, stressed, corroded, bulged, or otherwise in poor condition posing a threat of leakage;

Respondents citing the testimony of Mr. Wayne Gums, contend that they have promptly commenced to organize and repackage or dispose of their drums, and are proceeding as fast as it is "physically possible" for Mr. Gums and "financially possible" for AERR Co.[79/] The order entered herein, however, does not permit them to proceed at the pace they regard as convenient, but requires that the work be done within the time specified.

Complainants in their post-hearing brief have modified Paragraph 1 of the original proposed order to specifically provide that the drums be arranged on pallets in rows which are no more than two drums high and two drums deep. The requirement that the drums be arranged in rows which are no more than two drums high and two drums deep seems reasonable and will be included. Pallets however, are relatively expensive.[80/] Consequently, the order will not specifically require pallets. Respondents should have the right to use some

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79/ Proposed Finding No. 32.

80/ Tr. 300.

alternative means of stacking their drums, providing it does permit weekly inspections without the danger of having to handle the drums in a manner that may rupture them or cause them to leak.

Complainant would also have Paragraph 1, specifically require Respondents to segregate incompatible wastes. Since it does appear that Respondents have been doing this, a provision requiring that it be done seems unnecessary, and will not be included. The purpose of the order would appear to be to correct the violations found and not simply incorporate requirements which Respondents are complying with.

Paragraph 3 of the order provides as follows:

> 3. Within ninety (90) days of the date of this Order, neutralize the acid in the acid tanks, perform a waste analysis of the contents of the tanks, and dispose of properly any hazardous waste remaining in the tanks.

Respondents contend that all that can be required under this provision is what they have already done, namely, consolidate the contents of the two tanks into the larger tank, eliminate the smaller tank and neutralize the acid in the remaining tank.[81/] The record shows, however that the tank contained liquids which met the characteristic of EP Toxicity.[82/] Neutralizing the acids would not affect this characteristic. Consequently, a waste analysis should be performed of the contents of the remaining tank to ensure their proper disposal.

Complainant would change this paragraph to allow only sixty (60) days for compliance and to now give Respondents the option of either repairing all structurally damaged portions of the acid tank, or to neutralize the acid, perform a waste analysis of the contents, and dispose of properly any

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81/ Proposed Finding No. 33.

82/ Tr. 327.

untreated hazardous waste. These measures seem reasonable and the Order will be revised accordingly.

Paragraph 4 of the order provides as follows:

> 4. Within ninety (90) days of the date of this Order, remove and dispose of properly soils contaminated by hazardous waste spillage or leakage from damaged or leaking hazardous waste drums;

Respondents contend that it was unnecessary for them to address this part of the order because they could find no evidence of contaminated soils at the facility.[83/] The absence of contaminated soils cannot be assumed so readily as Respondents appear to do, because of the evidence of the leaking drums and tanks at the facility containing hazardous waste. The order will ensure that Respondents do make a careful and diligent examination of the premises, since it is not at all clear from the record that Respondents have so far done this.

Paragraph 5 of the order provides as follows:

> 5. Within thirty (30) days of the date of this Order, submit evidence of a proper financial assurance arrangement for closure of the facility in accordance with 40 CFR 265.143;

Respondents argue that their estimate of no closure costs satisfied this requirement.[84/] The reasons why it does not has already been stated. Respondents have submitted a revised estimate, but no determination can be made on this record as to whether it satisfied the requirement of a "proper financial assurance arrangement", so this paragraph will remain in the order.

Paragraph 6 of the order provides as follows:

> 6. Within thirty (30) days of the date of this Order, secure the facility by means of an adequate fence or barrier;

83/ Proposed Finding No. 37.

84/ Supra at 27.

Respondents contend that they have not addressed this paragraph of the order because they could find no evidence of inadequate security.[85/] The evidence shows the contrary.[86/]

Complainant no longer insists on the final two paragraphs of the order (Paragraphs 7 and 8) proposed in the complaint, and they will, accordingly, be dropped from the final order.

ORDER[87/]

Pursuant to the Solid Waste Disposal Act, as amended, Section 3008, 42 U.S.C. 6928, the following order is entered against Respondents, American Ecological Recycle Research Corporation and Donald K. Gums:

1. (a) A civil penalty of $8,000 is assessed against Respondents for violations of the Solid Waste Disposal Act found herein.

   (b) Payment of the full amount of the penalty assessed shall be made within sixty (60) days after service of this order upon Respondents by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America.

2. Respondents shall take the following action at their facility located in Jefferson County, Colorado (the "Rocky Flats" facility):

   (a) Within sixty (60) days of the date of this Order, organize all drums on site to allow for inspection of the condition

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85/ Proposed Finding No. 38.

86/ Supra at 27-30.

87/ Unless an appeal is taken pursuant to 40 CFR 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 CFR 22.27(c).

of all drums containing listed or characteristic hazardous wastes. This shall be done by arranging each separate waste category in rows which are no more than two drums high and two drums deep so that the storage area and drums may be inspected at least weekly (40 CFR 265.174). The drums should be stacked so that they can be managed without being ruptured or made to leak.

(b) Within sixty (60) days of the date of this Order, repackage or dispose of properly the contents of all containers of hazardous waste which are presently leaking, stressed, corroded, bulged, or otherwise in poor condition posing a threat of leakage (40 CFR 265.171);

(c) Within sixty (60) days of the date of this Order, repair all structurally damaged portions of the acid tank, or neutralize the acid in the acid tank, perform a waste analysis of the contents of the tanks, and dispose of properly any untreated, hazardous waste remaining in the tank (40 CFR 265.15(c); 40 CFR 265.192-.194);

(d) Within ninety (90) days of the date of this Order, remove and dispose of properly soils contaminated by hazardous waste spillage or leakage from damaged or leaking hazardous waste drums (40 CFR 265.31);

(e) Within thirty (30) days of the date of this Order, submit to EPA evidence of a proper financial assurance arrangement for closure of the facility (40 CFR 265.143);

(f) Within thirty (30) days of the date of this Order, secure the facility by means of an adequate fence or barrier (40 CFR 265.14).

Gerald Harwood

Gerald Harwood
Administrative Law Judge

July 1, 1983