UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	RCRA 81-6-R-DSE-C
CITY INDUSTRIES, INC.	)	
	)	
Respondent	)	

1. Resource Conservation and Recovery Act - Determination of Penalty - The use by the Agency of a penalty policy, widely distributed but nor formally adopted by the Agency, in determining the amount of the proposed penalty is proper where the rationale of the document accurately reflects the intent of the Act and is in accord with expressed Agency policy.

2. Resource Conservation and Recovery Act - Determination of Penalty - The Court lacks jurisdiction or authority to assess penalties for violations continuing subsequent to the date found in the complaint but rather should use the existence of such violations to increase the proposed penalty on the basis of failure to exercise good faith efforts to cure the violations and recalcitrance.

3. Resource Conservation and Recovery Act - Determination of Penalty - Since actual harm to the environment or public health is rarely found, the potential for harm associated with a violation is the main factor in assessing penalties under the Act.

4. Resource Conservation and Recovery Act - Determination of Penalty - In assessing the potential for harm, one should consider both the hazardous nature of the wastes involved and the danger their exposure to the environment and human health represents.

5. Resource Conservation and Recovery Act - Determination of Penalty - In determining the conduct aspect a violation, the extent and scope of deviation from management standards or regulations should be considered.

6. Resource Conservation and Recovery Act - Authority of the Presiding Officer - The presiding Administrative Law Judge in these cases lacks the authority to order the Respondent to take immediate corrective measures prior to the issuance of an initial decision since no action can be mandated until the initial decision becomes final Agency action through the mechanisms set forth in the regulations.

Appearances:

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For the Respondent

INITIAL DECISION

This is a proceedings under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, (hereinafter "RCRA"), §3008, 42 U.S.C. 6928 (supp. IV, 1980), for assessment of a civil penalty for alleged violations of the requirements of the Act, and for an order directing compliance with those requirements.[1/] The proceeding was instituted by a complaint and compliance order against City Industries, Inc., and a companion complaint against Resource Conservation and Recovery of America, Inc., both of which are owned by Mr. Arthur Greer, filed by the United States Environmental Protection Agency on

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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. . . ."

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 Subchapter III, 42 U.S.C. 6921-6931.

September 16, 1981. The complaint against Resource Conservation and Recovery of America, Inc., was subsequently dismissed for reasons hereinafter set forth. The complaint against City Industries alleged that City Industries, operates a facility (at 3920 Forsyth Road, Orlando, Florida) which generates, treats, stores and disposes of hazardous wastes, had violated the standards for hazardous waste treatment, storage and disposal as set forth in the Act and the regulations promulgated pursuant thereto. Specifically, the complaint charges that the Respondent violated the Act and regulations by: (1) failing to obtain analysis of hazardous wastes before accepting it as required by 40 CFR 265.13(a); (2) failing to determine that the waste generated in its treatment of hazardous wastes is hazardous itself as required by 40 CFR 262.11; (3) failing to provide a waste analysis plan for inspection as required by 40 CFR 265.13(b); (4) failing to separate and protect the ignitable and reactive wastes from sources of ignition and reaction as required by 40 CFR 265.17(a); (5) failing to transfer hazardous wastes from corroding deteriorating and leaking drums to good drums as required by 40 CFR 265.171; (6) storing reactive and ignitable materials in a manner that might cause containers to rupture or leak in violation of 40 CFR 265.173(b); and (7) storing ignitable and reactive wastes less than 15 meters from the facility property line in violation of 40 CFR 265.176. A civil penalty in the amount of $1500.00 was requested. The order further directed City Industries to correct the alleged violations.

City Industries answered and denied some of the violations and admitted others. Following an extensive pre-trial exchange of information

and materials, a hearing was held in Orlando, Florida on August 12, 1982. Following the hearing, the parties submitted proposed findings of fact and conclusions of law, briefs in support thereof and a proposed order.

Factual Background

The Respondent, City Industries, Inc., has apparently been involved in the handling and reclamation of chemicals since 1976 or 1977. The Respondent was aware of the upcoming requirements of RCRA that were to become effective on November 19, 1979. In that year, Mr. Greer, contacted Mr. Norman Smith, who is an officer with Environmental Technology of America, a consulting firm that among other things provides advice and consultation to persons involved in handling, storage and generation of hazardous wastes. Mr. Greer met Mr. Smith in 1979 at a seminar that Smith's company was conducting in Florida and asked Mr. Smith to come down and work with him on trying to place his company in compliance with the new regulations that they knew were shortly to become effective. As I understand the statute, on November 19, 1980 persons having in their possession hazardous waste were required to either immediately transport them to a qualified receiver or to bring their own facility into compliance with the interim status regulations that the Agency had promulgated some six months prior to that date. Mr. Greer, like many of his colleagues throughout the United States, held himself out as an authorized receiver of hazardous waste and in the period between June and November of 1980, Mr. Greer's City Industries, Inc., and his other storage facility, known as Resource Conservation and Recovery of America, Inc., located in

Sanford, Florida, received thousands of barrels of hazardous waste. Mr. Greer, of course, charged the persons wishing to place their hazardous waste in his care a fee for each barrel. My experience in these cases leads me to believe that Mr. Greer, like many of the other persons in this country, was really not prepared to handle the large volumes of hazardous wastes that he accepted and consequently has found himself in violation of the Act and the regulations.

As indicated above, the Agency had originally filed a complaint against Mr. Greer's Sanford facility which had stored thereon (in an open field) approximately 3200 drums of hazardous wastes. The citizens and politicians in and around Sanford, Florida, upon becoming aware of the existence of this vast quantity of hazardous material took immediate steps, in conjunction with the Florida Department of Environmental Regulation to properly dispose of these drums. They utilized monies from a trust fund previously established by the State of Florida in the amount of $170,000, which the Respondent, Mr. Greer, was required to pay back to the State on a periodic and regular basis. Evidence at the trial indicated that, as of the date of that hearing, and for some time following thereafter, Mr. Greer has been in default of that loan and has not repaid the State of Florida for the monies advanced to it to clean up the Sanford site. The ultimate cleaning up of the Sanford site resulted in a motion filed on behalf of the Agency to dismiss the complaint it had previously issued against this facility. Upon order of the Court, the complaint was dismissed and is not the subject of this proceeding except to the extent that the circumstances surrounding the existence and the required clean up of the Sanford site impact upon the activities at Mr. Greer's Orlando facility, namely City Industries, Inc.

This proceeding was initially instituted as a result of an inspection made at Respondent's facility on April 3, 1982 by Mr. Kromis, an authorized inspector of the Environmental Protection Agency. The inspection revealed that the facility was being used for the storage, generation and reclamation of hazardous wastes. Some of the stored wastes were generated by City Industries from its reclamation operation and some had been received from off-site hazardous wastes generators. The inspector advised the operators of the Orlando facility of the violations and other discrepancies they observed upon this inspection and instructed the Respondent and its employees and agents to immediately take steps to cure the violations found. Apparently at the same time that Mr. Greer was having these problems with the Orlando facility, he was in the process of trying to comply with the State court's order to immediately clean up the 3200 drums at his Sanford site. This dual responsibility apparently over-taxed Mr. Greer's already meager financial resources and consequently very few, if any, of the observed violations were taken care within the time frame specified by the complaint and compliance order. The record further reflects (as will be discussed later) that even on the day of the hearing, which was over a year beyond the date of the initial inspection, the Respondent's Orlando facility was still in violation of many of the requirements identified by the EPA inspection.

During the course of the hearing, specifically on the cross-examination of Mr. Norman Smith, it came to light that Mr. Smith is also serving as the chief executive officer of Resource Conservation and Recovery of America, Inc. Apparently, Mr. Smith, who appeared as the expert witness

on behalf of the Respondent, is serving as president of that corporation with no pay. Although Mr. Smith's testimony was not found to be non-factual, his position as chief executive officer of one of Mr. Greer's other corporations does place some doubt on his objectivity as a theoretically independent and unbiased expert witness. Mr. Greer, who is the sole owner of the two corporations discussed herein, was advised not only by EPA but by Mr. Smith as well of the existence of the violations at the City Industries facility. Apparently Mr. Greer's lack of adequate financing prevented him from instituting the corrective measures that his consultant advised him to take. As I have found to be the case in other proceedings, although Mr. Greer received substantial sums of money for accepting the several thousand drums from off-site generators, the ultimate cost of disposing of these materials in conformity with the government regulations far exceed the fees he received for accepting the materials in the first place. Consequently, at the present time Mr. Greer is operating with a negative cash flow and is busily seeking to raise additional cash to save his Orlando facility through SBA loans and the selling off of other corporate properties which he still owns. As of the date of the hearing, Mr. Greer has been essentially unsuccessful in his efforts to raise additional cash to bring his City Industries facility into compliance with the regulations. It is his expressed desire to save this facility as it seems to be the only potentially income producing corporation that Mr. Greer presently owns.

Findings of Fact

1. City Industries, Inc., owns and operates a facility located at 3920 Forsyth Road, Orlando, Florida (hereinafter "the facility").

2. City Industries, Inc., conducts activities at the facility involving the receipt, handling, storage, reclamation and disposal of "hazardous waste" as that term is defined in the Solid Waste Disposal Act, §1004(5), 42 U.S.C. §6903, and in 40 CFR 261.3.

3. On April 3, 1982, the facility was inspected by Andrew G. Kromis, an employee of the United States Environmental Protection Agency, Region IV, Atlanta, Georgia, duly authorized by the EPA to make inspections pursuant to the Solid Waste Disposal Act, §3007, 42 U.S.C. 6927. Tr. 5, 6.

4. At the time of the inspection, the facility was being used for the storage and reclamation of hazardous waste. Some of the stored wastes were wastes generated by City Industries, Inc., from the reclamation operation and some wastes had been received from off-site hazardous waste generators.

5. At the time of inspection, City Industries, Inc., had accepted waste without an analysis as required by 40 CFR 261.13(a). Tr. 15, 84.

6. At the time of the inspection, City Industries, Inc., had failed to determine if wastes it generated were hazardous wastes. Tr. 16.

7. At the time of inspection, City Industries, Inc., did not make a waste analysis plan available for inspection. Tr. 9, 17.

8. At the time of inspection, City Industries, Inc., had failed to separate and protect ignitable and reactive wastes from radiant heat. Tr. 11, 17, 18.

9. At the time of inspection, City Industries, Inc., had hazardous waste stored in drums which were not in good condition and had rusting and/or bulging tops and which were leaking liquid. Gov't Exh. 2; Tr. 9, 11, 12, 13, 14, 15, 18.

10. At the time of inspection, City Industries, Inc., had hazardous wastes in containers stored on damaged pallets and at precarious angles in a manner that might cause the containers to rupture or leak. Gov't Exh. 2; Tr. 10, 11, 15, 18.

11. At the time of inspection, City Industries, Inc., was storing ignitable waste less than fifteen meters from the facility property line. Tr. 18.

12. At dates subsequent to the April 3, 1981 inspection, City Industries, Inc., has stored hazardous wastes in containers stacked in levels two drums high, tilted at precarious angles and in a manner that might cause the containers to leak or rupture. Gov't Exh. 3; Tr. 39, 55, 56.

13. At dates subsequent to the April 3, 1981 inspection, City Industries, Inc., has stored ignitable wastes within fifteen meters of the facility property line. Tr. 36, 53, 54, 94, 96, 115.

14. At dates subsequent to the April 3, 1981 inspection, City Industries, Inc., has stored hazardous wastes in rusting, bulging, damaged drums, and drums which were leaking liquid. Gov't Exh. 3; Tr. 41, 43, 62, 114.

15. At dates subsequent to the April 3, 1981 inspection, City Industries, Inc., has stored wastes which were incompatible in near proximity to each other without separating such wastes by means of a dike, berm, wall or other devices. Tr. 41.

16. At dates subsequent to the April 3, 1981 inspection, City Industries, Inc., has failed to protect ignitable and reactive wastes from radiant heat and static electricity. Tr. 53, 56, 57, 81, 87, 88, 90, 117, 118, 119, 120, 153.

17. At dates subsequent to the April 3, 1981 inspection, City Industries, Inc., accepted hazardous waste without a proper waste analysis. Gov't Exh. 4; Tr. 54, 55.

18. At dates subsequent to the April 3, 1981 inspection, City Industries, Inc., has failed to make available a waste analysis plan which meets the requirements of 40 CFR 265.13(b). Gov't Exh. 5, 6, 7; Tr. 69, 70.

Discussion of Violations and Penalty

In response to the tragedies of Love Canal and other infamous sites discovered throughout the United States, Congress enacted what is known as "RCRA" in an effort to prevent such occurences from happening in the future. The foundation upon which RCRA is built is the manifest or tracking system, which essentially attempts to trace hazardous waste from their initial generation to their ultimate disposal. An essential part of this exercise is the requirement that generators or receivers of hazardous material subject them to laboratory analysis to determine precisely what they consist of. This is required for a variety of reasons, not the least of which is to prevent incompatible chemicals from being mixed which might result in either explosion or the generation of noxious or poisonous gases. It also provides a means for assuring the proper

ultimate disposal of the hazardous waste, in that, depending on the characteristics of the wastes themselves, different methods of disposal are mandated.

The record in this case indicates that the failure of the Respondent, City Industries, Inc., to either test the materials it received or to require that the generator thereof test them prior to shipment is the gravamen of the offenses found in this matter. One of the most important ingredients in this sampling and identification process is the requirement that persons, such as the Respondent, must develop and implement a proper waste analysis plan. The purpose of the plan is to describe the procedures that the owner will carry out to comply with the requirements of 40 CFR 265.13(a). At a minimum, this plan must specify the parameters for which each hazardous waste will be analyzed and the rationale for the selection of these parameters, in other words, how the analysis for the parameters will provide sufficient information on the waste properties to comply with other requirements of the regulations. Also the test methods which will be used to test these parameters and the sampling methods which will be used to obtain a representative sampling of the waste to be analyzed must be described. The plan must also identify the frequency with which the initial analysis of the waste will be reviewed or repeated to assure that the analysis is accurate and up-to-date. The EPA inspector testified that he asked to see to the Respondent's plan and the employees were unable to provide this document. Some time between the date of the complaint and the hearing, the Respondent asked Mr. Smith,

its consultant, to prepare such a plan and a document purporting to comply with the requirements of the regulations was submitted to the Agency, which upon review determined that the plan was inadequate in several regards. The record further indicated that regardless of the adequacy of the plan prepared, there was some question as to whether or not it was being implemented.

Following the hearing, the Court directed that EPA make an immediate inspection of the facility to determine what, if any, improvements had been made thereon since the original inspection, which gave rise to the issuance of the complaint. The inspection was made by EPA personnel along with State and local officials on the day following and a rather comprehensive report was filed with the Court by the Agency and the State which sets forth the findings of that later inspection. One of the criteria for acceptance by EPA of a waste analysis plan is that it be sufficiently exact so as to advise the owner's employees, many of whom are unschooled in the technicalities of chemistry and hazardous waste analysis, so that they will be able to properly identify and analyze the hazardous materials which the facility is accepting. This requirement was lacking in the plan submitted by the Respondent and to the extent that revisions were promised to be made in that document, the later inspection revealed that although the Respondent was attempting to comply with the requirements of the regulations, several inconsistencies and discrepancies were noted by the inspector.

The separate inspection report filed by the Florida Department of Environmental Regulation describing the results of its inspection, made

on August 13, 1982, revealed that numerous deficiencies in the waste determination area, the manifest system, and the general handling of waste by Respondent were in violation of the Act. For example, City Industries, Inc., generates hazardous waste as a result of recovery of organic solvents through distillation. This activity generates "still bottoms" which are listed as hazardous wastes. The still bottom waste streams have been assigned particular EPA hazardous waste numbers and yet the City Industries' Part A Application did not utilize these waste numbers. A revision is needed to correct this deficiency. Further, to meet the requirements of 40 CFR 265.13(3), the still bottoms generated by City Industries, Inc., require a complete detailed chemical and physical analysis whenever the waste stream is believed to have changed. The last analysis available at the time of the August 1982 inspection was dated June 26, 1981. There is evidence that the waste streams have changed since that time and, therefore, the analysis should be made more frequently and failure to do so constitutes a violation of the regulations. The manifests examined by the State inspector were found to be incomplete in several details. Although one might characterize this deficiency as merely a failure to perform some government-required paperwork, the manifest information is extremely important in that the information it provides is essential for emergency response personnel who may respond to a spill of hazardous waste while it is being transported. If the manifest is incomplete or not of sufficient detail, the response personnel may be unable to properly contain or evaluate the hazard associated with the spill thereby causing the potential for harm to persons, property and

livestock living in the vicinity of the spill. The State inspector also found violations of pre-transport requirements, waste analysis, general inspection requirements, separation of ignitable, reactive or incompatible wastes, preparedness and prevention, manifest system, bookkeeping and reporting, container storage check list, and others. Both the State and Federal inspectors noted the presence of bulging and otherwise inadequately maintained storage containers. Evidence of soil contamination was also found at several locations in the facility even though the Respondent had apparently made an attempt to cure this defect by digging up portions of the ground previously identified as being potentially contaminated, placing the dirt in drums and subjecting it to laboratory analysis to determine whether or not it is, in fact, hazardous.

Following the Agency's receipt of the Court directed inspection report, which took place the day following the hearing, a motion was filed by the Complainant asking the Court to issue an order requiring immediate corrective action by the Respondent. The order which the Complainant wished the Court to issue required that the Respondent immediately cease acceptance of hazardous waste that are not accompanied by proper analysis from the generator, or allow it to accept hazardous waste only upon showing that the Respondent has implemented a program at his facility that assures that a proper analysis of the hazardous waste is being performed as required by the regulations. The order also would have required the Respondent to analyze a representative sample of the waste generated by its own activities in accordance with the regulations, and that within fifteen (15) days of the suggested order, the Respondent

would be required to re-write or amend its waste analysis plan to incorporate the corrections cited at the August 1982 hearing and discussed with Respondent's consultant during the August 1982 inspection. The Respondent would also have been obliged to file a copy of the rewritten or amended plan with EPA as soon as possible. The Respondent would also have been ordered to correct its on-site analysis of hazardous waste to conform to the testing methods specified in the regulations or by an approved equivalent method. The order also would have required the Respondent, within forty-five (45) days, to have been in total compliance with all requirements of the Act and its regulations. The order also would have required the Respondent to pay penalties for non-compliance with RCRA requirements in the following manner: a $1000.00 per day penalty from the date of receipt of this order to the fifteenth (15) day from the date of this order; and upon satisfactory completion of all items requiring compliance within fifteen (15) days of the order, $500.00 per day from the sixteenth (16) to the thirtieth (30) day following the receipt of the order; and upon failure by Respondent to satisfactorily complete any of the ordered tasks within the time period specified in the order, the penalty would be increased to $5000.00 per day for each day of non-compliance; and upon failure by Respondent to be in total compliance with all the requirements of RCRA and its regulations within forty-five (45) days of this order, a penalty of $25,000.00 per day for each day of non-compliance was requested to be assessed.

Upon the Court's receipt of this order, it contacted the appropriate officials in Headquarters to determine whether or not in their judgement

the Court had the authority to issue such an order. Unfortunately, no advice on this question was forthcoming and inasmuch as the Court had serious reservations of its own about its authority to issue such an order, the motion was not granted nor was the order issued. In the same vein, the proposed order submitted by the Agency along with its post-hearing brief, requests that a civil penalty of $1500.00 be assessed against Respondent for the violations of the Act set forth in the complaint of September 16, 1981. The proposed order goes on to request that a civil penalty of $10,000.00 be assessed against Respondent for the continuing violations of the requirements of the Act found to have existed since the expiration of the compliance date set forth in the complaint. Although the evidence is clear that the violations identified in the complaint occurred and, further, that the Respondent failed to correct a substantial number of these violations even up to the date of the hearing, the Court has serious doubts as to whether or not it possesses the authority to assess a penalty for violations occurring beyond the time specified in the complaint. As noted above, the Agency wishes the Court to specifically assess a penalty in the sum of $10,000.00 for the violations which continued beyond the compliance date set forth in the complaint. It occurs to me that I do not have such authority. Rather the continued nature of the violations could be properly used by the Court in assessing the appropriate civil penalty for the offenses found by using these continuing violations as an indication of lack of good faith effort to comply with the complaint. The statute authorizes a civil penalty in the amount of $25,000.00 per day for every day a violation

occurs. As previously noted, the complaint filed by the Agency only asks for a total civil penalty of $1500.00. Just how the Agency arrived at this rather nominal amount is unknown to the Court, but in a similar case arising out of the Chicago region of EPA the original complaint and compliance order did not contain a proposed civil penalty amount but rather merely noted that the statute authorizes penalties up to $25,000.00 per day. In that case, the Agency, upon determining that the Respondent had not complied with the provisions of the complaint and compliance order, moved for leave to file an amended complaint which did set forth a specific amount of the penalty based on the continuing nature of the violations up to the date the Respondent apparently had made final compliance. In that manner, the Court was presented with an amended complaint which took into account the failure of the Respondent to comply with the previously issued complaint and compliance order and proposed a rather substantial penalty based on the Agency's best judgement of a per diem amount which fairly represented the nature and gravity of the violations found.

In the brief filed by the Complainant in support of its proposed findings of fact and conclusions of law, no detailed analysis of how the Complainant arrived at either the original $1500.00 penalty or the $10,000.00 penalty proposed for the continuing violations was provided. The brief did provide a rather extensive analysis of the violations found and a narrative description of facts surrounding those violations, as well as, the potential that these violations may pose to the environment and human health.

In previous decisions written by the undersigned, utilization has been made, in assessing the appropriate civil penalty to be assessed, of a written penalty policy prepared for the Agency by an outside independent contractor. This penalty policy, although not officially adopted by the Agency by publication in the Federal Register or otherwise, does provide a well-reasoned rational approach to the calculation of penalties in these cases which is in agreement with the intent and mandate of the statute as enacted by Congress. I will, therefore, utilize this policy in conjunction with the facts found in this case in assessing what I consider to be an appropriate penalty. In addition to the penalty policy hereinabove mentioned, I also will be guided by a document issued to the Agency's Regional Administrators and Enforcement Division Directors by Mr. Douglas McMillan, Director of Office of Waste Programs and Enforcement,* which provides guidance on developing compliance orders under RCRA. The utility of this document is that it classifies violations into three categories. Class I violations are those that pose direct or immediate harm, or threats of harm to public health or the environment. Class II violations involve non-compliance with specific requirements mandated by the statute itself and for which implementing regulations are not required, as opposed to requirements and regulations implementing the statute. Class III violations are those procedural or reporting violations which in themselves do not pose direct short-term threats to the public health or the environment. Utilizing this memorandum, I will attempt to place each of the violations committed by the Respondent in this case, in a proper classification for purposes of further analysis.

*Attachment "B" to Agency's brief.

My analysis of the violations set forth in the complaint leads me to the conclusion that they should all be placed in the Class I category. Although the inspection reports and the testimony of varous witnesses revealed that there are other violations of the regulations being committed by the Respondent at his facility, these violations were neither cited in the complaint nor do any of them fall in what I would consider to be the Class I category. Many of these violations would probably be more likely to be placed in the Class III category, which the Agency's penalty policy indicates should be addressed outside the formal administrative order process. These involve bookkeeping or record keeping violations which, although found by the Agency, do not constitute a serious threat to the health of persons or to the environment.

Section 3008(c) states, in part, that the Administrator, in his order, may assess a penalty which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements. Unlike other statutes that the Agency administers, which allow for the assessment of a civil penalty, no mention is made in RCRA of the requirement that the Administrator take into account when assessing a penalty the ability of the owner of a facility to pay the fine. The omission by Congress of this criteria from RCRA indicates to me the seriousness with which Congress viewed violations of the Act and their determination that persons who violate the terms thereof shall be subjected to heavy penalties (up to $25,000.00 a day). I mention this factor for two reasons: (1) to set forth my opinion as to Congress' intent in establishing civil penalties

under RCRA; and (2) the financial condition of the Respondent in this particular case.

The Respondent, in this case, apparently views himself as one who is attempting to provide a useful public service and is doing the best he can to provide that service given his limited financial resources. I agree that persons who elect to get into the business of receiving, storing and treating hazardous waste do provide a public service. However, given the stringent requirements set forth in the Act and the regulations, simply doing the best one can within one's financial resources is not good enough. Persons who take it upon themselves to receive hazardous materials for ultimate disposal and do not thereafter properly handle or dispose of such wastes are not doing the public a service but rather a disservice. Mr. Greer, the owner of the Respondent corporation, apparently tends to agree with the statements expressed above inasmuch as he stated on cross-examination that if it were determined that he was in violation of the Act he would, "close down tomorrow".

The undersigned utilized the policy memorandum issued by the Director of the Office of Waste Program Enforcement for purposes of classifying the violations existing in this case and found them all to be in the Class I category. I now intend to utilize the penalty policy document entitled, "A Framework for Development of a Penalty Policy for RCRA," prepared for the Environmental Protection Agency by an independent contractor to determine the amount of the penalty.

The above-mentioned document contains three matrices which set forth appropriate penalties for each group of classified violations and divides

each matrix into a damage axis and a conduct axis. Therefore, one must make the determination as to where the violations found in this case fit in this matrix - the damage axis running from major, moderate and minor, and the conduct axis likewise being so divided. Obviously, if one determines that the damage aspect is major and the conduct is likewise major, that represents the highest penalty box in the matrix ranging from $20,000.00 to $25,000.00 per day. In evaluating the damage axis, the phrase "damage" is used to include both actual damage and potential for damage or injury and the degree of hazard which exposure of the chemicals involved represents to the environment or to human health. In most cases, actual damage will probably not have occurred and therefore one must utilize the notion of determining the potential for damage or injury the violation represents.

Given the nature of the materials handled by the Respondent which included acetone (a highly volatile substance), methyl ethyl ketone, cyanide, nitric oxide, carbon tetrachloride, and other hazardous wastes, one must conclude that the potential for harm both to the environment and to human health are high. In my judgement, the violations noted which are associated with the failure of the Respondent to either require that the originators or transporters of the material provide him with an analysis thereof or his failure to analyze the materials himself constitutes the violations which possess the highest potential for injury and damage. Throughout the hearing, it became apparent from the testimony of various witnesses that in all too many cases, the Respondent simply did not know what was in the some 1300 drums he stored on his facility. The

record also reflects that in some instances materials were improperly or erroneously labeled by the Respondent based on his employees' best recollection of what the barrels were likely to contain. In one instance, a drum was labeled sulfuric acid and a subsequent pH test revealed that the material was, in fact, alkaline. Such a mistake could have disastrous results if a subsequent handler of the materials were to rely on the label in disposing or otherwise treating the materials. Some of the other violations included failure to separate and protect ignitable and reactive wastes from sources of ignition and reaction, and storing reactive and ignitable materials in a manner that might cause the containers to rupture or leak, or to properly separate certain chemicals which if intermingled by accident or design, produce extremely hazardous by-products in the form of gases, or in some cases, explosion. One of the primary purposes of the requirements of RCRA is to properly identify and track hazardous wastes throughout their life so that they can be handled, disposed of and otherwise treated, in a manner consistent with their physical and chemical properties. Extreme hazard to both the public and emergency response teams, will undoubtedly result if chemical wastes are improperly labeled. In the event of a spill or accident involving a transporter, the persons on the scene, who have the responsibility to warn the public of the nature and the extent of the hazards involved or to properly neutralize the materials involved, are placed in great danger if the drums are, in fact, are mislabeled. Given all of the above, I am of the opinion to place the damage aspect of these violations in the major category.

The conduct axis of the matrix is utilized to measure, in some fashion, the extent of the violators deviation from the requirements of the regulations and also should include such matters as good faith efforts to cure the defects, recalcitrance and past history of violations. In the instant case, the conduct of the Respondent must be placed in the major category inasmuch as the record would seem to indicate that the facility had been in violation of all of the items set forth in the complaint from approximately November 19, 1980 until at least the date of the inspection on April 3, 1981. The record also reflects that, based on results of investigations made subsequent to the initial inspection by EPA personnel, many of the violations noted continued to exist even up to the date of the hearing in 1982. There was testimony that the Respondent has, in the recent past, made an effort to cure some of the more serious violations involving its failure to analyze the hazardous waste it receives and to that extent, some credit must be given for efforts on the part of the Respondent to solve the problems existing at its facility. Rather than attempt to assign a specific penalty for each of the seven (7) violations noted in the complaint which the Agency proved at the hearing, I intend to assess a single fine covering the seven (7) violations since many of them are interrelated in that they are caused by the same initial violation, i.e., improper identification of the wastes.

As noted before, the Complainant wishes the Court to assess an initial penalty of $1500.00 for the violations found on the date of the inspection, and a $10,000.00 fine for the violations that continued on up through the date of the hearing. I am of the opinion that I lack the

authority to assess penalties for violations occurring subsequent to the date of the complaint. The Agency has other means at its disposal to address violations of a continuing nature which they feel to be serious. From what I have previously said, it is obvious that I am of the opinion that to limit myself to the $1500.00 figure requested by the Complainant in the original complaint and compliance order would be insufficient, considering the seriousness of the violations found and their continuing nature.

40 CFR 22.27(d) authorizes the presiding officer to assess a penalty different from that suggested in the complaint. The regulations also state that if the presiding officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, he shall set forth, within the initial decision, specific reasons for the increase or decrease. The undersigned is of the opinion that the discussion above will suffice to satisfy the requirements of the regulation in so far as it provides a rationale for the presiding officer assessing a penalty different from that suggested in the complaint. Taking into account the seriousness of the violations and the high potential for harm that these violations represent, as well as the failure of the Respondent to take corrective action in a reasonable period of time, suggests that a penalty of $50,000.00 is appropriate for the violations found in this case.

Although the statute does not mandate that the Agency consider the ability of the Respondent to pay in assessing a penalty under RCRA, the penalty policy does discuss this issue. In the instant case, the Court is faced with a dilemma in that it is apparent that the Respondent is

suffering serious financial woes and that his ability to pay a penalty of almost any amount is substantially diminished. However, the Respondent is not entirely without assets and it occurs to me that to assess a penalty based solely on his ability to pay would provide no incentive for his remedying his existing deficiencies and to operate his facility in strict conformity with the requirements of the law and the regulations in the future. I am of the opinion that the penalty assessed herein is of sufficient size to deter the Respondent from further violations of the Act and yet not of such magnitude as to represent a sum he is absolutely unable to pay. I understand that in cases such as this, the Agency has been able to work out payment schedules for respondents suffering a cash flow deficiency and that the payment of the fine is not required to be collected all at one time. Given the fact that Respondent operates a facility which has the potential for generating fair income and possesses other corporations, at least one of which is capable of producing income, it is not entirely beyond his means to pay the penalty herein assessed over a period of time.

All proposed findings of fact and conclusions of law inconsistent with this decision are rejected.

Conclusion

It is concluded on the basis of the record that City Industries, Inc., has violated the provisions of the Act and the regulations promulgated pursuant thereto as set forth in the complaint and as more specifically identified in the findings of fact set forth above. It is

further concluded, that for the reasons above stated, $50,000.00 is an appropriate penalty for said violations and that a compliance order in the form hereinafter set forth should be issued.

ORDER*

Pursuant to the Solid Waste Disposal Act, §3008, as amended, 42 U.S.C. 6928, the following order is entered against Respondent, City Industries, Inc.:

1. (a) A civil penalty of $50,000.00 is assessed against the Respondent for violations of the Solid Wastes Disposal Act found herein.

   (b) Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order by forwarding to the Regional Hearing Clerk a cashiers' check or certified check payable to the United States of America.

2. Immediately upon service of the final order upon Respondent, Respondent shall,

   (a) Cease the acceptance from off-site generators of wastes without first having obtained a proper waste analysis.

   (b) Forward to EPA a copy of a waste analysis plan which meets the requirements of 40 CFR 265.13(d).

   (c) Conduct its activities at its facility in strict conformity with all the provisions of 40 CFR 262, 263, and 265.

Thomas B. Yost
Administrative Law Judge

DATED: January 14, 1983

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* Unless appealed in accordance with 40 CFR 22.30 or unless the Administrator elects, sua sponte, to review the same as therin provided, this Decision shall become the Final Order of the Administrator in accordance with 40 CFR 22.27(c).