11/30/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

In the Matter of	:	
THE MARLEY COOLING TOWER COMPANY,	:	Docket No. RCRA-09-88-0008
	:	Judge Greene
Respondent	:	

Resource Conservation and Recovery Act, 42 U.S.C. §6901, et seq. 40 CFR §§265.143(e)(5), 265.145(e)(5), 265.147(a), 265.147(b). For failure to submit updated financial assurance information for closure and post-closure care, the appropriate penalty, in the particular circumstances of case, is $4,875.00; for failure to demonstrate financial responsibility for liability coverage for sudden and non-sudden accidental occurrences, the appropriate penalty under the circumstances here is $2,250.00.

Appearances:

David McFadden, United States Environmental Protection Agency, Region IX, 215 Fremont Street, San Francisco, California, for the complainant;

Timothy J. Verhagen, The Marley Company, 1900 Shawnee Mission Parkway, Mission Woods, Kansas, for the respondent.

Before: J. F. Greene, Administrative Law Judge

DECISION AND ORDER

This matter arises under Section 3008(a) of the Resource Conservation and Recovery Act (RCRA), (the Act), 42 U.S.C. §6928(a), and regulations promulgated thereunder. Respondent was charged with two counts of violating the financial assurance requirements of the Act and regulations.

Count I of the complaint charges respondent with failure to submit to the U. S. Environmental Protection Agency (EPA) updated financial assurance documentation for fiscal years 1986 and 1987 for closure and post-closure care of a waste facility located at respondent's Stockton, California manufacturing plant, as required by 40 CFR §§265.143(e)(5) and 265.145(e)(5). Respondent is charged in Count II of the complaint with failure to demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden and nonsudden accidental occurrences arising from operations of the facility, as required by the regulations at 40 CFR §§265.147(a) and 265.147(b). Complainant seeks a civil penalty in the amount of $25,000.00 for Count I and a civil penalty in the amount of $20,000.00 for Count II, for a total penalty of $45,000.00.

By a Stipulation Agreement on Jurisdiction, Liability, and Performance of Compliance Tasks, dated July 5, 1989, respondent stipulated to the allegations of liability set forth in the complaint. Therefore the remaining issue is whether the civil pen-

alty proposed in the complaint is appropriate. Respondent contends that the penalty for Count I should be in the range of $100.00 to $499.00, and that the penalty for Count II should in the range of $3,000.00 to $5,000.00. Respondent argues that such penalties should be reduced further because respondent has shown good faith, and because of the absence of willfulness and negligence, and for other reasons. 1/

Both parties base their penalty calculations on the guidelines set forth in the Agency's final RCRA Civil Penalty Policy, dated May 8, 1984 (hereinafter referred to as penalty policy), which prescribes the method of computing a penalty by means of a matrix. The axes on the matrix represent the two factors considered: (1) potential for harm, and (2) extent of deviation from a statutory of regulatory requirement. Each of the two factors is subdivided into "major," "moderate," and "minor" categories in a nine-cell matrix. Each cell is assigned a penalty range from which a "gravity-based penalty" is chosen. The gravity based penalty may then be adjusted, that is, increased or decreased to reflect any applicable adjustment factors, to arrive at the final civil penalty amount. 2/ The Act provides for a civil penalty assessment, taking into account the seriousness of

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1/ Respondent's Brief on the Issue of Penalties (hereinafter referred to as Respondent's brief) at 12-13, 20-23.

2/ The adjustment factors are discussed herein, infra p. 9-10.

the violation and any good faith efforts to comply, in an amount not to exceed $25,000.00 for each violation of RCRA. [(Sections 3008(a) of RCRA, 42 USC §§6928(a)]. Further guidance is provided by the RCRA penalty policy, which is ordinarily considered by the presiding judge in assessing a civil penalty in order to provide a uniform penalty policy calculation system. In the Matter of Sandoz, Inc., RCRA Appeal No. 85-7 (Final Decision, February 27, 1987. See also 40 CFR §22.27(b).

Count I of the Complaint

Accordingly, the first step in determining the penalty for Count I is to characterize the potential for harm as "major, "moderate," or "minor". The potential for harm is determined by consideration of two standards: (1) the likelihood of exposure to hazardous waste posed by noncompliance, or (2) the adverse effect noncompliance has on the statutory or regulatory purposes or procedures for implementing the RCRA program. Because the former standard may be difficult to quantify in this case, the latter will be considered. Under that standard, the "major," "moderate" and "minor" categories are defined respectively as actions which (a) have or may have a substantial adverse effect, (b) have or may have a significant adverse effect, or (c) have or may have an adverse effect upon the statutory or regulatory purposes or procedures for implementing the RCRA program (penalty policy

at 7). Examples of each of the three categories of potential for harm are provided in the penalty policy.

Complainant recognizes that one such example involves the financial assurance requirement for closure of hazardous waste facilities, 40 CFR §265.143. 3/ In that example, if the failure to word a trust agreement establishing financial assurance for closure as specified in 40 CFR §264.151(a)(1) is "such that funds would not be available to close the facility properly, the lack of identical wording would have a substantial adverse effect upon the regulatory scheme." 4/ Therefore, the "major" potential for harm category would be assigned. To analogize that example to the violation at hand in Count I, if respondent's failure to submit updated financial assurance documentation for 1986 and 1987 signified a lack of funds available for proper closure and post-closure care, then the "major" category would be appropriate.

However, respondent asserts that it "has maintained financial support for such [financial assurance] documentation during all times relevant." (Respondent's Brief at 11). Complainant does not refute this assertion, responding merely that the "fact that respondent could have re-established financial assur-

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3/ Complainant's Brief in Support of Penalty Proposed in Complaint (hereinafter referred to as Complainant's brief) at 5; penalty policy at 7.

4/ Penalty policy at 7.

ance (for 1986 and 1987) does not change the fact that respondent did not do so." 5/ However, that fact does affect the probability of harm. While it is noted that potential rather than actual harm is at issue, it is also noted that the likelihood of harm as well as the extent of possible harm are constituents of the potential for harm, or the degree to which the RCRA program may be disrupted.

The likelihood of harm is inconsequential, since funds were sufficiently available in fiscal years 1986 and 1987 for closure and post-closure care. 6/ However, there is still the question of disruption of the RCRA program. The Agency's inability to monitor respondent's financial capability during the years at issue undermines the Agency's ability to assure proper closure and post-closure care, which is essential to the RCRA program. Such disruption to the program is significant, warranting a classification of "moderate" potential for harm.

Respondent urges that the potential for harm is minor when initial financial assurance has been established and compliance with 40 CFR §§265.143(c)(6) and 265.145(c)(6), which require that

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5/ Complainant's Reply Brief to Respondent's Brief on the Issue of Penalties (hereinafter Complainant's reply) at 3.

6/ Respondent's assertion that its financial support was maintained is credited since complainant has not asserted otherwise, or contested credibility issues by requesting a hearing.

notice be sent to EPA if the owner or operator no longer meets the financial criteria for closure and post-closure care, are complied with. 7/ However, when financial criteria are met and maintained, there is no active "compliance" because there is then no duty to act under §§265.143(c)(6) and 265.145(c)(6). EPA cannot rely upon inaction as an indication that a facility is maintaining financial requirements; an owner or operator of a facility may fail to notify the Agency in the event of financial hardship. It is concluded that the "moderate" category for the potential for harm is appropriate for the violation charged in Count I of the complaint.

The next step in assessing a penalty for the Count I violation is to determine the extent of deviation from a statutory or regulatory requirement. The appropriate category is "major" if the violator "deviates from the requirements of the regulation or statute to such an extent that there is substantial noncompliance;" "moderate" if the violator "significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended," and "minor" if the violator "deviates somewhat from the regulatory or statutory requirements but most of the requirements are met." 8/

Two regulations are at issue in Count I, 40 CFR §§265.143

7/ Respondent's brief at 9. The CFR citations are to the July 1, 1987, edition.

8/ Penalty policy at 8-9.

and 265.145, which require financial assurance for closure and for post-closure, respectively. Respondent has met some of the requirements under each of the regulations by properly establishing financial assurance in 1985. 9/ Moreover, respondent apparently maintained its financial assurance, albeit documentation was not submitted to EPA. 10/ Respondent's failure to submit such documentation is a significant deviation from the requirements of the regulations, especially considering that violations of two regulations and two years are at issue. 11/ Therefore, the "moderate" category is appropriate to represent respondent's extent of deviation, for Count I of the complaint.

Applying the matrix set forth in the penalty policy, a "moderate" potential for harm and a "moderate" extent of deviation yields a penalty range of $5,000.00 to $7,999.00. The midpoint of the range is ordinarily chosen. 12/ As there are no extraordinary circumstances in this case, it is determined that the midpoint of the range, $6,500.00, is the appropriate gravity-based penalty for Count I of the complaint.

9/ Respondent's brief at 5, 11; Exhibit H attached thereto.

10/ See supra at 6, note 6.

11/ See penalty policy at 12: "The fact that two separate sections were violated will be taken into account in choosing higher 'potential for harm' and 'extent of deviation' categories on the penalty matrix."

12/ In the Matter of Environmental Protection Corporation (East Side Disposal Facility), Docket No. RCRA-09-86-0001 (October 24, 1989) at 15-16 (citations omitted).

The final step in determining the amount of civil penalty for Count I is to increase or decrease the gravity-based penalty by percentages indicated in the penalty policy for any adjustment factors that may apply. These factors are (1) good faith efforts to comply/lack of good faith; (2) degree of willfulness and/or negligence; (3) history of noncompliance; (4) ability to pay; or (5) other unique factors. 13/ Additionally, economic benefit from noncompliance and multiple and multi-day penalties are added to the total penalty amount, if applicable. 14/ In the stipulation agreement of July 5, 1989, however, complainant agreed not to seek seek imposition of a penalty reflecting any benefit from non-compliance. 15/ Further, complainant has not sought imposition of multiple or multi-day penalties. 16/

Complainant has not specifically proposed any adjustments to the penalty because of the confidential nature of the settlement negotiations in which adjustment factors were discussed. 17/ However, in its brief complainant stated that "respondent has demon-

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13/ Penalty policy at 16-21.

14/ Penalty policy at 11-16.

15/ Exhibit "D" at 5, attached to respondent's brief; complainant's brief at 7-8.

16/ Complainant's reply at 6, 8; Respondent's brief at 12.

17/ Complainant's brief at 8; Complainant's reply at 9.

strated some good faith." 18/

Respondent asserts that it fully cooperated with EPA and the California Department of Health Services (hereinafter referred to as DHS) and "had numerous conversations with the Department and other enforcing agencies relative to its ability to pay for the actions undertaken and yet to be undertaken at the site." 19/ The penalty policy allows an adjustment up to 25%, or up to 40% in unusual circumstances. 20/ A 25% reduction in the gravity-based penalty is appropriate to reflect respondent's good faith. No further adjustments appear to be warranted for respondent's violation in Count I, since such matters as willfulness, history of noncompliance, ability to pay have not been raised by the parties and appear inapplicable to this violation. 21/ Therefore, the total adjusted penalty for Count I is $6,500.00 decreased by 25%, or $4,875.00.

Count II of the Complaint

Count II of the complaint charges respondent with failure

18/ Complainant's reply at 9. Respondent's objection to that portion of complainant's reply on page 9, lines 4 through 23, is noted. (See letter from respondent to Judge Greene, dated September 1, 1989).

19/ Respondent's brief at 12,13.

20/ Penalty policy at 17.

21/ Respondent's brief at 13.

to submit to the Agency a demonstration of financial responsibility for bodily damage and property damage to third parties caused by sudden and non-sudden accidental occurrences arising from facility operations, in violation of 40 CFR §265.147(a) and (b). The potential for harm, as in Count I, is evaluated in terms of the "adverse effect noncompliance has on the statutory or regulatory purposes or procedures for implementing the RCRA program," due to the inapplicability of the "likelihood of exposure" standard. 22/

Respondent argues that its financial assurance submission in 1985 covering closure and post-closure, and its general liability insurance coverage substantively satisfied its financial assurance obligations with respect to liability coverage. 23/ Complainant rebuts this argument, asserting that respondent would require a much higher net working capital and tangible net worth in order to satisfy substantively the requirement set forth in 40 CFR §265.147(f). Complainant's rebuttal is supported by the EPA Regional Administrator's denial of respondent's request for variance under 40 CFR §265.147(c), dated July 22, 1988, in which respondent requested that the financial test securing non-sudden lia-

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22/ Penalty policy at 6. There is no likelihood of exposure to hazardous waste posed per se by respondent's failure to demonstrate financial responsibility for any accidental occurrences.

23/ Respondent's brief at 19-20; 19 n. 8; 22 n. 9.

bility be reduced from $36 million to $18 million. 24/ Respondent was apparently not in de facto compliance with the regulation at issue, 40 CFR §265.147. Therefore, the potential for harm is not diminished.

Complainant argues that there is substantial likelihood of exposure to hazardous waste, due to circumstances of known ground water contamination at respondent's facility and its location in a populated area. 25/ However, those circumstances do not demand the category of "major" potential for harm; rather, they are factors to be considered in determining the likelihood of accidental occurrences which then trigger liability coverage. Other factors to consider are the respondent's precautions against exposure of third parties to hazardous waste, and most important, respondent's financial ability to cover any sudden or non-sudden accidental occurrence liabilities. Third parties have recourse in suing respondent in the event of an accidental occurrence. Because respondent is solvent and financially responsible, the appropriate category of potential for harm is "minor," i. e. an action which has or may have an adverse effect upon the statutory or regulatory purposes of procedures for implementing the RCRA program.

24/ Respondent's brief at 2; Exhibit C attached to respondent's brief.

25/ Complainant's brief at 6-7; Exhibit 2, attached to complainant's brief.

Turning to the extent of deviation from a statutory or regulatory requirement, complainant's selection of the "major" category is accepted. Respondent completely failed to comply with the regulation requiring financial assurance for sudden as well as nonsudden accidential occurrences, rendering the requirements inoperative, which is substantial noncompliance.

A "minor" potential for harm and "major" extent of deviation yield a penalty range of $1,500.00 to $2,999.00 according to the penalty policy matrix. 26/ The seriousness of the violation does not warrant a selection of the uppermost or lowermost penalty amount. The midpoint of the range, $2,250.00, is appropriate.

The adjustment factors to be considered for the Count II violation are (a) good faith/lack of good faith; (b) degree of willfulness and/or negligence; and (c) other unique factors. 27/ Respondent states that it was in constant contact with DHS and asked DHS what was required with respect to financial assurance. 28/ Respondent asserts that it was not informed either by DHS or EPA that it was required to have liability coverage for accidental occurrences to third parties, and relied upon guidance provided by

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26/ Penalty policy at 4, 10.

27/ Economic benefit, multiple and multi-day penalties, history of non-compliance, and ability to pay are not applicable to respondent's violations. See supra p. 10-11.

28/ Respondent's brief at 22.

DHS that "because the RCRA unit was to be closed . . . the only requirement was to submit proof of establishment of financial assurance for projected closure and post-closure costs." 29/ Respondent further asserts that in discussions of financial coverage with DHS representatives in connection with their review of respondent's closure plan, no deficiency in financial assurance documentation was mentioned until about the time the complaint issued. 30/ Complainant contends that respondent did not substantiate statements made by DHS officials, and that "EPA had primary responsibility for implementing the RCRA program in 1986 and 1987 and cannot be bound by a facility's reliance on the state's enforcement policy." 31/ While EPA may not be so bound, and lack of knowledge is ordinarily not used as a basis for reducing the penalty 32/, respondent's reliance upon guidance from DHS is evidence of its good faith, supporting a 25% reduction in the gravity-based penalty.

Respondent asserts that liability coverage was not available from outside sources for sudden and non-sudden pollution

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29/ Id. at 16-18, see also 21-22.

30/ Respondent's brief at 17-18. Respondent's assertions are taken as fact since complainant has waived its right to contest credibility by not requesting a hearing.

31/ Complainant's reply at 10.

32/ Penalty policy at 18.

occurrences due to the groundwater contamination problem at its facility, and the collapse of the insurance and bonding market for pollution risks and environmental impairment. 33/ However, other options of financial assurance were available to meet the requirements of 40 CFR §265.147, such as the financial test, corporate guarantee or a combination of the financial test and insurance, or the corporate guarantee and insurance. 34/ Respondent therefore had some control over the events involved in the violation and did not take all reasonable precautions against such events. 35/ No evidence is presented to demonstrate that respondent attempted to obtain a corporate guarantee, insurance, or a variance until after the complaint was filed. Therefore no mitigation of the gravity-based penalty is warranted on this account.

No other facts are presented which would support further adjustment to the penalty. The cases cited by respondent for the proposition that complainant's penalty calculation was excessively high in comparison to administrative precedent, are not inconsist-

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33/ Respondent's brief at 2 n. 1, 17 n. 6, 19.

34/ 40 CFR §§265.147(a)(3), and 265.147(b)(3).

35/ These factors, among others, are to be considered in weighing the degree of willfulness and/or negligence. See penalty policy at 18.

ent with the penalty assessed herein. 36/ The gravity-based penalty of $2,250.00 less 25% for respondent's good faith reliance upon the advice of DHS, or $2,025.00, is the appropriate penalty for the violation set forth in Count II of the complaint. Coupled with the penalty for Count I, $4,875.00, the total penalty assessment is $6,900.00. 37/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent is a "person" within the meaning of 42 USC §6903(15), §1004(15) of the Act.

Respondent's Stockton, California facility is an "existing hazardous waste management facility" as defined in 40 CFR §260.10.

Respondent's Stockton, California facility is a "disposal facility", as defined in 40 CFR §260.10.

36/ Cases cited in Respondent's brief at 23-24: Landfill Incorporated, RCRA-IV-82-65-R (September 16, 1986); F & K Plating, RCRA-VI-427-H (April 14, 1986); Aero Plating Works, Inc., RCRA-V-W-84-R-071-P (February 12, 1986); Frit Industries, Inc., RCRA-VI-415-H (August 5, 1985); Webbcraft, Inc. RCRA-VI-446-H (July 23, 1985); Willis Pyrolizer Company, RCRA-83-H-002, Appeal No. 84-3 (February 19, 1986).

37/ 40 CFR §22.27(b) provides, in pertinent part:

> If the presiding officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the presiding officer shall set forth in the initial decision the specific reasons for the increase or decrease. The specific reasons for the decrease in the proposed penalty are set forth herein.

Respondent is and at all relevant times has been the owner or operator of the Marley Cooling Tower Company, Stockton, California facility.

Respondent failed to submit updated information for fiscal years ending in 1986 and 1987 concerning financial assurance for closure of the facility, or to provide an alternate financial assurance mechanism for the cost of closure, in violation of 40 CFR §265.143(e)(5).

Respondent failed to submit updated information for fiscal years ending in 1986 and 1987 concerning financial assurance for post closure care of the facility, or to provide an alternate financial assurance mechanism for the cost of post-closure, in violation of 40 CFR §265.145(e)(5).

Respondent failed to submit a financial assurance mechanism which properly covers financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences and therefore is in violation of 40 CFR 265.147(a).

Respondent failed to submit a financial assurance mechanism which properly covers financial responsibility for bodily injury and property damage to third parties caused by non-sudden accidental occurrences and therefore is in violation of 40 CFR §265.147(b).

Respondent violated the financial responsibility requirements of RCRA §3004(a)(6), 42 U.S C. §6924(a)(6), as amended, and the following regulations duly promulgated thereunder: 40 CFR §§265.143(e)(5) and 265.145(e)(5), 265.147(a), and 265.147(b).

A civil penalty of $4,875.00 for Count I of the complaint, and $2,025.00 for Count II of the complaint, for a total penalty of $6,900.00 is reasonable and appropriate for these violations, considering the circumstances set forth above, including the financial condition of respondent, the cooperation between the respondent and state agencies responsible for enforcing State RCRA programs, and the good faith reliance by respondent upon the advice of a State agency.

Accordingly, respondent is liable for a penalty of $6,900.00 for violations of the Act and applicable regulations.

ORDER

A civil penalty of $6,900.00 is hereby assessed against respondent for the violations found herein. Payment of $6,900.00 shall be made within sixty (60) days of the date of service of this order, by submmitting a certified or cashier's check payable to: EPA - Region 9 Regional Hearing Clerk, Post Office Box 360863M, Pittsburgh, Pennsylvania 15251.

A copy of the check and the transmittal letter shall be

sent to the Regional Hearing Clerk, United States Environmental Protection Agency, Region 9, 215 Fremont Street, San Francisco, California 94105.

J. F. Greene
Administrative Law Judge

November 30, 1989
Washington, D. C.

Copy

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Order in the matter of MARLEY COOLING TOWER, Docket No. RCRA-09-88-0008, was served on each of the parties, addressed as follows, by mailing First Class Mail, in a U.S. Postal Mail Box, or by hand delivering, in the City and County of San Francisco, California, on the 12th day of December, 1989:

Timothy Verhagen, Esq. — First Class Mail
P.O. BOX 2965
Mission Woods, Kansas 66205

(SV) Nancy Marvel ~~David McFadden~~, Esq. — Hand Delivered
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 9,
215 Fremont Street
San Francisco, Ca. 94105

Dated at San Francisco, California, this 12th day of December, 1989.

Steven Armsey
Hearing Clerk
Office of Regional Counsel
EPA, Region 9