

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

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In the Matter of:	)	
	)	'04 SEP 14 12:12
Dearborn Refining Company	)	RCRA (3008) Appeals and Hearings
Docket No. RCRA-05-2001-0019	)	PROTECTION AGENCY REGION V

**FINAL ORDER**

**I. INTRODUCTION**

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

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

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

Dearborn raises no other objections to the penalty calculation. The Board held oral argument in this matter on July 29, 2004.<sup>6</sup>

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<sup>4</sup>(...continued)

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

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

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

## II. DISCUSSION

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

## III. CONCLUSION

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

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

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

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<sup>7</sup>(...continued)

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

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

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Treasurer, United States of America, at the following address:

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Region V  
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Regional Hearing Clerk  
P.O. Box 70753  
Chicago, IL 60673

So ordered.<sup>9</sup>

ENVIRONMENTAL APPEALS BOARD

Dated: Sept. 10, 2004

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

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

CERTIFICATE OF SERVICE

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

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\_\_\_\_\_  
/s/  
Annette Duncan  
Secretary