8/9/95

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	**Docket No. RCRA-III-247**
RYBOND, INC.,	)	
	)	
Respondent		

Resource Conservation and Recovery Act. Where respondent failed to comply with the Order issued by the Administrative Law Judge on January 12, 1995, requiring it to submit its prehearing exchange within 30 days of service, respondent has been found in default pursuant to 40 C.F.R. § 22.17, and to have admitted the violations charged. Respondent is hereby assessed the full amount of the penalty proposed in the complaint.

ORDER ON DEFAULT

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: August 9, 1995

APPEARANCES:

For Complainant:

Jean Heflin Kane, Esquire
Senior Assistant Regional Counsel
U.S. EPA, Region III
841 Chestnut Building
Philadelphia, PA 19107

For Respondent:

Steven A. Hann, Esquire
Hamburg, Rubin, Mullin,
Maxwell & Lupin
375 Morris Road
P.O. Box 1479
Lansdale, PA 19446-0773

I. INTRODUCTION

This proceeding was initiated under Section 3008(a)(1) and (g) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a)(1) and (g), by issuance of a Complaint, Compliance Order and Notice of Opportunity for Hearing (complaint) on September 16, 1993 by the U.S. Environmental Protection Agency, Region III, (complainant or EPA). The complaint charges respondent Rybond, Inc. (respondent), with violations of RCRA and regulations promulgated thereunder and violations of the provisions of the Pennsylvania Solid Waste Management Regulations, 25 PA Code § 75 at respondent's facility located at 840 Main Street, Lansdale, PA.

The complaint charges specifically that respondent violated: (1) 25 PA Code § 75.270(a) by operating a hazardous waste storage facility without a permit; (2) 25 PA Code § 75.264(r)(8) by not conducting the required inspections of the two 275 gallon tanks at respondent's facility; (3) 40 C.F.R. § 268.50(a)(2) by storing hazardous waste restricted from land disposal for purposes other than to accumulate such quantities as necessary to facilitate proper recovery, treatment, or disposal and by failing to mark the two tanks with the information specified by 40 C.F.R. § 268.50(a)(2)(i) and (ii); and (4) 25 PA Code § 75.264(b)(1) by accepting hazardous waste for treatment, storage or disposal without receiving an identification number from the Pennsylvania Department of Environmental Regulation (PADER). A civil penalty in the amount of $178,896 is sought from respondent.

An Answer denying the allegations in the complaint and requesting a settlement conference was filed by respondent on November 1, 1993.

Respondent failed to file the prehearing exchange required to be submitted 30 days from service of the January 12, 1995 order granting an extension for such filing. Based upon this failure, and in accordance with 40 C.F.R. § 22.17, it is concluded that respondent is in default.

II. FINDINGS OF FACT

1. Respondent is a private entity doing business in Pennsylvania and is a "person" as defined in 25 PA Code § 75.260.

2. Since September 14, 1973, respondent has owned a "facility" as that term is defined under 25 PA Code § 75.260, located at 840 Main Street, Lansdale, Montgomery County, PA (facility).

3. This proceeding was initiated under Section 3008(a)(1) and (g) of RCRA, 42 U.S.C. § 6928(a)(1) and (g), by issuance of a complaint by EPA on September 16, 1993, charging respondent with violations of RCRA and regulations promulgated thereunder and the Pennsylvania Solid Waste Management Regulations.

4. EPA performed an inspection of the facility on December 9, 1992, pursuant to RCRA § 3007(a), 42 U.S.C. § 6927.

5. On December 9, 1992, EPA representatives conducted an inspection of the facility and found that the following materials were being stored there: (1) a mixture of used machine oil and

spent solvents in two above-ground tanks, each with a capacity of approximately 275 gallons; (2) approximately thirty-three 55 gallon drums and four 20 gallon containers of various materials, including liquid coolants, lubricants, paint solutions and cleaning solutions; (3) three degreasing units; and (4) a pile of fine and gritty gray material.

6. From 1963 through May 1987, Precision Rebuilding Corporation (Precision) operated a machine repair business at 422 W. Sixth Street, Lansdale, PA. As part of its machine repair operations from 1975 to 1979 and 1986 to 1987, Precision used a solvent, Zurnkleen NF, for the degreasing of machine parts. According to its Material Safety Data Sheet, the Zurnkleen contained 96% 1,1,1-trichloroethane. After the solvent was used for its intended purpose, it was placed into each of the two 275 gallon above-ground tanks.

7. From 1987 through 1988, Innovative Machine Technology (IMT) operated the machine repair shop at 422 W. Sixth Street. In the course of its operations, IMT personnel placed used machine oils into each to the two 275 gallon above-ground tanks, which contained used solvent.

8. On June 1, 1987, Acoustical Associates, Inc. (Acoustical), purchased the property located at 422 W. Sixth Street from Precision.

9. A contractor hired by Acoustical transported the two 275 gallon above-ground tanks, including their contents, to the facility in June 1991. This action was part of a soil remediation

effort undertaken by Acoustical at the 422 W. Sixth Street location. The soil at 422 W. Sixth Street was sampled and analyzed by another consultant hired by Acoustical prior to excavation. The tests concluded that the soil was contaminated with volatile organic compounds, including 1,1,1-trichloroethane, tetrachloroethylene, trichlorethylene, and 1,2-dichloroethylene.

10. The substance contained in the two storage tanks (sampled during the December 9, 1992 inspection) is a "hazardous waste" as defined in 40 C.F.R. § 260.10 and 25 PA Code § 75.260(a). The waste contains 1,1,1-trichloroethane (used in degreasing) and bears the hazardous waste identification number F001, a spent halogenated solvent, as described in 25 PA Code § 75.261(h)(2).

11. The hazardous wastes in the two 275 gallon above-ground tanks have been in "storage," as that term is defined in 25 PA Code § 75.260(a), at the facility since June 1991.

12. The facility is a hazardous waste "storage" facility.

13. The facility is a "new hazardous waste management facility," as defined in 25 PA Code § 75.260(a).

14. Respondent was an "owner" of the facility, as that term is defined in 25 PA Code § 75.260(a), during the period of storage, i.e., since June 1991, and is currently the owner of the facility.

15. An answer to the complaint was served on November 1, 1993. The answer denied the violations and requested a settlement conference.

16. A settlement conference was held on January 6, 1994, but did not result in a settlement of the matter. The issue of inability to pay was raised at that time as a means to adjust the penalty amount, but no financial information was ever submitted by respondent to support such a claim.

17. On February 23, 1994, the undersigned Administrative Law Judge (ALJ) issued an order granting respondent's counsel's motion to withdraw its representation and requiring respondent to notify the ALJ if it was going to appear pro se.

18. On April 18, 1994, the ALJ issued to respondent an order to show cause (OSC) why an order on default, pursuant to 40 C.F.R. § 22.17, should not be issued against respondent for failure to respond to the order of February 23, 1994.

19. On April 22, 1994, respondent responded to the OSC of April 18, 1994 and stated that it was appearing pro se in this matter.

20. In correspondence dated May 23, 1994, August 18, 1994, and January 2, 1995, respondent has stated its position that it should not have to pay a penalty. In complainant's October 7, 1994 status report, complainant's then counsel, Jean Kane, Esquire, noted that, although respondent had completed a portion of the remedial work required under the compliance order part of the complaint, it had refused to discuss settlement of the penalty portion of the complaint.

21. By order dated June 17, 1994, the ALJ supplemented his previous orders and set forth a schedule for submission of pre-hearing exchanges. Prehearing exchanges were to be filed no later than September 9, 1994.

22. On September 1, 1994, complainant requested an extension to file the prehearing exchanges. This request was granted by the ALJ and the deadline for submission of the prehearing exchanges was extended to October 31, 1994.

23. Complainant filed its prehearing exchange on October 31, 1994, but respondent failed to do so.

24. On December 27, 1994, the ALJ issued an OSC requiring respondent to show cause why an order on default should not be issued, pursuant to 40 C.F.R. § 22.17, for failure to submit its prehearing exchange by October 31, 1994.

25. Respondent filed a response to the OSC dated January 2, 1995, reiterating its denial of the violations, but failing to provide a prehearing exchange.

26. On January 12, 1995, the ALJ issued an order granting respondent an extension for submitting its prehearing exchange. Respondent was given thirty days from service of the order to submit its prehearing exchange.

27. Respondent again failed to submit its prehearing exchange by the deadline required under the January 12, 1995 order. Instead, respondent filed a letter again denying the violations set forth in the complaint.

28. On March 7, 1995, the ALJ issued an order to complainant directing that complainant submit a draft order on default within twenty days of service.

29. On March 28, 1995, complainant orally requested and was granted a one week extension for such submission.

III. COUNTS ALLEGED IN COMPLAINT AND CIVIL PENALTIES SOUGHT

Count I - Respondent violated 25 PA Code § 75.270(a) by operating a hazardous waste storage facility without a permit. The penalties for the violations alleged in Counts III and V are included within the penalty assessed for Count I, as these counts are violations directly resulting from the failure to obtain a permit as alleged in Count I.

Count III[1] - Respondent violated 25 PA Code § 75.264(r)(8) by not conducting the required inspections of the two 275 gallon tanks at the Facility.

Count V - Respondent violated 25 PA Code § 75.264(b)(1) by accepting hazardous waste for treatment, storage or disposal without receiving an identification number from PADER.

Although EPA is not required to "collapse" the penalties for Counts I, III and V, EPA elected to do so as a matter of enforcement discretion. This resulted in a decrease in the total

[1] Count II in the original complaint was addressed solely to respondent, Innovative Machine Technology, who was subsequently dismissed from this action by the ALJ upon a motion to dismiss by complainant. Count II is, therefore, omitted from discussion in this order.

amount of the penalty assessed. Therefore, a total civil penalty in the amount of $97,406 is sought for the violations set forth in Counts I, III, and V.

Count IV - Respondent violated 40 C.F.R. § 268.50(a)(2) by storing hazardous waste restricted from land disposal for purposes other than to accumulate such quantities as necessary to facilitate proper recovery, treatment, or disposal and by failing to mark the two tanks with the information specified by 40 C.F.R. § 268.50(a)(2)(i) and (ii). A civil penalty in the amount of $81,490 is sought for this violation.

IV. CONCLUSIONS OF LAW

Pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) and (g), complainant has the authority to institute enforcement proceedings concerning violations of any requirement of RCRA Subtitle C, EPA's regulations thereunder (including 40 C.F.R. Part 268), or any requirement of a state hazardous waste program which has been authorized by EPA. Section 3008(g) of RCRA, 42 U.S.C. § 6928(g), authorizes the assessment of civil penalties against any person who violates any requirement of Subtitle C of RCRA.

Pursuant to section 3006(b) of RCRA, 42 U.S.C. § 6926(b), and 40 C.F.R. Part 271, Subpart A, the Commonwealth of Pennsylvania was granted final authorization to administer a state hazardous waste management program in lieu of the federal program established under RCRA Subtitle C, 42 U.S.C. § 6921-6939(b), on January 30, 1986. The provisions of Pennsylvania's hazardous waste management

program, through its final authorization, have become requirements of RCRA Subtitle C and are, accordingly, enforceable by EPA pursuant to Section 3008(a). The applicable Pennsylvania regulations are set forth in 25 PA Code § 75.259-75.282.

Respondent's answer to the complaint denies the violations set forth in the complaint, but goes no further to disprove their veracity, establish that the complainant failed to establish a prima facie case, or justify the dismissal of the complaint.

An examination of the prehearing exchange documents submitted by complainant supports the allegations in the complaint that respondent violated: (1) 25 PA Code § 75.270(a) by operating a hazardous waste storage facility without a permit; (2) 25 PA Code § 75.264(r)(8) by not conducting the required inspections of the two 275 gallon tanks at the facility; (3) 25 PA Code § 75.264(b)(1) by accepting hazardous waste for treatment, storage or disposal without receiving an identification number from PADER; and (4) 40 C.F.R. § 268.50(a)(2) by storing hazardous waste restricted from land disposal for purposes other than to accumulate such quantities as necessary to facilitate proper recovery, treatment, or disposal and by failing to mark the two tanks with the information specified by 40 C.F.R. § 268.50(a)(2)(i) and (ii). The prehearing exchange documentation is sufficient to establish a prima facie case to support the allegations in the complaint. Despite abundant opportunity to do so, respondent has not offered evidence to refute that which was submitted by complainant.

At this juncture, it is appropriate to note that subsequent to the ALJ's March 7, 1995 order, finding respondent in default but prior to this order, respondent obtained new counsel on April 28, 1995. On May 2, 1995, the ALJ granted respondent's request orally to file a motion in response to the March 7 order. Such motion was served on May 8, 1995, requesting the ALJ to withdraw its March 7 order finding respondent in default, and requesting 30 days to amend its prehearing exchange so that the case can proceed on its merits.[2] On May 22, 1995, complainant filed a response in opposition to respondent's motion for the aforementioned relief.

In its motion, respondent cites In re Midwest Bank & Trust Company, Inc., RCRA (3008) Appeal No. 90-4 (CJO, October 23, 1991), for the proposition that the "good cause" standard for setting aside default orders in 40 C.F.R. § 22.17(d) can be interpreted broadly to include facts and circumstances other than those that resulted in respondent's failure to timely respond. Therefore, after reviewing the whole record, it is urged that the ALJ should examine whether fairness and a balance of the equities dictate that the default order be set aside. Among the circumstances respondent contends warrant allowing this case to proceed are the following: its only connection to this matter is its ownership of the realty, its good faith efforts to rectify the violations which it did not create, the nature and amount of the penalty, the former pro se

[2] It is noted that respondent's request to amend its prehearing exchange is without any basis because it never submitted the same.

status of respondent, and the general principle of resolving cases on their merits.

While respondent correctly cites the proposition in Midwest Bank, the ALJ finds none of these circumstances to be persuasive. First, the record in this proceeding reflects that respondent has demonstrated a contumacious disregard for prior orders of the ALJ. Second, respondent has failed to rebut its liability established by this default order. Although it asserts that its answer presents "meritorious defenses" to the complaint, respondent simply makes this baseless claim without any reference or substantiation to what the "meritorious defenses" are. Additionally, as complainant properly asserts, good faith efforts to comply are factors to be considered on the penalty issue. However, they have no relevancy for determining liability in this matter. Third, while granting a large penalty without a hearing may cause hesitancy, respondent has had countless opportunities, but still fails to provide any documentation concerning an inability to pay the full penalty. Moreover, respondent elected under its own volition to proceed pro se. Respondent is the architect of its own legal misfortune. For all the above reasons, and considering the whole record, it is concluded respondent has failed to establish that good cause exists for setting aside the default order under section 22.17(d).

Furthermore, respondent's failure to submit its prehearing exchange is grounds for default and constitutes an admission of all facts alleged in the complaint and a waiver of a hearing on the factual allegations. 40 C.F.R. § 22.17(a).

IV. CONCLUSION

Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), requires that the Administrator, in assessing a penalty, take into account "the seriousness of the violation and any good faith efforts to comply with applicable requirements." In addition, the RCRA Penalty Policy of October 1990 states that, in assessing a penalty, EPA shall take into account the potential for harm caused by the violation, the extent of deviation from the requirements, multiple and multi-day violations, economic benefits obtained from non-compliance, and adjustment factors such as good faith efforts to comply with requirements, degree of willfulness and/or negligence, history of non-compliance, ability to pay, and other unique factors. EPA has taken into account all relevant factors in arriving at the penalty sought. However, by its default, respondent has waived the right to contest the penalty, which shall become due and payable without further proceedings.

The penalty sought from the respondent in the complaint is $178,896, consisting of $97,406 for Counts I, III and V, and $81,490 for Count IV. This penalty amount is consistent with RCRA § 3008 (g), 42 U.S.C. § 6928(g), and the RCRA Penalty Policy.

V. RATIONALE FOR PENALTY ASSESSMENT

The penalty was calculated in accordance with RCRA Section 3008(g) and the Penalty Policy. As explained below, EPA determined the gravity of each violation by considering the potential for harm and the extent of deviation from the relevant statutory or regulatory requirement, and selecting the appropriate cell within the matrix set forth in the Penalty Policy. EPA then considered evidence regarding good faith efforts to comply, any economic benefit of noncompliance, multi-day violations, respondent's lack of history of compliance, and other unique factors relating to this case in arriving at the penalties asserted in the complaint.

The narrative explanation to support the penalty is set forth below:

COUNTS I, III, AND V

COUNT I - Respondent violated 25 PA Code § 75.270(a) by operating a hazardous waste storage facility without a permit.

COUNT III - Respondent violated 25 PA Code § 75.264(r)(8) by not conducting the required inspections of the two 275 gallon tanks at the facility.

COUNT V - Respondent violated 25 PA Code § 75.264(b)(1) for accepting hazardous waste for treatment, storage or disposal without receiving an identification number from the PADER.

1. **Gravity-Based Penalty**

(a) Potential for Harm **Moderate** - Respondent's failure to obtain a permit for the storage of hazardous waste at the facility

as required by 25 PA Code § 75.270(a) constituted a moderate potential for harm to the integrity of the RCRA program because the respondent unilaterally precluded its inclusion in the RCRA regulatory universe and avoided compliance with applicable hazardous waste regulations. When hazardous waste management facilities operate outside the scope of regulatory supervision, there is an increased likelihood that safety considerations will be inadequate. Owners or operators of such facilities are often unaware of the various safety requirements associated with the handling of hazardous waste, resulting in an increased likelihood of improper management, in addition to creating a significant potential for harm to human health and the environment, by increasing the likelihood of human health or environmental exposure to hazardous waste. Since respondent stored F001 hazardous waste without a permit, the potential for harm was significant. However, the potential for harm is somewhat mitigated by the relatively small volume of waste stored and the good condition of the tanks. Counts III and V are, for the purposes of penalty assessment, included within the penalty assessed for Count I, as these counts are violations directly resulting from the failure to obtain a permit as alleged in Count I.

(b) Extent of deviation **Major** - The respondent failed completely to comply with the applicable regulatory requirements by not obtaining a permit to store hazardous waste. Thus, the respondent's failure to obtain a permit was a major deviation from the applicable requirements of 25 PA Code § 75.270(a). Due to the

self-implementing nature of the hazardous waste management regulations, the failure to obtain the required permit resulted in the management of hazardous waste outside the scope of regulatory supervision, thereby undermining the very purpose of the hazardous waste management program. Accordingly, respondent's various acts and omissions have had a substantially adverse effect on the RCRA regulatory scheme.

2. **Multiple/Multi-day Penalty**

Based on the moderate potential for harm and the major extent of deviation described above, the Penalty Policy dictates an assessment of a multi-day penalty in the range of $2,200 to $400 per day. The amount of $400 per day was selected because of the relatively low potential for harm to human health and environment posed by the violations. The unpermitted tanks were secured inside of a building that was kept locked and, therefore, the possibility of actual human exposure was relatively low. The violation had persisted for approximately two years from the time the tanks were delivered to the property to the time of the EPA inspection in December of 1992. However, EPA assessed the penalty for the minimum 180 days required by the Penalty Policy because it believes that amount would have a sufficient deterrent impact on the respondent and any penalty assessment over that amount would be excessive.

3. **Adjustment Factors**

No evidence has been produced which indicates either the presence or lack of good faith, willfulness, negligence, or a

history of noncompliance with respect to the violation. No unique factors are applicable to this count.

4. **Economic Benefit**

An economic benefit was calculated based on the cost avoided by the respondent for not obtaining a permit and complying with other applicable requirements. The economic benefit derived by not complying with the applicable requirements was calculated to be $16,306.

5. **Penalty Assessed** - $97,406.

COUNT IV

Respondent violated 40 C.F.R. § 268.50(a)(2) by storing hazardous waste restricted from land disposal for purposes other than to accumulate such quantities of hazardous waste as necessary to facilitate proper recovery, treatment, or disposal and by failing to mark the two hazardous waste storage tanks with the information specified by 40 C.F.R. § 268.50 (a)(2)(i) and (ii).

1. **Gravity-Based Penalty**

(a) Potential for Harm **Moderate** - The potential for harm to human health or environment is relatively small because there was a relatively small amount of waste stored in the two tanks, the two tanks were secured within a building which was locked, there were no apparent leaks in the tanks, and there was an impermeable floor beneath the tanks. The potential for harm to the implementation of the RCRA program is significant because

respondent has essentially ignored a significant requirement of the RCRA Land Disposal Restriction regulations.

(b) Extent of deviation **Major** - According to the Penalty Policy, any failure to comply with the land disposal regulations constitutes a substantial deviation from the regulations. Classification of the extent of deviation from the requirements of this violation as "major" is justified because the requirement violated is a prohibition of storage of restricted hazardous waste, and the hazardous waste was stored in excess of two years in the tanks at the facility.

2. **Multiple/Multi-day Penalty**

Based on the moderate potential for harm and a major extent of deviation described above, the Penalty Policy recommends an assessment of a multi-day penalty in the range of $2,200 to $400 per day. The amount of $400 per day was selected because of the relatively low potential for human health and environmental harm posed by the violations. The unpermitted tanks were secured inside of a building that was kept locked and, therefore, the possibility of actual human exposure was low. The violation had persisted for approximately two years from the time the tanks were delivered to the property to the time of the EPA inspection in December of 1992. However, EPA assessed the penalty for the minimum 180 days required by the Penalty Policy because it believes that amount would have a sufficient deterrent impact on the respondent and any penalty assessment over that amount would be excessive.

3. **Adjustment Factors**

No evidence has been produced which indicates either the presence or lack of good faith, willfulness, negligence, or a history of noncompliance with respect to the violation. No unique factors are applicable to this count.

4. **Economic Benefit**

The economic benefit portion of the penalty was calculated by estimating the cost benefit in delaying the disposal of the tank contents. The economic benefit was calculated to be $390.

5. **Penalty Assessed** - $81,490.

ORDER

IT IS ORDERED that:

1. Pursuant to Section 3008(a)(1) and (g) of RCRA, that the respondent, Rybond, Inc., be assessed a civil penalty of $ 178,896.

2. Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within sixty (60) days after the final order is issued. 40 C.F.R. § 22.17(a).

EPA - Region III
Regional Hearing Clerk
P.O. Box 360515M
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and the EPA docket number, plus respondent's name and address must accompany the check.

4. Failure on the part of respondent to pay the penalty within the prescribed statutory time frame after the entry of the final order may result in assessment of interest on the civil penalty 31 U.S.C. § 3717; 4 C.F.R. § 102.13.

5. Pursuant to 40 C.F.R. § 22.17(b), this order constitutes the initial decision in this matter. Unless an appeal is taken pursuant to 40 C.F.R. § 22.30, or the Environmental Appeals Board (EAB) elects to review this decision on its own motion, this decision shall become the final order of the EAB. 40 C.F.R. § 22.27(c).

VI. COMPLIANCE ORDER

To the extent not done so already, the remaining items required under the compliance order of the complaint must be completed within 30 days of the effective date of this Order on Default.

1. Submit to EPA a Waste Determination Report and Hazardous Waste Disposal Plan for the material contained in the 38 containers, the material contained in the three degreasing units, and the waste pile of gray material. The report must include a summary of the results for hazardous waste determinations for all of the materials.

2. For the two drums determined to contain a RCRA characteristic hazardous waste, provide a description of the final disposition of the material. Identify any and all transporters (include the name, address, and a reference to the Pennsylvania

hazardous waste haulers license) and the name, address, and EPA identification number of any treatment, storage, recycling and/or disposal facility which will (or already has) receive(d) the hazardous waste.

3. For the aforementioned two drums of hazardous waste, provide a detailed schedule for its disposition within 15 days of submission of the Waste Determination Report and Hazardous Waste Disposal Plan.

Frank W. Vanderheyden
Administrative Law Judge

Dated: August 9, 1995