UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Titan Wheel Corporation of Iowa,	)	**Docket No. RCRA-VII-98-H-0003**
	)	
	)	
Respondent.	)	

INITIAL DECISION

This case was initiated on September 17, 1998 by the filing of a complaint pursuant to Sections 3008(a) and (g) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 et. seq. The Complaint charges the Titan Wheel Corporation of Iowa ("Titan Wheel" or "Respondent") with three counts of violating RCRA and the regulations promulgated thereunder. Complainant seeks a total civil penalty for the alleged violations in the amount of $150,289. That total allocates $55,050 for Count I, $74,381 for Count II, and $20, 858 for Count III.

EPA also requests that the Court order Respondent to submit to EPA a closure plan for the hazardous waste storage areas in accordance with 40 C.F.R. Part 264, Subpart G, proof of financial assurance for the closure pursuant to 40 C.F.R. § 264.143, and a certification of closure pursuant to 40 C.F.R. § 264.115.[1]

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[1]As a preliminary matter, on February 13, 2001 EPA filed a Motion to Strike an Affidavit of Stanley A. Riegel, counsel for Respondent, and a letter from EPA to Mr. Riegel dated October 12, 1999, both of which were submitted by Respondent with its Reply Brief. EPA argues that the two documents should not be admitted into evidence as they are both untimely and irrelevant. EPA maintains that Respondent should have included these documents in its prehearing exchange and that given that such documents had not been entered into the record previously, they should not be allowed into evidence at this stage of the proceedings. With respect to the relevancy of the two documents, EPA contends that they do not address the closure of the facility as sought by EPA in the Complaint. Rather, they address the sampling and remediation of petroleum contaminated soil, which EPA argues is not relevant to the Complaint and was not the subject of the EPA inspections.

On September 1, 1999, the Court issued a Notice of Hearing, setting an evidentiary hearing for December 2-3, 1999 in Kansas City, Missouri. On November 24, 1999, the parties filed a Joint Statement of Facts and waived their right to an evidentiary hearing. On November 29, 1999, the Court issued an Order Canceling the Hearing.[2]

Count I alleges that on eight separate occasions between May 13, 1994 and April 17, 1998, Respondent stored containers of D001, F003, and F005 hazardous waste at the Titan Wheel facility for periods greater than 90 days, prior to shipping the waste off-site for disposal, without an extension from

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In response to the Motion, Respondent argues that the exhibits are indeed relevant to the issue of the closure plan because they describe the circumstances surrounding the development of a plan for additional soil assessment in lieu of a closure plan. Respondent maintains that EPA permitted it to submit the soil assessment plan instead of the closure plan and may not now require that it submit a closure plan and financial assurance of such. EPA did not reply to Respondent's arguments in its Opposition to Complainant's Motion to Strike.

Based on the written record, which is the only evidence upon which the Court may make a determination, as the parties waived their right to an oral hearing, there is no indication that EPA did in fact agree to the submission of a soil assessment plan in lieu of the closure plan and financial assurance, except for the testimony given by Stanley Riegel, in his affidavit of February 9, 2001. The Court cannot make any conclusions as to conversations or agreements between the parties beyond the scope of the record. The documents EPA seeks to have excluded do not affect liability one way or another, that is, the material contained in these two documents do not change the Court's finding that Respondent committed the violations that EPA alleged in the Complaint. See infra text at 6. As such, the Court concludes that these documents are irrelevant to the determination of liability on the part of Respondent. It is on this basis, and because the exhibits were submitted in an untimely manner, at the time Respondent submitted its reply brief, that they will not be admitted.

[2] In another preliminary determination, on December 13, 2000 the Court granted EPA's December 1, 1999 Motion to Strike. The effect of this Order was to strike certain exhibits submitted by Respondent. Specifically the following proposed exhibits were excluded:
(1) summaries of other enforcement actions; (2) documents received from the State of Missouri which pertain to enforcement actions filed and/or settled by that State under the Missouri Hazardous Waste Management Law during the previous two years; (3) letters from Respondent requesting summaries of enforcement actions; (4) a list of enforcement actions taken by EPA, as printed from EPA's web site; and (5) documents received from EPA Region VII under a Freedom of Information Act request which pertain to enforcement actions filed and/or settled by EPA under RCRA during the previous two years. *See*: Order Granting Complainant's Motion to Strike, December 13, 2000.

the Environmental Protection Agency ("EPA" or "Complainant"), in violation of Section 3005(a) of RCRA, 42 U.S.C. § 6925(a).

Count II alleges that Respondent failed to develop or implement a personnel training program addressing the requirements of 40 C.F.R. Part 265, in violation of 40 C.F.R. § 265.16.

Count III alleges that Respondent had an inadequate contingency plan, specifically, that Respondent failed to have and update a contingency plan for the facility that describes the emergency services arrangements required by 40 C.F.R. § 265.52(c), that includes a list of emergency coordinators, as required by 40 C.F.R. § 265.52(d), and that lists any emergency equipment.

BACKGROUND[3]

Titan Wheel is an Iowa corporation and is a "person" as defined in RCRA Section 1004(15), 42 U.S.C. § 6903(15). Respondent has leased and operated the facility located at R.R. 2, Blue Grass Road, Walcott, Iowa ("facility") since July 1988[4], where it manufactures steel wheels for agricultural equipment. As a result of the manufacturing activities at the facility, Respondent generates solid and hazardous waste, as those terms are defined in 40 C.F.R. § 260.10. On or about April 1, 1996 Respondent submitted to EPA a Notification of Hazardous Activity, identifying itself as a hazardous waste generator. During the time in which the alleged violations occurred, Respondent generated hazardous waste in quantities greater than 1000 kilograms per month at the facility, thus making it a Large Quantity Generator. As a consequence, Respondent was subject to the requirements under RCRA § 3005.

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[3]On November 24, 1999, the parties submitted to the Court a Joint Statement of Facts and waived their right to hearing in this matter. Because the parties agreed, there is no dispute as to the facts set forth in this decision. The facts related in this Background section are taken from the Joint Statement and consequently are not in dispute. These facts establish and Respondent concedes, liability as to all Counts. The only remaining dispute in this proceeding involves the appropriate penalty for each Count.

[4]The facility has approximately 300 employees and it is located on a site of about 45 acres in size. Prior to July 1988, the facility was operated under the name French & Hecht, under different ownership. Around September 1980, French & Hecht identified itself to EPA as a hazardous waste generator.

On October 22, 1997, EPA representative, Mr. Bryce Tobyne, conducted a RCRA screening inspection of the facility. Based on Mr. Tobyne's findings, EPA decided to conduct a full RCRA compliance inspection of the facility. On February 10-11, 1998, another EPA representative, Mr. David Whiting, conducted such an inspections. As a result of the inspections, EPA filed a Complaint against Respondent, charging it with the violations as set forth in the three counts. The violations have been conceded. (*supra* note 3).

With respect to Count I, that Respondent on eight separate occasions stored hazardous waste at the facility for periods greater than the 90 days allowed by RCRA, without a permit, interim status, or an extension granted by EPA, the following has been established:
(1) Respondent stored containers of D001 and F003 hazardous waste at the facility for a period of 187 days from October 11, 997 to April 17, 1998; (2) Respondent stored containers of D001, F003, and F005 hazardous waste at the facility for a period of 112 days from April 24, 1997 to August 14, 1997; (3) Respondent stored containers of D001, F003, and F005 hazardous waste at the facility for a period of 143 days from December 2, 1996 to April 24, 1997; (4) Respondent stored containers of D001, F003, and F005 hazardous waste at the facility for a period of 111 days from August 18, 1996 to December 2, 1996; (5) Respondent stored containers of D001, F003, and F005 hazardous waste at the facility for a period of 160 days from March 6, 1996 to August 18, 1996; (6) Respondent stored containers of D001, F003, and F005 hazardous waste at the facility for a period of 264 days from June 16, 1995 to March 6, 1996; (7) Respondent stored containers of D001, F003, and F005 hazardous waste at the facility for a period of 134 days from February 2, 1995 to June 16, 1995; and (8) Respondent stored containers of D001, F003, and F005 hazardous waste at the facility for a period of 118 days from May 13, 1994 to September 7, 1994.

The violation alleged in Count II of the Complaint, that Respondent failed to develop or use a personnel training program that is aimed at compliance with the requirements of 40 C.F.R. Part 265, and that teaches employees how to respond to emergency situations, is based on the findings made during the February 1998 inspection of the facility. While Respondent did provide its employees with OSHA hazardous communication training and had a pamphlet at the facility describing proper hazardous waste

management, Respondent failed to have a written description of the personnel training program or records documenting that persons working at the facility received and completed such training.

Regarding the violations alleged in Count III, it has been conceded that Respondent's contingency plan failed to meet the requirements of 40 C.F.R. §§ 265.50-.54 as it (1) did not describe emergency arrangements agreed to by local police departments, fire departments, hospitals, contractors, and state and local emergency response teams, pursuant to 40 C.F.R. § 265.37; (2) did not list names, addresses, and telephone numbers (both office and home) of all persons qualified to act as emergency coordinator; and (3) did not include a list of all emergency equipment at the facility, describe the locations and physical description of the equipment, or provide an outline of the capabilities of such equipment.

LIABILITY

As Respondent has conceded all factual and legal issues regarding the three Counts, the Court finds Respondent liable for all three counts. Respondent's storage of D001, F003, and F005 hazardous waste on site without a permit or interim status for more than 90 days, violated Section 3005 of RCRA, 42 U.S.C. § 6925(a). Respondent's failure to develop or use a personnel training program in a manner that ensures compliance with the regulations of 40 C.F.R. Part 265, violated 40 C.F.R. § 265.16. Last, Respondent's failure to have and to update a contingency plan for the facility that contains all of the requirements of 40 C.F.R. Part 265, violated 40 C.F.R. §§ 265.52(c),(d), and (e).

PENALTY DETERMINATION

Pursuant to RCRA Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), "[a]ny penalty assessed...shall not exceed $25,000 per day[5] of noncompliance for each violation of a requirement of [Subchapter III]." The section also states that the Court must "take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." RCRA Section 3008(a)(3), 42 U.S.C. § 6928(a)(3).

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[5]This figure has been increased for inflation by 10%, to $27,500, for violations that occur after January 30, 1997. 40 C.F.R. Part 19.

In determining a proper penalty, the Court must rely on the "evidence in the record" and must do so "in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). The Court must consider "any civil penalty guidelines issued under the Act." Id. EPA has issued such guidelines to aid in the calculation of penalties for violations of RCRA. The RCRA Civil Penalty Policy ("Penalty Policy"), which was issued in October 1990, consists of four components that are used to calculate the penalty: (1) a gravity-based component; (2) a multi-day component; (3) adjustments of the sums of the gravity-based and multi-day components; and (4) an economic benefit component.

For Count I of the Complaint, EPA has proposed a civil penalty in the amount of $55,050. In determining this total for Count I, EPA calculated a gravity-based penalty in the amount of $5,500, a multi-day penalty in the amount of $49,225, and a penalty for Respondent's economic benefit of noncompliance in the amount of $325. For Count II of the Complaint, EPA determined that a penalty of $74,381 is appropriate. This total reflects a $5,500 gravity-based penalty, a $49,225 multi-day penalty, and a $19,656 penalty for Respondent's economic benefit of noncompliance. With respect to Count III, Respondent calculated a penalty of $20,858, which consists of a gravity-based penalty of $550, a multi-day penalty of $19,690, and a $618 penalty for economic benefit.

COUNT I : EPA's Penalty Calculation for Count I

1. Gravity

In arriving at the $55,050 proposed penalty for the violation alleged in Count I of the Complaint, EPA first looked to the gravity of the violation, in accordance with the RCRA Penalty Policy. EPA determined that the Count I violation fell within the moderate potential for harm/moderate extent of deviation category in the penalty cell matrix. This determination produced a $5,500 gravity-based penalty. According to the written testimony of Royce Kemp, this penalty amount reflects the lowest end of the cell's range for a moderate potential for harm/moderate deviation, after inclusion of the 10% upward adjustment for inflation. Written Testimony of Royce Kemp (CX19) at 7.

A. Evaluation of the Potential for Harm

EPA found that the violation fell within the range of moderate potential for harm because Respondent stored hazardous waste for "extended periods of time" which increases the potential for leaking

containers and accidental releases of wastes, both of which could negatively impact the drinking water supply and could disrupt the ecosystem. EPA also explained that "extended periods of hazardous waste storage tend to lessen the accountability of a facility's waste management system, which can ultimately result in improper disposal practices" and undermine the RCRA permitting program. Complainant's Brief in Support of Complainant's Proposed Findings of Fact, Conclusions of Law ("Complainant's Brief") Order at 13; Complainant's Reply to Respondent's Post-Hearing Brief ("Complainant's Reply Brief") at 1-2. EPA did not find that a minor potential for harm designation was proper because of the increased risks of harm to human health and the environment associated with storing hazardous waste for extended periods of time. CX19 at 7; Complainant's Brief at 13. EPA also did not find that there was a major potential for harm from this violation because, according to Mr. Kemp, the drums in both storage areas were not damaged, incompatible wastes were stored separately, and the majority of the drums were labeled as hazardous waste, to reduce the risk of accidental exposure. CX19 at 8.

B. Evaluation of the Extent of Deviation

Following the penalty guideline for RCRA, EPA next determined that the extent of deviation was moderate because of the extended periods of time that spent solvent waste was stored outside. Such storage occurred for over 90 days on each of eight separate occasions. CX19 at 8; Complainant's Brief at 14. Storing the drums of hazardous waste outdoors for such extended periods of time[6], EPA argues, increases the risk that the drums would leak due to rusting.[7] CX19 at 8. The violation did not amount to a minor deviation because Respondent stored the hazardous waste for over 90 days on the listed occasions over a period of close to four years, and was never in compliance with the hazardous waste treatment, storage, or disposal requirements of 40 C.F.R. Part 264 during those time periods. CX19 at 8; Complainant's Brief at 14. EPA did not consider the violation in Count I a major deviation, as the facility did "manifest off-site hazardous waste still bottoms from the indoor storage area, although not always in the

[6]As discussed previously, on seven of the eight occasions of the alleged violations, Respondent stored hazardous waste on-site for periods greater than 100 days and on one occasion stored the waste for more than 200 days. See supra text at 3-4.

[7]There were 42 drums of spent solvent waste that were stored on-site in violation of RCRA Section 3005(a).

90 day period required." CX19 at 8.

2. The Multi-day Component

After analyzing the seriousness of the violation, EPA, in accordance with the RCRA Penalty Policy, calculated the multi-day penalty. Under the Policy, a multi-day penalty is mandatory when EPA determines that the potential for harm and the extent of deviation each fall within the moderate range. For Count I, EPA calculated a multi-day fine in the amount of $49,225. This total reflects a per day amount of $275, which is the lowest end of moderate-moderate cell in the multi-day matrix, adjusted upward 10% for inflation, multiplied by 179, which is the number of days of violation the penalty policy presumes for this type of violation. CX19 at 9; Complainant's Brief at 15. Respondent stored hazardous waste for periods longer than 90 days on eight different occasions between August 11, 1994 and April 17, 1998, which amounts to at least 500 days of storage in violation of RCRA. Id. Thus, EPA used the full 179 days presumed by the Penalty Policy in making this calculation. EPA also determined that the $275 per day amount was appropriate to "serve as a deterrent for future violations." Id.

3. Economic Benefit of Noncompliance

EPA used an expert, Mr. Jonathan Sheffetz, to help calculate the present value of the economic benefit.[8] EPA determined Respondent's economic benefit of noncompliance for Count I to be $325. The $325 amount "represents the savings realized by [Respondent as a result] of delaying the removal of the excess spent solvent and other hazardous wastes that were disposed of by the facility subsequent to the February 10-11, 1998 compliance evaluation inspection." CX19 at 10-11. Based on April 29, 1998 correspondence from Respondent to Mr. Kemp, and a May 22, 1998 telephone conversation between Dan Freeman of Titan Wheel and Mr. Kemp, Respondent spent $21,680 "to analyze and dispose of hazardous wastes" which had been stored on-site for more than 90 days. Id. at 11. EPA determined that the economic benefit penalty should be $325, a figure which represents the earnings potential of the $21, 680 during the period of noncompliance. Id.

[8]Mr. Sheffetz's services were used for the determination of the economic benefit for each of the three Counts of the Complaint.

Respondent's Position Regarding the Penalty for Count I

Respondent maintains that the penalty EPA has proposed for Count I is unreasonable and that EPA, in calculating it, ignored Respondent's good faith efforts to comply with RCRA Section 3005(a).[9] Respondent argues that under the gravity component of the penalty policy, both the potential for harm and the extent of deviation should be in the minor category. Respondent's Post-Hearing Brief ("Respondent's Brief") at 4-5. In coming to the conclusion that there was only a minor potential for harm, Respondent notes that the drums containing the hazardous waste were not damaged, that at the time of the February 1998 inspection it regularly shipped hazardous waste off-site for disposal, and that it stored incompatible wastes separately. Id. Respondent also argues that it made good faith efforts to comply with RCRA both before and after the inspection, and that therefore, the extent of its deviation from the requirements was only minor. Id. at 16. Its efforts, according to Respondent, are evidenced by the fact that it regularly shipped waste off-site for disposal and that, soon after it learned of the 90-day violations, it removed all excess drums containing hazardous waste from the facility and instituted an 80 day maximum storage limit. Respondent also notes that it increased recycling to reduce its inventory of waste on the premises. Id. at 4-5. Respondent contends that by placing the violations alleged for Count I in the minor potential for harm and minor extent of deviation categories, EPA would not be required to institute a fine for the multi-day component of the penalty policy and, as a result, the proposed multi-day penalty could be dropped. Id. at 16.

The Court's Penalty Determination for Count I

Respondent argues that the potential for harm should be minor and not major because the drums were not damaged, incompatible wastes were not stored together, and it regularly shipped waste off-site

[9]In its Reply Brief, Respondent argues generally, that "EPA provides only conclusory and arbitrary justifications for the penalties it seeks to impose upon [Respondent]...." Respondent does not challenge the methods of calculation in either of its two briefs, except when arguing the economic benefit calculations. See infra text at 10-11 (discussion of Respondent's assertions against EPA's calculation of economic benefits).

for disposal. Id. at 16. However, EPA, in determining that the potential for harm should be placed in the moderate category, took those factors into account, noting that because Respondent stored incompatible wastes separately, the containers were not damaged, and the majority of the drums were labeled as hazardous waste, the potential for harm was not *major*.

Respondent's argument that the fact that it regularly shipped waste off-site for disposal demonstrates its good faith efforts is not persuasive, as Respondent repeatedly shipped waste off-site only after the 90 days allowed by RCRA. The violations encompassed within Count I occurred on eight separate occasions, over four years, and for periods of greater than 100 days on each of the occasions. Efforts to ship waste off-site for disposal after, for example, storing it on-site outside, for a period of 264 days without a permit or interim status, as Respondent did from June 16, 1995 to March 6, 1996, 174 days beyond the 90-day limit, or for a period of 187 days, as Respondent did from October 11, 1997 to April 17, 1998, 97 days longer than RCRA allows, do not appear to be attempts by Respondent to with comply with RCRA.[10] Furthermore, EPA points out that Respondent did not disclose its noncompliance to EPA or attempt to remedy the violations prior to EPA's discovery of the violations during the inspections.

Based on the fact that the violations took place over several years, for periods greater than 90 days during each of those periods, without any apparent attempt to by Respondent to determine its obligations under RCRA for disposal or to remedy the violations, the Court finds that EPA was correct in its assessment of the penalty calculated for the gravity component and the multi-day component of the penalty for Count I of the Complaint.

With respect to the economic benefit penalty, Respondent maintains that EPA's calculation is "arbitrary" and "illegal."[11] Respondent's Brief at 20. Respondent criticizes the methods used by Mr. Sheffetz in calculating the benefit, arguing that the determining costs by compounding Respondent's cash flows "at an estimate of [Respondent's] cost of capital to determine the present value of economic benefit, is flawed.

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[10]It is also noted that despite EPA's notification to Respondent of its violations of RCRA § 3005 through its February 11, 1998 Notice of Violation, Respondent still failed to ship the drums of hazardous waste off-site for disposal until more than two months after such notice.

[11]Respondent makes this argument for the economic benefit calculations for all three Counts of the Complaint. See infra text at 17, 20.

Respondent argues that accordingly, the penalty should be reduced from $325 to $233.

EPA, on the other hand, emphasizes that "Respondent neither provided its own expert testimony nor attempted to discredit that of Mr. Sheffetz by submitting its own evidence into the record or cross examining Mr. Sheffetz," as both Respondent and EPA waived their right to a hearing. Complainant's Reply Brief at 14. EPA notes that the Court warned Respondent that waiving its right to hearing would prevent Respondent from being able to orally cross-examine EPA's witnesses, and Respondent understood this risk. Id. at n. 8.

The Court agrees with EPA's arguments that Respondent failed to provide its own expert testimony and failed to submit its own evidence. Both parties waived their right to a hearing on this matter. Thus, *at least on the record*, there is no basis to reject the economic benefit calculation performed by EPA. Accordingly, the Court adopts EPA's penalty calculation for Count I and imposes a penalty of $55,050.

COUNT II: EPA's Penalty Calculation for Count II

1. Gravity

In calculating the gravity for Count II, EPA determined that the violation fell within the moderate potential for harm/moderate extent of deviation range of the penalty policy cell matrix, and again selected the lowest end of the cell's range, producing a penalty of $5,500. CX19 at 11. In this instance EPA chose the low-end of the cell matrix because Respondent did provide other training[12] and had on file one copy of a pamphlet describing proper hazardous waste management. CX19at 12. Selecting a penalty at the low-end of the cell matrix, in EPA's view, also was warranted due to the "small proportion of hazardous waste activity conducted on-site compared to the size and sophistication of the facility." Id.; Complainant's Brief at 21.

A. Evaluation of the Potential for Harm

EPA determined there was a moderate potential for harm for this Count because Respondent did not provide hazardous waste management as required by 40 C.F.R. § 265.16. CX19 at 11; Complainant's Brief at 20. EPA stated that "[h]ad employees received this training, other violations that were discovered during

[12]See supra text at 4; See infra text at 14 (noting that Respondent conducted OSHA Hazard Communication Training for facility personnel).

the inspection could have been avoided." CX19 at 11. By not providing the training and annual updates, EPA argues that moderate harm to the RCRA program occurred. EPA did not find the potential for harm to be minor because the lack of training placed facility personnel at an increased risk for exposure to the hazardous waste, and because untrained personnel are more likely to contribute to accidental releases or improper disposal, resulting in harm to the environment, through the mishandling of the waste. EPA did not find however, that there was a major potential for harm because Respondent did provide the Occupational Health & Safety Act ("OSHA") Hazard Communication training to its employees. CX19 at 11-12.

B. Evaluation of the Extent of Deviation

EPA found the extent of Respondent's deviation from the requirements under 40 C.F.R. § 265.16 to be moderate because Respondent failed, in large part, to comply with them. CX19 at 12; Complainant's Brief at 21. EPA noted that Respondent did not complete the required training and did not have written documentation of job descriptions or of any related training that personnel may have completed. Id. A minor extent of deviation was not selected due to the fact that the Respondent failed to "conduct any initial or annual reviews of the hazardous waste management" practices, which contributed to Respondent's "noncompliance with several other RCRA requirements." Id. EPA did not however, conclude that the extent of deviation was major because Respondent did conduct some hazardous communication training under OSHA. EPA emphasizes that this training is not equivalent to the training required by RCRA. CX19 at 12.

2. Multi-day Component

As noted previously, the RCRA Penalty Policy directs EPA to impose a multi-day penalty when the potential for harm and the extent of deviation fall within the moderate range. The multi-day penalty proposed by EPA, $49,225, was calculated using the same per day amount with the inflation adjustment and multiplying that figure by 179. This figure was viewed as an appropriate penalty to serve as a deterrent against future violations. CX19 at 13; Complainant's Brief at 22.

3. Economic Benefit of Noncompliance

After determining that no other adjustments to the penalty were necessary, EPA evaluated whether Respondent received an economic benefit due to noncompliance. EPA concluded that Respondent benefitted from its noncompliance by $19, 656 for Count II. CX19 at 14; Complainant's Brief at 24. This figure reflects the money saved by Respondent by failing to provide annual refresher training courses for eight facility employees.[13] CX19 at 14. Based on a table for annual training costs in an EPA publication entitled "Estimating Costs for the Economic Benefit for RCRA Noncompliance," the benefit in 1997 dollars would total $4,876.[14] Id.; Complainant's Brief at 24. EPA next adjusted this figure to 1999 dollars, calculating the total economic benefit to be $19,656, which represents Respondent's savings over the five year period of the violation from avoiding the costs of providing annual refresher training courses. Id.

Respondent's Position Regarding the Penalty for Count II

Respondent objects to the penalty proposed for Count II, arguing that the potential for harm was only minor, as it provided its employees with OSHA Hazard Communication Training in accordance with OSHA regulations and, for that reason, its failure to document this training should be considered only a minor violation. Respondent's Brief at 17. Additionally, Respondent maintains that it made good faith efforts to comply after it learned of the violation, by instituting a Hazardous Waste Management training program. Id. at 18.[15] Additionally, EPA recognized that with respect to the extent of deviation, EPA found that it was only moderate and not major because of Respondent's use of OSHA training.

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[13]According to Mr. Kemp's testimony, during an August 4, 1998 conversation he had with Respondent's Safety and EPA Program Coordinator, Mr. Dan Freeman, Mr. Freeman determined that eight employees would require the hazardous waste training: six general facility laborers, one equipment operator, and one supervisor.

[14]This cost reflects six laborers at $490 each, one equipment operator at $570, and one supervisor at $1,386. CX19 at 14; Complainant's Brief at 24.

[15]The gravity of the violation, according to Respondent should be considered minor and as such, the gravity based penalty should be $110. Respondent also argues that the $110 figure should be reduced to $66 for its alleged good faith efforts to comply. Respondent's Brief at 17.

The Court's Penalty Determination for Count II

The Court finds that EPA's penalty calculation Count II is appropriate. Respondent made attempts to remedy its violation after receiving notice of it, but did not do so immediately. After EPA notified it of the violation by not implementing a training program, Respondent did not devise or initiate a personnel training program at any time prior to August 4, 1998, a period of approximately six months after it received notice of the violation. Thus, while Respondent did correct its violation, its delay in doing so demonstrates to the Court that Respondent was not expeditious in meeting its obligations for hazardous waste management. Therefore its efforts do not evidence any good-faith efforts to comply with RCRA. Furthermore, while Respondent argues that the economic benefit analysis was flawed, and that it should be reduced from $19, 656 to $18, 843, the Court finds no reason, upon reviewing the record, to deviate from EPA's proposed penalty for economic benefit.[16] Accordingly, for Count II, the Court imposes the $74,381 penalty, as proposed by EPA.

COUNT III: EPA's Penalty Calculation for Count III

1. Gravity

In proposing the $20,858 penalty for Count III, EPA found the potential for harm to be minor and the extent of deviation to be moderate. As such, it calculated a gravity based penalty in the amount of $550. This figure is the amount at the lowest end of the cell's range for minor potential for harm/moderate extent of deviation/, after inclusion of the 10% upward adjustment for inflation. CX19 at 15; Complainant's Brief at 26.

A. Evaluation of the Potential for Harm

EPA selected a minor potential for harm because it viewed Respondent's use of the OSHA Hazard training program to somewhat decrease the risk of harm to employees and the environment. EPA notes that Respondent also presented the OSHA Emergency Action Plan to EPA as its RCRA contingency plan. CX19 at 15. The OSHA plan, however, does not meet all of the requirements for a contingency plan under RCRA, as it fails to describe arrangements with local authorities, list emergency coordinators, or list

[16] See supra text at 12.

emergency equipment. Id.; Complainant's Brief at 25. Nonetheless, EPA determined that from the OSHA Hazard Communication Training and the OSHA Emergency Action Plan, facility personnel "would likely have knowledge as to what to do in a general emergency and how to evacuate the facility if necessary." Id. EPA did not select a moderate or major potential for harm because Respondent made the emergency responders aware of the hazardous waste at the facility. Id. Also, as EPA took into consideration with the penalty determination for the other two Counts, the proportion of hazardous waste activities conducted at the facility is small compared to the size of the facility's overall operations. Id.; Complainant's Brief at 25-26.

B. Evaluation of the Extent of Deviation

EPA found, however, that the extent of deviation was moderate because "Respondent's contingency plan lacked several important items of information required by 40 C.F.R. § 265.42." CX19 at 15; Complainant's Brief at 26.[17] EPA did not find that there was a major extent of deviation because Respondent did use the OSHA Emergency Action Plan, and "the RCRA regulation allows for amending an existing contingency or emergency plan." CX19 at16.

2. Multi-Day Component

Under the Penalty Policy, a multi-day penalty is discretionary for violations categorized as having a minor potential for harm but with a moderate extent of deviation. Because Respondent continued its hazardous waste activities at the facility after being notified of the violation without adding the required elements to its contingency plan prior to August 4, 1998, EPA decided to calculate a multi-day penalty, because in its view Respondent's failure to remedy its violation in a expeditious fashion created additional risks. CX19 at 16; Complainant's Brief at 27. EPA arrived at the multi-day penalty of $19,690 by multiplying $110, which is the lowest end of the cell matrix for violations with a minor potential for harm and a moderate extent of deviation, adjusted upward by 10% for inflation, by 179 days. CX19 at 16-17; Complainant's Brief at 27. The figure 179 was used again in this instance because Respondent was in violation for "well over the total 180 days...." CX19 at 17; Complainant's Brief at 27.

3. Economic Benefit of Noncompliance

[17] See supra text at 4-5 (listing the required items missing from Respondent's contingency plan).

EPA calculated an economic benefit of noncompliance of $618, an amount reflecting the money Respondent saved as a result of its failure to have a contingency plan meeting all of the RCRA requirements for a period of five years.

Respondent's Position Regarding the Penalty for Count III

Respondent contends that the penalty proposed for the violations alleged in Count III is inappropriate. Respondent's Brief at 18-19. Specifically, Respondent argues that, as with EPA's determination that the potential for harm was minor, so too its extent of deviation from the RCRA requirements for contingency plans was only minor, as it substantially complied with the requirements. Id. at 19. Respondent also maintains that in calculating this penalty, EPA ignored its good faith efforts to comply with the contingency plan requirements both prior to and after the inspection.[18] Id. Additionally, after being notified of the violations, Respondent argues that it quickly updated its contingency plan to include the missing elements required under RCRA, and established a policy for updating the plan. Id. at 18-19.

The Court's Penalty Determination for Count III

The Court finds no reason to deviate from the penalty proposed by EPA for this Count. While Respondent did update its contingency plan to comply with the requirements under 40 C.F.R. Part 265, it did not do so until August 1998, approximately six months after receiving notification from EPA as to its violation. Thus Respondent's efforts to comply with the law took some extended time. Further, in calculating the penalty EPA did not ignore the fact that Respondent substantially had complied with the regulations. Accordingly, Respondent's efforts fail to demonstrate that it was making good faith efforts to comply. On the same grounds advanced for Counts I and II, Respondent argues that the calculation for Count III also is flawed.[19]

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[18] Respondent contends that EPA ignored the fact that prior to receiving notice of violation, it fulfilled many other requirements under 40 C.F.R. §§ 265.50-52. Respondent's Brief at 3, 19.

According to Respondent, the gravity based penalty should be $110 after placing the violation in the minor/minor category and then it should be reduced to $66 to reflect Respondent's alleged good faith efforts to comply. Id. at 19.

[19] See supra text at 12.

The Court, however, for the reasons discussed previously, will not depart from EPA's proposed penalty for economic benefit as Respondent has not, on this record, countered EPA's analysis. Accordingly, for Count III the Court imposes a civil penalty of $20,858.

Penalty and Compliance Order

A civil penalty in the amount of $150,289 is assessed against the Respondent. The Court also orders Respondent to take all actions listed in the Compliance Order sought by EPA, and according to the timetable for such compliance, all as set forth at Paragraph 35 of the Complaint at subparagraphs (a), (b), (c), (d), (e).[20] Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check payable to the Treasurer, United States of America and mailed to:

Mellon Bank
EPA Region 7
Regional Hearing Clerk
P.O.Box 360748M
Pittsburgh, PA 152521

A transmittal letter identifying the subject case and the EPA docket number, plus the Respondent's name and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalties.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30(a), within thirty (30) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under

[20]The authority to issue a Compliance Order appears at Section 3008(a)(1) of RCRA, 42 U.S.C. § 6928(a)(1) and provides in relevant part: "...whenever on the basis of any information the Administrator determines that any person has violated any requirement of this subchapter, the Administrator may issue an order ... requiring compliance immediately or within a specified time period ..."

40 C.F.R. § 22.30(b), to review the Initial Decision.

William B. Moran
United States Administrative Law Judge

Dated: May 4, 2001

In the Matter of Titan Wheel Corporation of Iowa, Respondent
Docket No. RCRA-VI-98-H-0003

CERTIFICATE OF SERVICE

I certify that the **Initial Decision**, dated May 4, 2001 was sent this day in the following manner to the addressees listed below.

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: May 4, 2001

Original By Regular Mail To:

Kathy Robinson
Regional Hearing Clerk
U.S. EPA
901 North 5th Street
Kansas City, KS 66101

Copy By Regular Mail To:

Mike Gieryic, Esquire
Assistant Regional Counsel
U.S. EPA
901 North 5th Street
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Copy By Certified Mail Return Receipt To:

Stanley A. Reigel, Esquire
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