

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the matter of)
)
Brenntag Great Lakes, LLC,) **Docket No. RCRA-5-2002-0001**
(f/k/a MILSOLV Minnesota Corporation))
)
Respondent)

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: June 2, 2004
Washington, D.C.

Appearances

For Complainant: Andre Daugavietis, Esq.
Joseph Williams, Esq.
Region 5
U.S. Environmental Protection Agency
Chicago, Illinois

For Respondent: Thomas Terp, Esq.
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I. Statement of the Case

This enforcement proceeding arises under Section 3008(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act of 1976 (“RCRA”). 42 U.S.C. § 6928(a). The United States Environmental Protection Agency (“EPA”) issued a complaint charging MILSOLV Minnesota Corporation (“Milsolv”) with one violation of RCRA for failing to comply with Minnesota Rule 7001.0520, subp. 1, item A.¹ EPA has authorized the State of Minnesota to enforce its own RCRA program in lieu of the Federal

¹ Subsequent to the filing of the complaint in this case, Milsolv was merged into Brenntag Great Lakes, LLC. The caption of this case has been amended to reflect this merger. The parties, however, continue to refer to the respondent as “Milsolv.” Tr. 28, 834.

program. The Minnesota Rule at issue provides that it is unlawful to store and to treat hazardous waste without a hazardous waste facility permit. EPA seeks a \$358,678 civil penalty for this alleged RCRA violation. 42 U.S.C. § 6928(a).²

It is undisputed that respondent did not possess a hazardous waste facility permit. Milsolv, however, disputes the charge of violation. It argues that the material stored and treated at its facility was a “co-product” and not a hazardous waste. If that were the case, there would have been no need for a hazardous waste facility permit and thus there would be no RCRA violation.

A hearing was held in this matter on January 22-24, 2003, in Chicago, Illinois. The hearing was continued on February 11-12, 2003, in Cincinnati, Ohio. As set forth below, it is held that Milsolv violated Section 3008(a) of the Resource Conservation and Recovery Act of 1976, as alleged by EPA. 42 U.S.C. § 6928(a). For this violation, respondent is assessed a civil penalty of \$175,000.

II. Facts

A. Introduction

This case involves the chemicals anhydrous isopropyl alcohol (“anhydrous IPA”) and aqueous isopropyl alcohol (“aqueous IPA”). Anhydrous IPA contains isopropyl alcohol, also referred to as isopropanol, and only trace amounts of water. Aqueous IPA contains both isopropyl alcohol and water. Tr. 428, 435, 602. The aqueous IPA involved in this case, for example, contained as much as 21 percent water. Of these two isopropyl alcohols, anhydrous IPA is the more commercially valuable. Tr. 617.

Here, Milsolv, a chemical distributor, purchased aqueous IPA from another chemical distributor. Milsolv then removed the water from this aqueous IPA, thereby rendering it anhydrous IPA (*i.e.*, isopropyl alcohol with only trace amounts of water). EPA alleges that the aqueous IPA that was stored and treated by Milsolv was a “hazardous waste.” EPA further alleges that respondent did not have a hazardous waste facility permit when it stored and treated the aqueous IPA. This, EPA charges, is a violation of Minnesota State law and hence, a violation of the Resource Conservation and Recovery Act of 1976. *Id.*

Milsolv disputes this charge of violation, asserting that the aqueous IPA was not a hazardous waste. It argues that the aqueous IPA was, instead, a “co-product” generated by the

² In the complaint, EPA also sought enforcement of a compliance order. EPA, however, did not address the compliance order issue at any subsequent time in this proceeding. It is assumed, therefore, that a civil penalty is the only relief which complainant seeks. *See* Compl. Br. at 49.

3M Company during the manufacturing of an adhesive product.³ Milsolv further maintains that co-products are not regulated by the State of Minnesota and, as a result, there can be no RCRA violation for the storage and treatment of the aqueous IPA.

B. 3M Cordova

The aqueous IPA purchased by Milsolv originated at a 3M facility located in Cordova, Illinois (“3M Cordova”). 3M Cordova began producing this aqueous IPA in late 1994. It ceased its production sometime around the middle of 1999. Tr. 610. Just how this aqueous IPA was generated by 3M Cordova is set forth below.

The aqueous isopropyl alcohol resulted from a manufacturing process at 3M Cordova designed to strengthen adhesive through the addition of glass fibers. The glass fibers started out in the form of small square wafers. Because the glass fibers were held together with a starch binder, it was necessary to first remove the starch. Accordingly, the fibers were placed in a 55-gallon drum and water was added to dissolve the starch. Once the starch was dissolved, the bundled glass fibers were released. The released fibers took on the appearance of “cotton candy” in water. The water and starch were then pumped out of the drum and discharged to the sewer, essentially leaving only the glass fibers in the drum. As the water and starch were discharged, a filter was used to keep the fibers in the drum. This rinsing process was repeated in order to remove the starch residue from the glass fibers. Despite the fact that the water and starch were pumped out of the drum, small amounts of water still remained on the glass fibers.

The next step involved removing the glass fibers from the 55-gallon drum and placing them into a 4,000-gallon reactor vessel. There, they were to be incorporated into the adhesive. A number of drums of fibers were placed into the reactor vessel prior to the addition of the adhesive mixture. Because water adversely affects the strength of the adhesive, the small amounts of water still remaining on the glass fibers had to be removed before the adhesive could be added. This is where the anhydrous IPA came into play.

As noted, anhydrous IPA essentially contains no water. It is 99.9 percent isopropyl alcohol. The anhydrous IPA was added to the reactor vessel in order to remove the water remaining on the glass fibers. This solution was then pumped from the vessel. Again, as it was being pumped from the reactor vessel this solution passed through a filter so as to screen out the glass fibers. This process of adding anhydrous IPA and then pumping out the resulting solution was repeated in order to keep the water left on the fibers to an “absolute minimum.” At this point, the isopropyl alcohol that had been added to the reactor vessel, and then pumped out, was no longer anhydrous IPA. Because it now contained the water that was removed from the glass fibers it no longer qualified as anhydrous IPA; instead, it was now aqueous isopropyl alcohol, or aqueous IPA. Finally, the adhesive mixture was added to the glass fibers in the vessel to

³ The 3M Company generated the aqueous IPA during a manufacturing process and then sold it to a chemical distributor, which then resold it to Milsolv.

produce the finished adhesive product.

Unlike the water and starch solution that was pumped out of the 55-gallon drum early in the adhesive manufacturing process and that was subsequently discharged to the sewer, the isopropyl alcohol and water solution pumped from the reactor vessel had value. Accordingly, the aqueous IPA that was pumped out of the reactor vessel was stored by 3M Cordova in either a trailer or in drums. It was assigned a product number by the company. 3M Cordova did not use this aqueous IPA in its adhesive strengthening process because, unlike isopropyl alcohol in its anhydrous state, aqueous isopropyl alcohol is not effective for removing water from glass fibers. Tr. 594-610.

While 3M Cordova determined that it had no use for aqueous IPA at its facility, the company also determined that there was a ready market for this isopropyl alcohol and water solution. Tr. 439, 609, 661. Thus, in early 1995, 3M Cordova made its first sale of aqueous IPA to a company called Products and Recycling Services, Inc. (“Products and Recycling Services”). All the aqueous IPA processed by 3M Cordova was sold to this company and to its successor, PAR Services, Inc. (“PAR”). Tr. 610-611.

The amount that Products and Recycling Services, and subsequently PAR, paid for this aqueous IPA depended on its water content. According to a 3M Cordova representative, the aqueous IPA that they sold was approximately 75-80 percent isopropyl alcohol, with the remainder being water. Tr. 591. The lower the percentage of water and the higher percentage of isopropyl alcohol, the higher the cost of this chemical. Tr. 617. Accordingly, prior to sale, 3M Cordova tested the aqueous IPA to determine its water content and hence its value. Tr. 617-618. In addition, as a part of the sale process, 3M Cordova provided a Material Safety Data Sheet to the purchaser, which listed the components and hazards of the aqueous isopropyl alcohol. Tr. 625. 3M Cordova discontinued adding the glass fibers to the adhesive mixture in 1998. It stopped shipping the aqueous isopropyl alcohol to PAR at the same time. Tr. 631.

C. Products and Recycling Services and PAR

As noted, in early 1995, 3M Cordova began selling its aqueous IPA to Products and Recycling Services. In 1998, PAR took over the business from Products and Recycling Services. Tr. 765-766, 783. Like Products and Recycling Services, PAR is a chemical broker. Also, like its predecessor, PAR does not manufacture chemicals, nor does it store or treat any of the chemicals it sells. Rather, Products and Recycling Services and PAR were middlemen located in Fort Wayne, Indiana, who simply purchased chemicals, such as aqueous IPA, and sold these chemicals to customers, such as Milsolv. Tr. 771-772. Darrell Patton, the president of PAR, testified that his company does not handle hazardous waste. Tr. 769.

Both Products and Recycling Services and PAR bought the aqueous IPA from 3M

Cordova “as is” and they sold it to Milsolv “as is.” Tr. 792.⁴ Also, both Products and Recycling Services and PAR shipped the aqueous IPA to Milsolv on a standard bill of lading and both provided their customer with a Material Safety Data Sheet. Tr. 790-791; RX 5. They also arranged for the shipment of this aqueous IPA from the 3M facility in Cordova, Illinois, directly to the Milsolv facility in Roseville, Minnesota. Tr. 765-766. (PAR referred to this aqueous isopropyl alcohol purchased from 3M Cordova and sold to Milsolv as “IPA 55.” Tr. 777.) PAR stopped its sale of aqueous IPA in approximately 1999, when 3M Cordova stopped adding glass fibers to its adhesive mixture and the supply of aqueous IPA no longer was available. Tr. 795; RX 23.

D. Milsolv

Milsolv also is a chemical distributor. It has been in business since the 1950's. Milsolv plays a “middle role” in representing more than 300 manufacturers and in selling more than 6,000 products. One of the products that it buys and sells is aqueous isopropyl alcohol. Milsolv purchases this aqueous IPA and resells it to companies for uses such as a press wash in a printing operation, or as windshield wash solvent in the automotive after-market. Tr. 834, 838-839, 852.

Sometime around mid-1997, Products and Recycling Services agreed to provide aqueous IPA to Milsolv. Tr. 863. Milsolv would place a purchase order for the aqueous IPA with Products and Recycling Services, and subsequently with PAR, and these chemical distributors would make the necessary arrangements with 3M Cordova. As noted, it was Products and Recycling Services and PAR which arranged for the shipment of the aqueous IPA directly from 3M's Cordova, Illinois, plant to Milsolv's facility in Roseville, Minnesota. Tr. 871; RX 36.

The aqueous IPA was purchased by Milsolv “as is.” An accompanying specification sheet indicated that the material contained between 79-85 percent isopropyl alcohol, with the remaining balance being water. Tr. 864-865; RX 5. Milsolv's last purchase of this aqueous IPA occurred in either early or mid-1999. It was at this time that 3M Cordova had stopped selling this chemical solution to the chemical distributor PAR. Tr. 870-871.

During the time period that Milsolv was purchasing the aqueous IPA, however, some of its customers wanted an IPA product with a higher concentration of isopropyl alcohol than was present in the aqueous IPA that respondent obtained from the 3M Cordova plant. Tr. 842. In that case, Milsolv would either purchase isopropyl alcohol in a more concentrated form, *i.e.*, with less water, or it would extract water from the aqueous IPA purchased from 3M Cordova. Tr. 841. In the latter event, respondent extracted the water using a molecular sieve, otherwise

⁴ PAR also sold some of the 3M Cordova aqueous IPA to a company called Tradco. Tradco was described as a packager for automotive after-market products. The aqueous IPA was used by Tradco in products such as carburetor cleaner and windshield washer. Tradco is not a party to this enforcement action, nor is there any assertion by EPA that PAR's sale of aqueous IPA to Tradco was unlawful. Tr. 777, 780.

referred to as a “dehydrator.” Tr. 842. A dehydrator essentially is a “still.” It distills the material, recovers the isopropyl alcohol, and then discharges the water. Tr. 440.

It is respondent’s storage of this aqueous IPA and its treatment of this material in the dehydrator to produce anhydrous IPA which is the focus of EPA’s enforcement action. EPA asserts that the aqueous IPA which Milsolv received from 3M Cordova, stored on-site, and then treated in its dehydrator, was a hazardous waste. If that were the case, Milsolv would have needed a hazardous waste facility permit (which it did not have) pursuant to Minnesota Rule 7001.0520, subp. 1, item A.

E. The Enforcement Action Against Milsolv

1. St. Paul-Ramsey County Department of Health

The enforcement action against Milsolv began with the St. Paul-Ramsey County Department of Public Health (“Ramsey County”). Milsolv is registered with Ramsey County as a 10-day transfer facility. This means that respondent’s Roseville, Minnesota, facility is authorized to accept RCRA hazardous waste that is manifested for shipment to another site, but that it is only allowed to keep this hazardous waste for 10 days. Milsolv’s license does not, however, allow it to treat hazardous waste. Tr. 33-34. In order to store hazardous waste for longer than 10 days, or to treat it, Milsolv would need a hazardous waste facility permit.

In late 1998, Ramsey County learned that a company called Essilor Thin Films (“Essilor”) contemplated sending isopropyl alcohol, containing approximately 2.7 percent water, to Milsolv’s Roseville facility as a “feedstock.”⁵ Essilor uses this isopropyl alcohol as a cleaning agent in manufacturing lenses. Because Essilor considered the isopropyl alcohol to be a hazardous waste, and because this isopropyl alcohol would be reused, Essilor determined that it was necessary to submit a feedstock application to Ramsey County. Tr. 36-44.

The “hazardous waste feedstock application” was filled-out by both Essilor, as the generator of the waste stream, and Milsolv, as the end-user. Tr. 51, 57. In completing the receiving facility’s portion of the application, Milsolv indicated that the isopropyl alcohol would be reclaimed through the company’s dehydrator. This raised a “red flag” for Ramsey County inasmuch as the feedstock exemption in the State regulations allows only for reuse of the

⁵ Minnesota Rule 7045.0125, subp. 5, allows for a feedstock hazardous waste exemption. This feedstock exemption allows the generator of hazardous waste to send the waste to someone who could use it “as is.” The hazardous waste can not be treated by the receiving party. Tr. 45. An application must be made for a feedstock exemption. The Minnesota hazardous waste feedstock application form essentially is a disclosure document. It contains information about the waste stream from the site of its generation, as well as how the material is to be used by the receiving entity. Both the generator of the waste stream and the end-user fill out this feedstock application form. Tr. 57.

chemical “as is.” As noted, there can be no treatment of the hazardous waste. Tr. 46, 48.

It was the view of Ramsey County that if Milsolv were to treat the isopropyl alcohol received from Essilor in the dehydrator, the feedstock exemption would not apply. Tr. 46-47, 50. Ramsey County was of the further view that in order to “dewater” the isopropyl alcohol, *i.e.*, to treat it in the dehydrator, Milsolv needed a hazardous waste treatment and storage facility permit. At that time, Milsolv only had a 10-day transfer storage license. Tr. 48-49.

Another “red flag” for Ramsey County was its learning that Milsolv was receiving another material from a chemical broker (apparently the 3M Cordova aqueous IPA) and that it was processing this material in its dehydrator. Ramsey County believed that Milsolv needed a facility permit in order to conduct that kind of processing activity. Tr. 48.

Accordingly, on March 18, 1999, Ramsey County sent a letter to respondent requesting “a list of all solvents that Milsolv processed, in 1998, through [its] dehydration equipment” at the Roseville facility site. CX 6. This letter was part of the County’s procedure to re-license Milsolv as a 10-day transfer facility. Tr. 59. Milsolv responded on March 30, 1999, stating in part that “[t]he dehydration operation in Minnesota processes a limited number of hydrous materials (predominately denatured ethanol) *none* of which are classified as hazardous waste.” CX 7 (emphasis in original).

Milsolv’s March 30, 1999, letter concerned Ramsey County because up until this time, the County understood that only industrial ethyl alcohol was being treated in the Roseville facility dehydrator.⁶ Accordingly, in June of 1999, Ramsey County referred this matter to the Minnesota Pollution Control Agency (“MPCA”). Tr. 63.

2. Minnesota Pollution Control Agency

Like Ramsey County, the Minnesota Pollution Control Agency had a growing concern over the dehydration activities at Milsolv’s facility. As it did with respect to Ramsey County, the fact that Milsolv was seeking to process in its dehydrator isopropyl alcohol from Essilor “raised a flag” for the MPCA. Tr. 147. MPCA Inspector Marni Karnowski stated, “[w]e were obtaining information that Milsolv was taking hazardous waste, isopropyl alcohol mixtures and treating it at their facility in their dehydrator unit.” Tr. 149. Accordingly, in July of 1999, the MPCA conducted its first inspection of respondent’s Roseville facility in order to determine whether the facility was receiving isopropyl alcohol and, if so, how the IPA was being managed. In other words, the MPCA wanted to know if the Milsolv facility was operating as an “unpermitted treatment storage or disposal facility.” Tr. 119, 146, 151.

During their inspection of respondent’s Roseville facility, the MPCA and Ramsey

⁶ Milsolv was processing industrial ethyl alcohol in its dehydrator pursuant to a regulatory exemption. Tr. 49.

County inspectors visited the dehydration unit and from there proceeded to a small tank farm where the isopropyl alcohol was stored prior to treatment in the dehydrator. The aqueous IPA was stored in two tanks, Tank No. 16 and Tank No. 23. Tr. 64, 152; CX 8.⁷ The inspectors were informed by Milsolv operations manager Kim Kuck that the aqueous IPA which was processed in the dehydrator into anhydrous IPA came from PAR, a chemical broker located in Indiana. The inspectors also learned that PAR was obtaining this material from a 3M Company plant located in Cordova, Illinois. Tr. 154-156.

Subsequently, the MPCA sent a letter to PAR requesting information on the isopropyl alcohol being sold to Milsolv. Tr. 156. In a letter dated August 31, 1999, PAR informed the MPCA that the isopropyl alcohol was no longer being produced and that it had not been produced since approximately May of 1999. CX 10. In a follow-up letter dated September 20, 1999, PAR informed the MPCA that PAR had sold the isopropyl alcohol to Milsolv as a product and that “[t]he utilization of this product by Milsolv Corporation was determined by Milsolv Corporation.” CX 11.

On November 12, 1999, the MPCA notified Milsolv that the company was in violation of the Minnesota Hazardous Waste Rules, specifically, the permit requirements of Minnesota Rule 7001.0520, subp. 1, item A. The MPCA charged: “The Company failed to obtain a hazardous waste facility permit prior to the storage and treatment of hazardous waste isopropyl alcohol at its facility in Roseville, Minnesota.” CX 12.

Thereafter, the MPCA contacted the Indiana Department of Environmental Management (“IDEM”) to learn more about PAR and its isopropyl alcohol sales. Tr. 165. The IDEM provided MPCA with an audit showing that PAR is a chemical distributor which obtained the subject isopropyl alcohol from a 3M Company plant located in Cordova, Illinois. Tr. 165; CX 14.

The MPCA again visited respondent’s Roseville facility on May 1, 2000. This time it was looking for information on both the origin of the isopropyl alcohol and the amounts that were received by respondent. Tr. 181-182. In a follow-up May 31, 2000, letter requesting this information, the MPCA alerted respondent to the fact that “[a]s a result of [its] inspections and further investigation into the acceptance and treatment of Isopropyl Alcohol (IPA)/water mixtures at Milsolv, MPCA staff have identified potential violations of federal regulations, state statutes, rules, or permit conditions.” CX 22.

Thereafter, on May 23, 2001, the Minnesota Pollution Control Agency referred this matter to the United States Environmental Protection Agency “for investigation and enforcement follow-up.” CX 34. EPA, in turn, subsequently filed the present enforcement action against

⁷ The MPCA had inspected the Roseville facility in 1998, but that inspection did not include the dehydration unit. That 1998 inspection focused only upon hazardous waste transportation matters. Tr. 120-121.

Milsolv.⁸

III. Discussion

A. RCRA Jurisdiction

In its post-hearing reply brief, Milsolv argues that this tribunal lacks subject matter jurisdiction in this case “because Congress did not authorize USEPA to enforce Minnesota’s hazardous waste regulations.” Resp. R.Br. at 3. Respondent had twice earlier raised this issue, albeit unsuccessfully. The first time was in a pre-hearing motion for summary judgment. This motion was denied by order dated December 19, 2002. The second time was at the hearing. *See* Tr. 13. For the reasons stated in this tribunal’s order of December 19, 2002, Milsolv’s jurisdictional challenge is again rejected.

Briefly, Section 3006(a) of RCRA sets forth procedures by which EPA may authorize a State hazardous waste program “in lieu of” the Federal program. 42 U.S.C. § 6926(a). The United States Environmental Protection Agency has so authorized the State of Minnesota to enforce RCRA. *See* 40 C.F.R. 272.1201.

Consistent with this State enforcement authorization, RCRA Section 3008(a) grants EPA the authority to enforce Subchapter III of RCRA (also referred to as Subtitle C), titled, “Hazardous Waste Management.” 42 U.S.C. § 6928(a). In that regard, Section 3008(a)(2) provides:

In the case of a violation of any requirement of this subchapter *where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title*, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

42 U.S.C. § 6928(a)(2) (emphasis added). In addition, RCRA Section 3008(a)(3) further supports a finding of jurisdiction in this case. That Section, which talks about Federal enforcement, provides in part that “[a]ny order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator *or a State under this*

⁸ EPA initiated an enforcement action against the 3M Company and it appears that the parties have settled that matter. Tr. 228; CX 59. Also, the Indiana Department of Environmental Management inspected PAR and found it to be in compliance with State and Federal laws. Tr. 234-235. In that regard, the IDEM noted that PAR “depends on the generator of the distilled solvents to make a proper waste determination and treat it on-site so it can be reused as is by a customer.” RX 12; *see* RX 13..

subchapter.” 42 U.S.C. § 6928(a)(3) (emphasis added).⁹

Accordingly, for the foregoing reasons, Milsolv’s jurisdictional challenge must once again fail.

B. Milsolv’s Motions to Strike

Following the conclusion of the hearing in this matter, Milsolv has filed two motions to strike. The motions are *granted in part* and *denied in part* as follows:

1. Exhibit 5

Milsolv moves to strike those portions of EPA’s main brief where, Milsolv submits, the complainant relies upon Complainant’s Exhibit 5 “for the truth of the matters asserted in the document.” Milsolv argues that this reliance is improper inasmuch as the exhibit was admitted into evidence only for the limited purpose “of establishing that the document was created, sent, and maintained in a distinct MPCA investigative file.” Resp. R.Br. at 1-2. Complainant’s Exhibit 5 is a letter dated September 23, 1998, from Essilor to the MPCA describing a feedstock application involving Essilor and Milsolv. In response, EPA submits that the Essilor letter is not necessary to establish certain facts in this case, “but it is helpful to understand them in context.” Compl. Resp. at 7.

At the hearing, EPA counsel represented that the Essilor letter is “background for how this situation came to the regulator’s attention.” Tr. 127. Indeed, given counsel’s representation, this exhibit was admitted for this background information and not for the truth of the matters asserted in the letter.¹⁰ Accordingly, the motion to strike is granted insofar as it relates to page 24, note 21, of EPA’s brief. There, the complainant relies upon this exhibit to prove the truth of the matters asserted in the letter. The motion to strike the reference to Complainant’s Exhibit 5 at Proposed Finding of Fact, ¶ 108, is denied as there the citation to the Exhibit 5 does not seek to establish the truth of the matters asserted in the Essilor letter.

⁹ See *United States v. Elias*, 269 F.3d 1003, 1010 (9th Cir. 2001) (Congress’s authorization of State RCRA program was not meant to preempt Federal program); *United States v. Marine Shale Processors*, 81 F.3d 1361, 1367 (5th Cir. 1996) (“[RCRA § 3008(a)] gave EPA the power to enforce the substance of an approved state’s program against private parties in the state.”); *Bil-Dry Corp.*, 2001 EPA App. LEXIS 1, *6 n.2 (“EPA has the authority pursuant to RCRA Section 3008(a)(1), to enforce any requirement of the authorized Pennsylvania program.”)

¹⁰ While Complainant’s Exhibit 5 was admitted for a limited background purpose, that purpose is not as restrictive as respondent suggests is the case. See Tr. 127-129.

2. Exhibit A

Milsolv also moves to strike Exhibit A, attached to EPA's brief, and any references which complainant makes to this document. Exhibit A is a "Notification of Waste Activity," dated

July 23, 1980, involving respondent's Roseville, Minnesota, facility. Respondent argues that this exhibit should be stricken because it was not admitted into evidence. Resp. R.Br. at 2. EPA argues that Exhibit A should be considered because it "was prepared and submitted by Milsolv and should be deemed an admission by Respondent." Compl. Resp. at 6.

For the reasons cited by Milsolv, the motion to strike Exhibit A is granted.

3. Exhibits A and B

Milsolv moves to strike EPA's citations at pages 9 and 16 of its brief to Exhibit A ("Case Development Form") and Exhibit B ("Region 5 Delegations Manual"),¹¹ which were attached to the affidavit of EPA Inspector Diane Sharrow.¹² The Sharrow affidavit had been submitted by complainant in support of its pre-hearing motion for accelerated decision. Respondent argues that these exhibits should be stricken because they were not admitted into evidence at the hearing. Resp. R.Br. at 2.

The motion to strike Exhibits A and B is denied. First, these exhibits are already a part of this record inasmuch as they have been submitted as attachments to complainant's summary judgment motion. Second, respondent is incorrect in arguing that at the hearing complainant had successfully challenged its use of these documents. In that regard, EPA's objection to the use of the Sharrow affidavit exhibits was sustained on the ground that their use by respondent on recross-examination exceeded the scope of the witness's redirect testimony. Tr. 283. Moreover, with respect to Exhibit A, respondent's counsel was permitted unrestricted cross-examination of Sharrow. *See* Tr. 344. In addition, Exhibit B is precisely the type of document of which "official notice" may be taken. *See* 40 C.F.R. 22.22(f).

4. The Bussard Letters

Milsolv also moves to strike two letters which are attached to EPA's reply brief. These letters were written by David Bussard, Director of the EPA Characterization and Assessment Division. Again, respondent argues that these letters should be stricken because they were not admitted into evidence. Mot. to Strike at 1. EPA's response is that because these "On Line"

¹¹ In its brief at page 9, EPA incorrectly references Exhibit B, the Region 5 Delegations Manual, as Exhibit C.

¹² Sharrow is an EPA RCRA inspector and she was substantially involved in this case once it was referred to EPA by the MPCA. Tr. 304-305.

letters reflect Agency policy, this tribunal is to accept them without question. Compl. Resp. at 1-5.¹³ In fact, EPA submits that “[t]he Bussard letters constitute relevant Agency guidance whether or not copies of them are attached to a brief, or made part of the case record.” Compl. Resp. at 4. EPA further submits that the Bussard letters are “part of the universe of Agency guidance to the issue in this case.” *Id.*

Inasmuch as EPA believes that the Bussard letters are both relevant and important to this case, it should have made the effort to introduce them into evidence at the hearing. It would be manifestly unfair to respondent to allow these letters into the record *after the hearing*, thereby denying it any meaningful opportunity to challenge them. While these “On Line” letters may support the Agency’s view of this case, it is a view not shared by Milsolv. It does not stretch the imagination to presume that respondent would have vigorously contested these letters (challenging both their admission into the record and any weight given to them), authored by an EPA employee who did not even testify in this case. Accordingly, Milsolv’s motion to strike the Bussard letters is granted.

C. Liability

1. Applicability of Minnesota Law

Because the State of Minnesota has been authorized by EPA pursuant to Section 3006(a) of RCRA, 42 U.S.C. § 6926(a), and 40 C.F.R. 272.1201 to enforce the Resource Conservation and Recovery Act of 1976 in lieu of the Federal program, whether or not a RCRA violation occurred here will be decided under Minnesota law. The issue to be decided is whether Milsolv stored and treated hazardous waste without a hazardous waste facility permit as is required by Minnesota Rule 7001.0520, subp. 1, item A (2002).

2. State Law Provisions

Minnesota Rule 7001.0520, subpart 1, item A (2002), provides that it is unlawful to “treat, store, or dispose of hazardous waste” without first obtaining a hazardous waste facility permit.¹⁴ It is undisputed that Milsolv did not have a hazardous waste facility permit when it stored and treated the aqueous IPA. Whether or not this aqueous isopropyl alcohol was a hazardous waste is the central issue in this case. If it were not, as respondent contends, then the facility hazardous waste permit requirement of Minnesota Rule 7001.0520, subp.1, item A, would not come into play and there would be no RCRA violation. If the aqueous isopropyl alcohol were a hazardous waste, then Milsolv would be in violation of RCRA for failing to

¹³ “RCRA On Line” consists of written responses which the Agency has provided to questions posed by the regulated community. Tr. 475.

¹⁴ The Minnesota Statutes and Rules cited in this opinion were jointly submitted by the parties post-hearing. Tr. 1067.

obtain the appropriate facility permit.

We begin our analysis of this issue with the State of Minnesota's definition of "hazardous waste." Section 116.06, subd. 11, of the Minnesota Statutes provides:

"Hazardous waste" means any refuse, sludge, or *other waste materials* or combinations of refuse, sludge, or other waste material in solid, semisolid, liquid, or contained gaseous form which because of its quantity, concentration, or chemical, physical, or infectious characteristics may (a) cause or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or (b) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. Categories of hazardous waste materials include, but are not limited to: explosives, flammables, oxidizers, poisons, irritants, and corrosives....

Minn. Stat. 116.06, subd. 11 (2002) (emphasis added).

Keeping the above definition in mind, it is clear that the aqueous IPA involved in this case is neither refuse, nor sludge. However, under Section 116.06, subd. 11, the involved aqueous IPA may still yet qualify as a hazardous waste if it is a "waste material" that poses a serious threat to human health or to the environment. Therefore, we next look to the meaning of "other waste material."

The term "other waste material" is defined in Minnesota Rule 7045.0020, subp. 63. That Rule provides:

"Other waste material" means any solid, liquid, semisolid, or gaseous material, resulting from industrial, commercial, mining, or agricultural operations, or community activities, and which:

A. is discarded or is being accumulated, stored, or physically, chemically, or biologically treated prior to being discarded; or

B. is recycled or is accumulated, stored, or treated prior to being recycled; or

C. is a *spent material* or by-product.

Minn. R. 7045.0020, subp. 63 (2002) (emphasis added).

The fact that under Minnesota law “spent material” falls within the definition of “other hazardous waste” is significant because, as explained below, this is the theory upon which EPA bases its claim that the aqueous isopropyl alcohol stored and treated by Milsolv is a hazardous waste. Accordingly, the meaning of the term “spent material” is critical in determining whether the aqueous isopropyl alcohol is indeed a hazardous waste.

Minnesota Rule 7045.0020, subp. 84b (2002), offers the following definition:

“Spent material” means a material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.

EPA maintains that the aqueous IPA dehydrated by Milsolv was such a spent material because the water collected from the glass fibers in the 3M Cordova reactor vessel contaminated the anhydrous IPA. It is due to this contamination that the anhydrous isopropyl alcohol became aqueous isopropyl alcohol. EPA further maintains that this aqueous IPA could no longer serve the purpose for which it was produced – namely, to extract the water from the glass fibers without being processed in the dehydrator and changed back to anhydrous IPA.

3. Whether the Aqueous IPA is a Spent Material

It is undisputed that 3M Cordova did not believe that the aqueous isopropyl alcohol was a hazardous waste. Instead, 3M Cordova believed that this IPA material was a product. In that regard, 3M Cordova gave the aqueous IPA a product number and provided a Material Safety Data Sheet (“MSDS”) to the buyer, just as it would with any product. Tr. 589, 612-613, 625. It is also undisputed that the chemical brokers Products and Recycling Services and PAR also believed that the aqueous IPA, purchased from 3M Cordova and resold to Milsolv, was a product. Tr. 768, 775. Both Products and Recycling Services and PAR likewise provided Milsolv with an MSDS and both shipped the aqueous IPA from the 3M Cordova plant to Milsolv’s Roseville facility not on a hazardous waste manifest, but on a standard bill of lading. Tr. 790-791.¹⁵

Milsolv makes much of the fact that 3M Cordova, Products and Recycling Services, PAR, and itself considered the aqueous IPA to be either a product or a co-product and not a hazardous waste. Despite this consensus, the record evidence supports a contrary finding.

¹⁵ When 3M Cordova sold the aqueous IPA, it also included a non-trade sales invoice which stated, in part, that “the scrap material sold under this agreement is sold solely as scrap material and may contain residue of toxic, explosive and/or flammable substances.” RX 34. 3M Cordova’s assertion that the non-trade sales invoices are used for “so many different things” and that this “boilerplate language” had nothing to do with the sale of the aqueous IPA is accepted as true. Tr. 644, 672, 680.

EPA's case that the aqueous IPA was a "spent material" and ultimately a regulated hazardous waste under the Minnesota regulations rests largely upon the testimony of Barrett Benson, a Sanitary Engineer for EPA's National Enforcement Investigation Center located in Denver, Colorado. Tr. 390. Specifically, Benson is a "[p]rincipal environmental engineer for the Center's Field Branch in civil and criminal multimedia compliance investigations with specialization in hazardous wastes (Resource Conservation and Recovery Act), water pollution (Clean Water Act), and Toxic Substances/PCBs (Toxic Substance Control Act)." CX 51. Benson was qualified in this case as an expert in the field of "hazardous waste determinations." Tr. 403-404.

As noted above, Minnesota defines the term "spent material" as "a material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." Minn. Rule 7045.0020, subp. 84b (2002).¹⁶ The Code of Federal Regulations similarly defines the term "spent material." 40 C.F.R. 261.1(c)(1). In that regard, the preamble to the Final Rule for the "Hazardous Waste Management System; Definition of Solid Waste" for 40 C.F.R. Parts 260, 261, 264, 265, and 266 is helpful in understanding what is meant by the term "spent material." 50 Fed. Reg. 614 (January 4, 1985); CX 21. There, under the heading, "Part II: Secondary Materials That Are Subtitle C Solid and Hazardous Wastes When Recycled," the preamble states that "[t]he final definition classifies the universe of secondary materials that are wastes when recycled as either sludges, spent materials, by-products, or scrap metal." *Id.* at 624. Of particular significance to this case is the following classification:

1. *Spent Materials.* We are continuing to define spent materials as those which have been used and are no longer fit for use without being regenerated, reclaimed, or otherwise re-processed. In response to comments, however, we have altered the wording of the definition of spent material to express this concept more clearly. As the proposal was worded, a spent material was one that had been used and no longer could serve its original purpose. The Agency's reference to original purpose was ambiguous when applied to situations where a material can be used further without being reclaimed, but the further use is not identical to the initial use. An example of this is where solvents used to clean circuit boards are not longer pure enough for that continued use, but are still pure enough for use as metal degreasers. These solvents are not spent materials when used for metal degreasing. The practice is simply continued use as a solvent. (This is analogous to using/reusing a secondary material as an effective substitute for

¹⁶ Noting the similarity between the Minnesota hazardous waste regulations and the Federal hazardous waste regulations, respondent submits that the Federal regulations "can be instructive regarding the analogous Minnesota regulations." Resp. Br. at 20 n3.

commercial products.) The reworded regulation clarifies this by stating that spent materials are those that have been used, and as a result of that use become contaminated by physical or chemical impurities, and can no longer serve the *purpose* for which they were produced....

50 Fed. Reg. at 624 (emphasis in original); CX 21.

EPA's expert, Benson, concluded that the aqueous IPA that was generated by 3M Cordova met this definition of a spent solvent. Tr. 426. This tribunal finds the testimony of Benson to be persuasive.

In that regard, Benson described isopropyl alcohol as a lower chain alcohol commonly used in industry as a solvent to extract water. Because anhydrous IPA contains .1 percent or less of water, it is a good solvent for the removal of water. Tr. 428. Benson stated that "[w]ater is very miscible with this isopropyl alcohol, [s]o it will mix, and they can pump it out." Tr. 431. Indeed, this is exactly the procedure which 3M Cordova followed in adding the anhydrous IPA to the reactor vessel in order to extract the water from the glass fibers.

Benson further concluded that once the anhydrous IPA extracted the water and thus became aqueous IPA due to its lower isopropyl alcohol concentration, the isopropyl alcohol became a spent solvent. He explained, "[s]pent solvent' means that if you were using this material, the solvent to do something, and it could no longer be used for that, it becomes spent for that process, for that particular unit operation." Tr. 441. 3M Cordova's representative, David Schulze, reluctantly agreed with this explanation.¹⁷ When asked whether the anhydrous IPA was being used as a solvent in its adhesive manufacturing process, Schulze stated, "the definition of solvent seems to carry an awful lot of meanings[,] [b]ut in terms of being insoluble with water, yes, it's insoluble and extracts water." Tr. 664.¹⁸

Insofar as this case is concerned, Benson concluded that the water extracted from the glass fibers contaminated the anhydrous IPA. Furthermore, because of this contamination, "that solvent would not be able to remove the water from the mixture of starch and glass fibers." Tr. 442, 732. In other words, the aqueous IPA could not be used by 3M Cordova to extract the water from the glass fibers in the reactor vessel. In fact, this is precisely why 3M Cordova did

¹⁷ Schulze is an Environmental Engineering Specialist with the 3M Company at its Cordova, Illinois, plant. Tr. 582.

¹⁸ Martin Hamper, respondent's expert witness, offered the opinion that the anhydrous IPA was not functioning as a solvent. He testified that in order for a solvent extraction to occur, two immiscible liquids are needed in the reactor and that was not the case here. Tr. 948-951, 963-965. In view of the testimony of Benson and Schulze that the anhydrous IPA was used as a solvent to extract water from the glass fibers, Hamper's contrary position is rejected.

not use aqueous IPA in preparing the glass fibers for incorporation into the adhesive mixture. Instead, 3M Cordova used only anhydrous IPA for this process and once used, it sold the remaining aqueous IPA to Products and Recycling Services and to PAR. Tr. 665.¹⁹

Accordingly, EPA's expert concluded that the aqueous isopropyl alcohol leaving the 3M Cordova plant was a spent solvent.²⁰ Moreover, as identified on the accompanying Material Safety Data Sheets, this aqueous IPA was a characteristic hazardous waste because it had a flash point of only 53 degrees Fahrenheit, well below the 140 degree benchmark for ignitability. Tr. 171, 310, 459; CX 33. Benson described the aqueous IPA as a material with a "spent ignitable hazardous waste characteristic." Tr. 459-460. For this reason, the aqueous IPA met EPA's classification for a D001 hazardous waste. Tr. 307.²¹

4. The Aqueous IPA was not a Product or Co-Product

Aqueous isopropyl alcohol is recognized as a commercial product. Tr. 374, 504, 753. In that regard, EPA concedes "that genuine aqueous IPA products are legitimately sold as products in commerce." Compl. R.Br. at 10. Milsolv's principal argument is that the aqueous IPA which it purchased from Products and Recycling Services and PAR was not a spent material, but rather it was either a product or a co-product. *See* Resp. Br. at 18. If such were the case, it would be significant inasmuch as it is not in dispute that products and co-products do not fall within the coverage of the Minnesota hazardous waste regulations. Tr. 221, 521; Compl. Pro. Find., ¶ 165. However, such is not the case because the aqueous IPA treated by Milsolv in its dehydrator unit was a spent material.

The terms "product" and "co-product" are not defined in the Minnesota regulations. Tr. 465. In fact, the Code of Federal Regulations only references the term "co-product" and it does so in defining the term "by-product." 40 C.F.R. 261.1(c)(3). In that regard, Section 261.1(c)(3) states that a by-product "does not include a co-product that is produced for the general public's use and is ordinarily used in the form it is produced by the process." In

¹⁹ Schulze testified that while aqueous IPA still had the ability to extract more water, "[w]e did not want to use it in our process, because we didn't want to carry any additional water to the adhesive." Tr. 665.

²⁰ Benson also believed that this aqueous IPA probably contained glass fibers. It was his view, however, that the isopropyl alcohol was a spent solvent even if such glass fibers were not present. Tr. 446-447. There has been no showing in this case that the aqueous IPA contained glass fibers.

²¹ Benson also testified that had 3M Cordova filed the proper reclamation notification, then the aqueous IPA could have been considered a product upon completion of the filtration process. Tr. 528-530, 534. However, because the material was not being reclaimed by 3M Cordova, any argument that the filtration of the aqueous IPA resulted in a product must be rejected. *See* RX 25, ¶ 8 & CX 60.

addition, the Federal Register offers the following explanation:

By “co-product” we mean a material produced for use by the general public and suitable for end use essentially as-is. Examples are sulfuric acid from smelters’ metallurgical acid plants, various metals produced in tandem by smelting operations (such as lead recovered from primary copper smelting operations), or co-products such as kerosene, asphalt, or pitch from petroleum refining. These co-products are not (and never were intended to be) covered by the regulations.

We therefore are clarifying the definition to indicate that by-products are materials, generally of a residual character, that are not produced intentionally or separately, and that are unfit for end use without substantial processing....

On the other hand, materials produced intentionally, and which in their existing state are ordinarily used as commodities in trade by the general public, are considered to be co-products and not by-products. [Fn. omitted.]

50 Fed. Reg. at 625.

In pursuing this argument, Milsolv submits that “3M intended that the aqueous IPA would be manufactured as a co-product of the glass fiber adhesive manufacturing process.” Resp. Br. at 21. Respondent further submits that before 3M Cordova even began to generate the aqueous IPA it met with the chemical distributor Products and Recycling Services “to discuss the chemical specifications of the aqueous IPA and its sale as a product.” *Id.* It is also significant, in respondent’s view, that 3M Cordova attached a product number to the aqueous IPA, that it tested the material for its water content prior to sale, and that Material Safety Data Sheets, typically associated with products, accompanied the IPA shipments. Finally, Milsolv argues that the aqueous IPA was suitable for end use “as is.” Resp. Br. at 21-24.

No doubt, Milsolv’s co-product argument has a certain appeal. After all, 3M Cordova, Products and Services Recycling, and PAR treated the aqueous IPA as if it were a product. Tr. 589, 775; RX 20. Also, the record shows that aqueous IPA can be used “as is.” For example, for some time prior to the events of this case, a company by the name of Tradco had purchased aqueous IPA “as is” from PAR for use in the “automotive after-market” as a carburetor cleaner and windshield wash. Tr. 503-504, 780. Tradco’s purchase and sale of this IPA violated no law. Tr. 504. In that regard, EPA’s expert, Benson, agreed that isopropyl

alcohol could be used as a product – *i.e.*, “as is” and “without reclamation.” Tr. 507.²² He testified that the aqueous IPA could continue to be used as a solvent. Tr. 555-557. Indeed, Benson noted that Milsolv sold some of the aqueous IPA which was generated by 3M Cordova as denatured alcohol and blended products. Tr. 506.²³

Benson, however, disputes respondent’s contention that in fact that is what occurred in this case. For example, he states that the anhydrous IPA used by 3M to extract water from the glass fibers was not an ingredient in a process to manufacture aqueous IPA. Tr. 428, 432-433. He further states that because the aqueous IPA is a spent solvent, it could not in any event also be an ingredient. Tr. 460, 492. Benson did testify that the aqueous IPA would have been a product if all that 3M Cordova did was to mix anhydrous IPA and water. Tr. 578. Here, the water was not an ingredient in the process, but rather it was a contaminant of the anhydrous IPA. Tr. 724, 729. Benson’s testimony is found to be persuasive and it is credited. In addition, finding the aqueous IPA to be a product or co-product would be inconsistent with the finding, discussed *supra*, that the aqueous IPA is a “spent material.”

Furthermore, as EPA argues, the aqueous IPA which is the subject of this case is quite unlike the co-products such as “kerosene, asphalt, and pitch from petroleum refining” that are discussed in the Federal Register, *supra*. Those co-products are generated from the constituents in the materials being processed. In this case, however, “[t]he anhydrous IPA ... was not a constituent of the material being processed; it was added to the glass fibers being processed for use in the process, and was subsequently removed when it was no longer effective.” Compl. R.Br. at 5 (fn. omitted).

D. Civil Penalty

Section 3008(a)(3) of the Resource Conservation and Recovery Act provides for the assessment of a civil penalty for violations of Subtitle C, “Hazardous Waste Management.” 42 U.S.C. § 6928(a)(3). The RCRA violation committed by Milsolv falls within this category. Section 3008(a)(3) states:

Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subchapter and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed \$25,000 per day of non-compliance for each violation of a requirement of this subchapter. *In assessing*

²² The term “reclamation” is a RCRA term used in conjunction with waste materials, not solids. Tr. 508.

²³ Benson added that, in Minnesota, approval of a feedstock use is necessary where a spent solvent takes the place of a commercial chemical product. Tr. 514; *see* Minn. R. 7045.0125, subp. 5 (2002).

such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

42 U.S.C. § 6928(a)(3) (emphasis added).²⁴

In addition, it is EPA who bears the burden of proof on the penalty issue. *John A. Capozzi d/b/a Capozzi Custom Cabinets*, 2003 EPA App. LEXIS 12; *New Waterbury, Ltd.*, 5 E.A.D. 529, 537 (EAB 1994).²⁵

1. Seriousness of the Violation

There were no spills of aqueous isopropyl alcohol at Milsolv's Roseville, Minnesota, facility. There also was no showing that respondent's handling of this aqueous IPA actually harmed individuals or the environment. Indeed, EPA concedes as much stating, "[c]omplainant determined that there was low potential of release of the waste material to the environment." Compl. Br. at 45. *See* Tr. 313. Still, the record shows that the violation was a moderately serious one.

We begin with a recognition that the Resource Conservation and Recovery Act of 1976 is a "cradle to grave" statute which Congress enacted to ensure the safe management of hazardous waste. *U.S. v. ILCO*, 996 F.2d 1126, 1130 (11th Cir. 1993). Furthermore, in *Everwood Treatment Company, Inc., and Cary W. Thigpen*, 6 E.A.D. 589 (1996), the Environmental Appeals Board stated, "the RCRA permitting requirements 'go to the very heart of the RCRA program[;] [i]f they are disregarded, intentionally or inadvertently, the program cannot function.'" 6 E.A.D. at 602 (citing *A.Y. McDonald*, 2 E.A.D. 402, 418 (CJO 1987)). Accordingly, the hazardous waste facility permitting requirements of RCRA are important and non-compliance with them is no small matter.

²⁴ Pursuant to the regulations implementing the Debt Collection Improvement Act of 1996, the maximum daily penalty amount allowed under Section 3008(a)(3) of RCRA has been increased to \$27,500 for violations occurring on or after January 31, 1997. 40 C.F.R. 19.4 (2003). A new Civil Penalty Inflation Adjustment Rule has since been promulgated, but it became effective after the events in this case. *See* 69 Fed. Reg. 7121 (February 13, 2004).

²⁵ The civil penalty assessment against Milsolv will be based upon the record evidence. Counsel for EPA suggests, however, that this tribunal has limited decisional independence and that the driving force in the determination of the penalty is Agency policy and not the evidence established at hearing. *See* Compl. Br. at 6 n.8 & 38-42. This approach is rejected. If such were the case, the opportunity afforded to respondent to be heard in this matter would not be a meaningful one. Indeed, this evidence-based approach ensures fundamental fairness to the party being sanctioned and it is consistent with the Environmental Appeals Board's civil penalty reasoning in *John A. Capozzi d/b/a Capozzi Custom Cabinets*, 2003 EAB App. LEXIS 12, and *Employers Ins. of Wausau*, 6 E.A.D. 735, 758-759 (1997).

Also, in determining the seriousness of respondent's hazardous waste facility permit violation, it is appropriate to consider the economic benefit that was obtained as a result of such non-compliance. In fact, given the substantial economic benefit gained by Milsolv in operating a hazardous waste facility without a permit, failure to take this factor into account would result in an unrealistically low penalty.

In this case, EPA asserts that by failing to obtain a permit Milsolv achieved an economic benefit of \$92,258. CX 3. EPA's assertion is correct. First, as detailed by the State of Minnesota, Office of Attorney General, it would have cost Milsolv \$35,440 to obtain a hazardous waste facility permit in 1998. The Office of Attorney General further determined that the annual fee for this permit would have been \$14,730 for the year 1999, and \$17,680 for the year 2000. CX 29. In addition to this amount, it would have cost respondent \$2,000 per year to obtain a county license for treatment, storage, and disposal of hazardous waste. Tr. 81; CX 41.

Second, taking these figures into account, EPA performed a "BEN" analysis. Tr. 315. The results of this BEN analysis appear in Complainant's Exhibit 42. They show that for the period of 1998 through 2000, Milsolv enjoyed an economic benefit of \$92,258 by its failure to obtain a hazardous waste facility permit as required by Minnesota Rule 7001.0520, subp. 1, item A. It is noteworthy that respondent does not challenge EPA's methodology for determining the economic benefit, or the accuracy of its computation.

Accordingly, the record establishes that Milsolv experienced a substantial economic benefit of \$92,258 as a result of its RCRA non-compliance.²⁶ This amount will be included in the civil penalty.

2. Good Faith Efforts to Comply

Citing the Agency's RCRA Penalty Policy, EPA states that a respondent's good faith efforts to comply, or a lack thereof, are considered penalty "adjustment factors." Compl. Br. at 45. Despite the fact that "good faith" is one of the two statutory penalty criteria of RCRA Section 3008(a)(3), EPA only tersely addresses this factor. It states, "[n]o adjustment factors were applied to the proposed penalty as calculated." Compl. Br. at 47. Respondent likewise fails to address this penalty criteria.

With respect to the "good faith" penalty criterion, the strongest argument in respondent's favor is that 3M Cordova, Products and Recycling Services, and PAR all treated the subject aqueous IPA as a product, and not as a hazardous waste. Also, to Milsolv's knowledge, PAR (the chemical broker with whom it dealt) did not even handle hazardous waste. Tr. 867-868. Given this fact, and the fact that the aqueous IPA was assigned a product number, shipped under a regular bill of lading (and not a hazardous waste manifest), and accompanied by a Material

²⁶ According to Milsolv, the actual profit realized through the sale of the aqueous IPA was only approximately \$2,000. Tr. 846.

Safety Data Sheet, one could conclude that respondent acted in good faith in believing that it did not need a hazardous waste facility permit to store and to treat the aqueous isopropyl alcohol.

Still, there is evidence suggesting that Milsolv either knew, or should have known, that the aqueous IPA which it treated in its dehydrator was a hazardous waste (or, at the very least, was considered by Minnesota enforcement personnel to be a hazardous waste). In that regard, Inspector Paul Gelbman of the St.Paul-Ramsey County Department of Public Health testified that he had talked to Kim Kuck, the operations manager of Milsolv, about the State's regulations involving the processing of hazardous waste in respondent's dehydrator unit. These discussions involved the Essilor matter and they took place prior to the enforcement action in this case, *i.e.*, sometime after late 1998 and before March 18, 1999. Tr. 57-58.

Moreover, on March 18, 1999, Ramsey County requested that Milsolv provide a list of all solvents that were processed in its Roseville dehydrator in 1998. Tr. 59-60; CX 6. This, together with the Gelbman-Kuck discussions, should have been Milsolv's "red flag" that it needed a hazardous waste facility permit in order to store and treat the aqueous IPA purchased from PAR.

Also, Kuck testified that when Essilor Thin Films approached respondent in 1998 concerning IPA material that Essilor generated (*i.e.*, the feedstock application matter) Essilor considered this IPA to be a "waste." Tr. 881. Again, this should have alerted respondent to the prospect that the aqueous IPA may in fact be a waste and not a product.

IV. Order

It is held that respondent Brenntag Great Lakes, LLC, f/k/a MILSOLV Minnesota Corporation, violated Minnesota Rule 7001.0520, subp.1, item A. This constitutes a violation of Section 3008(a) of the Resource Conservation and Recovery Act of 1976. 42 U.S.C. § 6928(a). For this violation respondent is assessed a civil penalty of \$175,000. 42 U.S.C. § 6928(a)(3). Respondent is directed to pay this penalty within 60 days of the date of this order.²⁷

Unless an appeal is taken to the Environmental Appeals Board pursuant to 40 C.F.R. 22.30, or unless a party acts pursuant to 40 C.F.R. 22.27(c), this decision shall become a Final Order as provided in 40 C.F.R. 22.27(c).

Carl C. Charneski
Administrative Law Judge

²⁷ Payment of the civil penalty may be in the form of either a cashier's check or a certified check, made payable to the Treasurer of the United States, and addressed to The First National Bank of Chicago, EPA Region 5 (Regional Hearing Clerk), P.O. Box 70753, Chicago, Illinois, 60673.