UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	**)**	
	)	
Titan Wheel Corporation of Iowa,	**)**	**Docket No. RCRA VII 98-H-003**
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	)	
	)	
Respondent.	**)**	

ORDER GRANTING COMPLAINANT'S MOTION TO STRIKE

Introduction

This is a proceeding under Section 3008(a) and (g) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA") and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. Sections 6901 et seq. Complainant, United States Environmental Protection Agency ("EPA"), alleges that Respondent Titan Wheel Corporation of Iowa ("Titan") violated Section 3005 of RCRA and regulations under 40 C.F.R. Part 265. On December 1, 1999, pursuant to 40 C.F.R. § 22.16, EPA filed a Motion to Strike certain exhibits filed by Titan.[1] Specifically, Complainant seeks to have the Court strike: (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. These documents include complaints, settlement agreements, legal motions and memoranda,

[1]The parties to this proceeding have waived any right to a hearing. Joint Statement of Facts, November 24, 1999. The Consolidated Rules of Practice, 40 C.F.R. part 22, govern this proceeding. Section 22.16 addresses motions.

inspection reports, photocopies of checks in payment of penalties, and accompanying transmittal letters; (3) letters from Respondent requesting summaries of enforcement actions, and EPA's responses thereto; (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 the Resource Conservation and Recovery Act during the previous two years, including complaints and settlement agreements. Complainant's Motion to Exclude at 1-2. On December 16, 1999, Respondent filed a response in opposition to Complainant's Motion, and a Reply from Complainant, filed on December 22, 1999, followed.

Background

There are three Counts in the Complaint. Count I alleges that Titan, as a generator of solid and hazardous waste at its steel wheel manufacturing facility, stored hazardous waste without a permit, interim status or any extension from such requirements, in violation of RCRA Section 3005(a). EPA seeks a penalty of $55,805 for the violation alleged in Count I. In Count II, EPA alleges that, in violation of 40 C.F.R. 265.16, Titan failed to develop or use a personnel training program regarding hazardous waste management. EPA seeks a $76,389 penalty for Count II.

Last, in Count III EPA asserts that Titan's contingency plan, applicable to those who generate hazardous waste, failed to set forth certain required information such as emergency arrangements and identification of emergency equipment in violation of 40 C.F.R. §§ 265.52 (c),(d) and (e). For Count III, EPA seeks a civil penalty of $21,015.

Discussion

Complainant argues that the exhibits it seeks to have excluded from the record are irrelevant, immaterial, and of little or no probative value to the instant matter. As such, Complainant contends, pursuant to 40 C.F.R. § 22.22(a), these exhibits are not admissible.[2] Complainant insists that evidence of penalties proposed or assessed in other enforcement actions should not be compared to the penalty proposed in this case because each enforcement action arises out of a unique set of facts and circumstances. EPA Motion at 2. Complainant notes that penalty assessments can differ greatly based on numerous criteria for determining proper penalties. In urging against the admissibility of the documents listed above, Complainant cites case law on the issue of whether evidence relating to penalties imposed in other actions is relevant to the validity of a penalty determination in an entirely distinct proceeding. *Id*.

In its Response Titan has asserted, as an affirmative defense, that the penalty EPA seeks in this matter is "unreasonable, arbitrary and capricious and an abuse of discretion." Titan's Opposition to Motion at 1. Respondent contends that, in this instance, EPA failed to adhere to its penalty policy which requires a uniform application of penalties for similar violations. *Id*. at 2.

Respondent finds such a lack of uniformity by comparing state agencies' enforcement of RCRA violations with EPA's enforcement of that statute. Titan asserts that the penalties sought in the state enforcement actions have been much lower than the penalties proposed for similar violations in instances when EPA directly enforces RCRA violations. Titan, like EPA, points to case law in support

[2]40 C.F.R. § 22.22(a) provides in pertinent part that the Court "shall admit all evidence which is not irrelevant, immaterial,...or of little probative value...."

of its position.

In the view of the Court, the cases do not support Titan's position. In United States v. Ekco Housewares Inc., 62 F.3d 806 (6th Cir. 1995) ("Ekco"), a RCRA case, the Sixth Circuit, addressed, as relevant here, Ekco's assertion that the district court abused its discretion "in imposing a penalty significantly higher than penalties imposed against other owners/operators for similar violations." *Id*. at 816. Although the court acknowledged that penalties in other cases are relevant, it also observed that the reasonableness of a penalty is "a fact-driven question, one that turns on the circumstances and events peculiar to the case at hand." *Id*. Noting that the cases cited by Ekco were from an earlier enforcement time and that EPA had subsequently imposed higher penalties for similar violations, it determined that the cases did not provide "meaningful guidance." The Court also rejected Ekco's attempt to distinguish those cases where higher penalties had been imposed from its own infractions, finding that Ekco's violations were not mere paperwork violations but rather posed a risk of future harm.

In Micro Pen of U.S.A., Inc., 1999 WL 362851 (E.P.A.), Docket No. FIFRA -09-0881-C-98-06, (ALJ, March 22, 1999), ("Micro Pen"), although Chief Administrative Law Judge Susan Biro rejected EPA's attempt to strike certain exhibits[3] from a FIFRA[4] action as irrelevant to the penalty issue, noting that they had been part of EPA's prehearing exchange documents, the judge also determined that several other exhibits should be stricken as not relevant to the proceeding. Those

[3]The admitted exhibits involved a report of test results of pens with, and without, germicidal plastic and another report concerning oral toxicity of respondent's pen barrels.

[4]"FIFRA" refers to actions under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §1361(a).

excluded exhibits are more pertinent to the matter in issue here, as they involved an attempt to introduce into the record settlement agreements and decisions in other cases decided under FIFRA. The judge, while acknowledging that information about other cases may not be deemed as never relevant, noted that the Environmental Appeals Board (EAB) held in Chatauqua Hardware Corporation, 3 E.A.D. 616 (EAB 1991), 1991 WL 310028 (E.P.A.), that settlements and decisions in other cases cannot be used to prove a fact bearing on the appropriateness of a proposed penalty. Citing Ekco, the trial judge observed that the reasonableness of a penalty is a fact-driven question which turns on the particular circumstances and events of each case. The judge also noted that a myriad of factors can affect proposed penalties and settlement agreements, making comparisons difficult or impossible and that these factors may not be fully set forth in the record of settlement. For those reasons, Judge Biro concluded that, in the instance before her, the documents from similar proceedings were unlikely to have any value for penalty assessment purposes and therefore rejected their introduction as irrelevant.

In Monieson v. Commodity Futures Trading Commission, 996 F.2d 852 (7th Cir. 1993) ("Monieson"), an administrative law judge imposed a sanction beyond that sought by the Trading Commission in banning the respondent from trading for life. The Seventh Circuit noted that an agency's choice of sanction will not be reversed unless it is unwarranted in law or without justification in fact. As relevant here, the Court examined the fine imposed in comparison to penalties levied in similar cases and noted two other cases where lesser penalties were applied in instances at least as grave as Monieson's. The agency did not discuss or distinguish those similar cases, described as "yardstick decisions." Notably, while the Seventh Circuit reduced the penalty, it had no hesitation in assessing a penalty that was nearly two times the amount of the penalty imposed in the larger of the two yardstick

cases. *Id*. at 864-865.

Essery v. Dept. of Transportation, 857 F.2d 1286 (9th Cir. 1988) ("Essery") has been cited by Titan for the proposition that where an agency has a policy favoring uniformity of penalties, past penalties are probative of the legitimacy of the penalty in litigation. Essery involved a commercial pilot's license revocation proceeding, comparing the uniformity of sanctions in other NTSB cases, finding a substantial identity among those actions and evidence that, within that identity, lesser sanctions were imposed for more egregious violations. *Id*. at 1291.

Titan and EPA both cite Briggs & Stratton Corporation, 1 E.A.D. 653, TSCA Appeal No. 81-1 (EAB 1981), 1981 WL 27909 (E.P.A.). ("Briggs & Stratton"). Like Titan, Briggs & Stratton argued that the penalties EPA sought were inconsistent with EPA's policy favoring uniform penalties for like violations. Briggs & Stratton submitted evidence of proposed penalties and assessments of others who violated PCB regulations. These were offered to demonstrate that the penalties sought in those cases were much less than the amount EPA was seeking against Briggs & Stratton. In affirming the ruling of the court below, excluding the assessments in other cases, Chief Judicial Officer McCallum noted that the trial judge observed that the companies that the Respondent had grouped together varied greatly in size and types of businesses. The Respondent's approach neglected that one must consider all of the statutory factors, as well as the nature of the violation, and that the comparison Respondent had attempted was an extreme oversimplification. The Court also pointed out that a variance of one factor could transform the usefulness of any comparison. It also observed that it would be improper to compare penalties which are assessed after a hearing with those derived in a consent decree upon settlement. Applying those considerations, the Chief Judicial Officer upheld the trial judge's

determination that Respondent had failed to establish like violations, negating the claim of a lack of uniform penalties for similar violations.

In Ward v. Derwinski, 837 F. Supp. 517 (W.D. N.Y. 1992), a case reviewing the discharge of a nurse, the Court ordered that the penalty be reconsidered by the Veterans Affairs agency after it was shown that more severe offenses by nurses had not resulted in discharges. Although the Court recognized that a penalty imposed in a particular case could not be rendered invalid solely because a more severe sanction had been imposed than in other cases, it noted that the Veterans Affairs had a policy of treating like offenses with similar penalties, and that it failed in that instance to consider the penalties that had been imposed in those like offenses.

These cases have commonalities. All recognize the difficulty that confronts a party attempting to show uneven treatment in penalty assessments. Expressly in some cases and implicitly in all, the cases recognize that dissimilar cases, involving different statutes or regulations, are not appropriate for penalty comparisons. Settlements too, because of the many variables that come into play in bringing about an agreement, are not appropriate for penalty comparisons. Even where a party establishes the preliminary requirement of showing that the comparisons involve like cases, the cases recognize that the particular facts and circumstances must be comparable as well. Thus in the cases in which a challenge was successful, the party challenging the penalty was able to identify such "yardstick" cases.[5]

Applying these precepts to the matter at hand, Titan's arguments in opposition fail in several respects. First, the Court rejects the premise of Titan's position. That premise is that EPA's proposed

[5]While not necessary to demonstrate uneven penalty assessments, it is noted that the respondents were able to show that the yardstick cases involved circumstances where lesser penalties applied in instances where the violations were more egregious.

penalties may not vary widely or systemically from the penalties proposed by *state* RCRA enforcement actions. Thus, Respondent does not maintain that EPA's own RCRA enforcement actions vary widely or systemically, only that *as compared to state enforcement actions* there is an alleged disproportionate treatment of RCRA violators. Titan reasons that EPA is in privity with those states that have been delegated enforcement authority and, as such, states act in place of and as agents of EPA. Therefore, it argues, the penalties imposed by states and EPA must be uniform. Titan offers no case law to support this position.

To the extent that the cases recognize, at least in principle, that penalties for similar violations may not be widely divergent, none stand for the proposition that the similarity must extend to actions brought by different enforcement authorities. Instead, the cases relate to wide disparities *within a particular enforcement agency* and, even then, those cases recognize that the reasonableness of a penalty is a fact driven question that ultimately rests on the particular circumstances of each case. Therefore, the Court finds that even if it could be demonstrated that penalty determinations for similar violations varied widely between state and EPA enforcement actions, such disparities are not relevant. Only wide disparities for similar penalties imposed *by a particular enforcement agency* can, theoretically, be subject to the claim that a proposed penalty is arbitrary or an abuse of discretion.

Further, even assuming for the moment, the correctness of Titan's proposition that, in RCRA actions, state and EPA enforcement penalties must be uniform, Titan does not offer any reason why the uniformity it urges should favor the lower penalties states may seek as opposed to requiring that, in the name of uniformity, states should be required to adjust their proposed penalties upward to be consistent with those sought by EPA.

In addition, even in instances where a respondent is claiming that such internal inconsistency in penalty proposals occurred within a particular enforcement agency, it is not sufficient for a respondent simply to make such an assertion and point, generally, to hundreds of pages of documents that ostensibly support that claim, leaving it to the court to sort through the documents in a search to determine if any of them support the respondent's assertion. Rather, to defeat a motion to exclude such documents, a respondent must point to the particular documents, and the pages within those documents, and then show an identity of facts and circumstances in those cases with the core facts in the case in litigation to demonstrate such an abuse of discretion in the penalty being proposed. That is what occurred in cases such as Essery and Monieson. In those cases, which involved comparisons of different proceedings brought by the same agency, there was an identity established between the cases in litigation and previous actions, together with a more severe sanction imposed in the case in litigation as compared with the sanctions imposed in earlier cases.

Accordingly, the conditions which must be established to allow consideration of other proposed penalties are onerous, as a respondent must show that the inconsistency is within a particular enforcement agency, and that the cases identified are so similar as to be one-to-one comparisons or virtually so, and also that, given such identity, the penalties were so divergent as to constitute an abuse of discretion.

Thus, in addition to the other infirmities with the Respondent's Opposition to EPA's Motion, it is not sufficient to defeat a Motion to Exclude such putatively similar enforcement documents to simply claim, as Respondent has here, that it "*will* show conclusively that EPA penalties are more than 'merely uneven,' but vary widely and systemically." Respondent's Opposition at 3, (emphasis added). To

defeat such a motion, a party must do more than merely promise to make such a showing at some future time. Rather, a respondent must make such a precise showing at the time it files its Opposition to the Motion to Exclude. In this instance, the Respondent has not made any such showing.

For the reasons already articulated, it is unnecessary for the Court to engage in an extended analysis of the documents Titan has submitted in an attempt to discover cases that support its claim of uneven penalty assessments. The Court is not obligated to sift through hundreds of pages, in search of one-to-one situations that Respondent believes exist but has failed to identify.[6]

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[6]Nevertheless, a brief sampling of these documents reveals that they do not meet the required identity to the case at hand and therefore lack any materiality in this proceeding. A few observations about these classes of information are instructive of this observation: Respondent's pages TW 000001- 000015 involve extremely brief violation summaries concerning, for the most part, different RCRA statutory and/or regulatory sections than those cited in this litigation. Among many deficiencies with the summaries, beyond the weight that could be given to any summary, there is no indication of the duration of or other details concerning the violations nor the particular circumstances attending settlements.

In some instances the documents in Respondent's pages TW 000016- 000591 do not even identify the type of RCRA violation involved; the description only informs that a payment has been made for a violation of state environmental laws. Where settlement agreements are included within these pages, spot reviews reveal that the settlements involved different violations than those in this litigation and the agreements disavow any admission that violations in fact occurred. It is also highly questionable whether penalty settlements are material for comparison to a penalty in a litigated case.

For Respondent's pages TW 000718-000720, these documents reveal that the inquiries by Respondent's Counsel were not focused on the violations in issue in this litigation but rather were directed to Missouri's, not EPA's, enforcement of hazardous waste regulations.

The documents set forth at Respondent's pages TW 000721-000732., identified as "Region 7 Enforcement Actions," provide information only as to the party cited, the penalty amount, and the name of the statute but without the particular section involved, and do not inform as to the particular facts involved such as the duration of the violation or the gravity.

As with the other document groups discussed above, the documents found at Respondent's pages TW 001081-001537, largely involving EPA consent agreements or complaints, are equally unilluminating. For example, TW 001201- 001214 represent a complaint involving entirely different RCRA regulatory and statutory sections from those in this litigation and seek a penalty in excess of that sought here. Within this group are TW 001168 - 001184. This group provides an example of Respondent's indiscriminate approach to its uneven penalty assessment claim, as these are the *very* pages of the complaint in this litigation.

It is noted that the Respondent's failure to make this showing does not mean that it is without redress to other arguments that the penalty proposed by EPA is inappropriate. Potentially, any respondent can demonstrate that, assuming liability is established or stipulated, the penalty proposed by EPA is inappropriate and therefore that the presiding judge should impose a different penalty. If the Court determines that Respondent is liable for any or all of the violations alleged in the Complaint, it then will consider EPA's penalty proposal to determine whether it should be adopted.

While the Court recognizes that EPA should carefully determine proposed penalties utilizing the criteria set forth in the RCRA penalty policy, it agrees with EPA that *in this instance* the evidence Respondent has presented of penalties sought in completely separate actions cannot be admitted as evidence to show a disparity between the proposed penalty in the instant matter and those in other matters, as such information does not have significant probative value and has no bearing on the determination of a penalty in the case at hand.

Accordingly, Complainant's Motion to Strike the documents listed above is GRANTED.

So Ordered.

William B. Moran
United States Administrative Law Judge

Dated: December 13, 2000

In the Matter of Titan Wheel Corporation of Iowa, Respondent
Docket No. RCRA-VII-98-H-003

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Granting Complainant's Motion To Strike**, dated December 13, 2000, was sent this day in the following manner to the addresses listed below:

Original by Regular Mail to:

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Maria Whiting-Beale
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Dated: December 13, 2000