IN RE BIL-DRY CORPORATION

RCRA (3008) Appeal No. 98-4

FINAL DECISION

Decided January 18, 2001

Syllabus

Bil-Dry Corporation ("Appellant" or "Bil-Dry"), appeals an Initial Decision of the presiding Administrative Law Judge ("Presiding Officer"), arising out of an administrative enforcement action against Bil-Dry for alleged violations of the Resource Conservation and Recovery Act ("RCRA") Subtitle C, 42 U.S.C. §§ 6921-6939e, and the regulations at 40 C.F.R. Parts 260-271, as well as several of Pennsylvania's Hazardous Waste Management ("HWM") regulations at 25 Pa. Code sections 260-270.

The United States Environmental Protection Agency Region III (the "Region") filed a complaint consisting of nine counts, alleging that Bil-Dry owned and operated a hazardous waste storage facility without a permit, failed to determine that its ignitable, corrosive, and chromium wastes were hazardous wastes, failed to determine that its chromium and Methyl Ethyl Ketone ("MEK") wastes were land disposal restricted ("LDR"), failed to properly store LDR waste, failed to establish a schedule for inspections at the facility, failed to have a closure plan for the facility, failed to have a written cost estimate, and stored hazardous waste in containers in poor condition.

The Presiding Officer ruled that Bil-Dry's management, storage and disposal of hazardous wastes in Drums Nos. 2-4 and Tanks A-C rendered its facility a hazardous waste management facility. The Presiding Officer also held that as an owner and operator of a hazardous waste management facility and, as a generator of hazardous waste, Bil-Dry was required, but failed, to comply with the permitting, management, and administrative obligations imposed by the authorized Pennsylvania HWM regulations. In addition, the Presiding Officer held that Bil-Dry failed to determine that its chromium and MEK wastes were LDR and failed to properly store LDR waste as required by the federal regulations. The Presiding Officer found Bil-Dry liable for all nine Counts and assessed a civil penalty of $103,400.

Bil-Dry argues on appeal that the Presiding Officer erred by holding that: (1) EPA could bring an enforcement action against Bil-Dry when the Pennsylvania Department of Environmental Protection ("PADEP") had already issued a Notice of Violation ("NOV") to Bil-Dry; (2) Drums Nos. 2-4 contained hazardous waste; (3) Bil-Dry was liable for the hazardous material in the tanks; and (4) Bil-Dry had the ability to pay a civil penalty in the amount of $103,400.

Held: (1) The Board affirms the Presiding Officer's ruling that EPA could bring an enforcement action against Bil-Dry. Bil-Dry's argument that a Federal enforcement action

is precluded under the Eighth Circuit's decision in *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999), is rejected because, *inter alia*, this case is distinguishable from *Harmon* because it does not involve overfiling.

(2) The Board affirms the Presiding Officer's finding that Drums Nos. 2-4 contained hazardous waste.

(3) The Board affirms the Presiding Officer's finding that Bil-Dry was the owner of Tanks A-C and, as such, was liable for the hazardous waste in the tanks.

(4) The Board reverses the Presiding Officer's Initial Decision finding liability for Counts II and III with respect to Tanks A-C, which alleged violations of Pennsylvania's HWM regulations requiring "generators" of waste to make hazardous waste determinations and LDR waste determinations, respectively. The Board finds that the evidence in the record is not sufficient to meet the Region's burden of proving that Bil-Dry was the "generator" of the hazardous waste in Tanks A-C. However, the Board affirms the Presiding Officer's Initial Decision finding liability for Counts II and III with respect to Drums Nos. 2-4.

(5) The Board affirms the Presiding Officer's finding that Bil-Dry did not meet its burden of establishing that it was unable to pay a civil penalty of $103,400. However, since the Board is reversing the Presiding Officer's Initial Decision finding liability for Counts II and III with respect to Tanks A-C, the Board assesses a reduced civil penalty of $89,150.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Reich:

I. *INTRODUCTION*

Bil-Dry Corporation ("Appellant" or "Bil-Dry") has appealed an Initial Decision issued October 8, 1998, in which the Presiding Officer assessed a civil penalty of $103,400 for seven violations of the Pennsylvania Hazardous Waste Management ("HWM") regulations,[1] and two counts of violations of the federal regulations governing land disposal of certain materials. For the reasons stated

[1] The Pennsylvania Department of Environmental Protection ("PADEP"), formerly known as the Pennsylvania Department of Environmental Resources, recodified its hazardous waste regulations on February 10, 1990, prior to the issuance of the Complaint. 20 Pa. Bull. 909 (Feb. 10, 1990). The Region, nevertheless, cited the regulations both as they originally appeared at 25 Pa. Code sections 75.259-75.282, and as they appeared at 25 Pa. Code sections 260-270 after their recodification. However, the recodified regulations at 25 Pa. Code sections 260-270 were subsequently further amended by deleting the text at Chapters 260-267, 269 and 270, and incorporating by reference in Chapters 260a-266b and 268-270a, the Code of Federal Regulations ("CFR") in effect as of May 1, 1999. 29 Pa. Bull. 2367 (May 1, 1999). We will cite to the recodified regulations at 25 Pa. Code sections 260-270 when discussing the Pennsylvania regulations.

below, we reverse the portion of the Presiding Officer's Initial Decision finding liability for Counts II and III as they relate to Tanks A-C, but affirm the portion of the Initial Decision finding liability for Counts II and III with respect to Drums Nos. 2-4. We also affirm the portion of the Initial Decision finding liability for Counts I and IV-IX with respect to Tanks A-C and Drums Nos. 2-4, and assess a $89,150 civil penalty against Bil-Dry.

II. *BACKGROUND*

A. *Statutory and Regulatory Background*

The United States Environmental Protection Agency, Region III (the "Region") alleges that Bil-Dry violated the Resource Conservation and Recovery Act ("RCRA") Subtitle C, 42 U.S.C. §§ 6921-6939e, and the regulations thereunder at 40 C.F.R. §§ 260-271, as well as the regulations implementing the Pennsylvania Solid Waste Management Act[2] ("SWMA"), 35 Pa. Const. Stat. section 6018.101 *et seq*.[3]

B. *Factual Background*

Respondent Bil-Dry owns and operates a facility that manufactures grout and cement patching products, wall and floor coverings, and other consumer products. Complainant's Exhibit ("C Ex") 1 ¶ 4. Bil-Dry has owned and operated the facility located at 5525 Grays Avenue, Philadelphia, Pennsylvania (the "facility") since 1985. *Id*.

1. *The Region's December 11, 1995 Inspection*

On December 11, 1995, Inspector Ronald Jones, an Environmental Protection Specialist with the Region, conducted an inspection of the facility. The purpose of the inspection was to determine the existence and condition of any under-

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[2] On January 30, 1986, pursuant to § 3006(b) of RCRA, 42 U.S.C. § 6926(b), and 40 C.F.R. part 271, subpart A, the Commonwealth of Pennsylvania was granted final authorization to administer a state hazardous waste management program in lieu of the Federal hazardous waste management program established under RCRA Subtitle C, 42 U.S.C. §§ 6821-6939e. Pennsylvania; Final Authorization of State Hazardous Waste Management Program, 51 Fed. Reg. 1791 (Jan. 15, 1986). The United States Environmental Protection Agency ("EPA") still administers those parts of RCRA for which Pennsylvania has not received authorization. In addition, EPA has the authority pursuant to RCRA § 3008(a)(1), 42 U.S.C. § 6928(a)(1), to enforce any requirement of the authorized Pennsylvania program. *See In re Rybond, Inc.*, 6 E.A.D. 614, 616 n. 1 (EAB 1996); *In re CID-Chemical Waste Management of Illinois, Inc.*, 2 E.A.D. 613 (CJO 1988).

[3] *See infra*, note 13.

ground storage tanks (USTs) located at the site. C Ex 3; Transcript of Hearing (December 2, 1997) ("Tr. I.") at 56-59.

During the inspection, Inspector Jones discovered tank caps, vent pipes, fill pipes and a dispenser unit, which indicated the presence of two to four tanks in the front of the facility. Tr. I at 59, 65; C Ex 3. According to Inspector Jones, the dispenser unit and four steel caps were immediately visible from outside the fenced-in loading area prior to his entry to the facility. Tr. I at 59, 65-66; C Ex 3.

When Inspector Jones questioned Joseph Mazza, the General Manager of the facility, about the steel caps and dispenser unit on the property, Mr. Mazza admitted that the steel caps and dispenser units seemed to indicate the presence of tanks under the concrete in the loading area of the facility. Tr. I at 60-62. However, Mr. Mazza informed Inspector Jones that there were no records available at the facility concerning the contents of the tanks. *Id*. at 60, 65-66.

Inspector Jones was unable to conduct sampling of the tanks' contents during the December 11, 1995 inspection because they were locked and sealed. *Id*. at 66. In addition, there were no signs or labels on the tanks' associated equipment or in their vicinity to indicate their contents. *Id*. at 66-67. At the hearing held in this matter, Inspector Jones testified that the tanks appeared to have been locked and sealed for a long period of time. *Id*. at 64.

Inspector Jones and Mr. Mazza toured the remainder of the facility to determine the presence of any additional tanks. Tr. I at 64. During this tour, Inspector Jones observed approximately 100 drums stored in a building adjacent to an open area at the rear of the facility. *Id*. at 64-65, 104. Inspector Jones noted that some of the drums were rusty and appeared to be in poor condition. *Id.* at 64, 67. Mr. Mazza stated that while he did not have any records concerning the drums or their contents, he believed that they had been there since 1985 when Bil-Dry took possession of the facility. *Id*. at 66. When Inspector Jones attempted to move several of the drums, he discovered that they contained materials. *Id*. at 68. Inspector Jones took photographs of the drums (*see* Tr. I at 49; C Ex 3) but did not take any samples from them (Tr. I at 100, 106) and made no determination regarding Bil-Dry's storage of waste materials. *Id*. at 107.

2. *March 21, 1996 Citizen Complaint*

On March 21, 1996, the Pennsylvania Department of Environmental Protection ("PADEP") received a citizen complaint alleging that there were drums improperly stored at the facility. Tr. I at 134; C Ex 6 at 1; C Ex 7. According to a PADEP Complaint Tracking Report, the complaint "indicates some 15 to 20 drums are being stored outside at this facility; some are rusted and there appears to be no containment area; concerned since facility works with paint/chemical compounds and there was a fire nearby recently." C Ex 7.

3. *PADEP's April 1, 1996 Inspection*

On April 1, 1996, a PADEP inspection team led by Heather Bouch arrived at the facility to conduct an inspection of the site. Tr. I at 133, 136. Initially, Mr. Mazza refused the PADEP inspection team entry, explaining that the Region had already conducted an inspection. *Id*. at 136. Mr. Mazza did, however, grant the PADEP inspection team access to the facility after Inspector Bouch explained the legal basis for the inspection and the concurrent jurisdiction of the Region and PADEP. *Id*. at 136-137, 152.

During her inspection, Inspector Bouch observed a "large quantity" of drums located within a building at the rear of the facility. *Id*. at 139; C Ex 6 at 2. According to Inspector Bouch, Mr. Mazza stated that he was unaware as to the contents of the drums and, while they had been sampled by Bil-Dry, he did not have the results at that time. Tr. I at 139. When asked whether he had an inventory for the drums, Mr. Mazza stated that he did not have one at the facility. *Id*. at 153. Inspector Bouch estimated that there were approximately 130 drums inside the building (*id*. at 140; C Ex 6 at 2) and that a large percentage appeared to be rusted and in poor condition. Tr. I at 139; C Ex 6 at 2.

In addition, Inspector Bouch observed an open-roofed area containing between 100 and 150 drums stacked three pallets high, six pallets wide, and two pallets deep, most containing three or four drums. Tr. I at 143; C Ex 6 at 3. Inspector Bouch noted that these drums were "not labeled, dated, or in good shape," and some of them had "materials hanging out of their tops and down [their] sides." C Ex 6 at 3.

Inspector Bouch also observed markings on drums located both inside the building and in the open-roofed area, but was unable to determine their meaning, and described them as "chicken scratch" numbers or markings. Tr. I at 139, 142. Inspector Bouch did not take samples for laboratory analysis to determine whether the drums contained hazardous waste, or photograph the condition of the drums. *Id*. at 150.

After inspecting the production areas of the facility, Inspector Bouch noted in her report that the primary waste generated by Bil-Dry was unusable packaging material and that there were no violations of Pennsylvania's HWM regulations associated with the ongoing manufacturing processes. Tr. I at 138; 151-52; C Ex 6 at 2. However, Inspector Bouch concluded that Bil-Dry was in violation of the Pennsylvania HWM regulations with regard to its storage of the drums. *See* Tr. I at 145.

4. *The Region's April 9-10, 1996 Inspection*

On April 9-10, 1996, Inspector Jones, accompanied by Environmental Protection Specialist Gerry Donovan and RCRA Enforcement and Compliance Officer Zelma Maldonado, conducted an inspection of the entire facility. Tr. I at 70. Mr. Mazza, William Rodgers, President of Bil-Dry Corporation, and George Sode, Senior Process Engineer, were present. Tr. I at 70; Transcript of Hearing (December 3, 1997) ("Tr. II") at 372, 446.

Prior to commencing the inspection, Inspector Jones inquired about the existence of any records concerning the tanks and the drums at the facility. Tr. I at 71. He was told by Mr. Sode that no records existed for the tanks. *Id*. Mr. Sode, however, presented an undated, handwritten, nine-page inventory list for the drums. *Id*.; C Ex 4. Inspector Jones took the inventory list to the rear of the facility to verify that the markings on the drums matched those on the inventory list, but determined that they did not. Tr. I at 71; C Ex 4.

Samples were taken from seven random drums (Drums Nos. 1 through 7) and four tanks (Tanks A through D) during the April 9-10 inspection according to standard EPA sampling procedures. Tr. I at 72-75, 77-78, 83-84; Tr. II at 372, 446; C Ex 4. EPA Drums Nos. 1 through 3 were located inside a building at the rear of the facility and Drums Nos. 4 through 7 were located outside the building. Bil-Dry's representatives did not obtain split samples from Inspectors Jones, Donovan, or Maldonado, nor did they undertake any sampling of their own in the presence of the Region's inspectors. Tr. I at 77, 85-86, 115.

Inspector Jones noted that the drums that had been stacked outside at the rear of the facility during his December 11, 1995 inspection had now been placed on a concrete pad and several had plastic lids covering tops which had "rusted out." Tr. I at 78-79, 81, 121; C Ex 4. In addition, some of the drums Inspector Jones had observed during his December 11, 1995 inspection were missing from the storage area. *Id*. at 80. In response to Inspector Jones' questions about this change, Mr. Mazza stated that the drums had been either used or repacked since the December inspection. *Id*. at 80, 115-117; Tr. II at 367; C Ex 4.

Based on the poor overall condition of the drums at the rear of the facility, the absence of a system to identify the drums or their contents, and Mr. Mazza's statement that they had been stored there since 1985, the Region's inspectors classified their contents as solid waste. Tr. I at 83; C Ex 4. At the time of the April 1996 inspection, Mr. Sode stated that Bil-Dry's position was that the contents of the drums were "raw materials" and therefore not solid waste. C Ex 4. Bil-Dry's representatives were unable to explain why the drums had been stored as they had since 1985, when the property was acquired by Bil-Dry, or identify the drums' contents. *Id*.

5. *Analysis of Drums Nos. 1-7*

EPA's Office of Analytical Services and Quality Assurance (OASQA) performed an analysis in May-June of 1996, on the samples taken from Drums Nos. 1-7 and Tanks A-D.[4] OASQA's analysis was properly calibrated to take into account the presence of sodium in high alkaline solutions, temperature, positioning of electrodes and the age of the samples. Tr. I at 171-175. The contents of Drums Nos. 2-5,[5] and Tanks A-C exhibited hazardous characteristics[6] according to Dr. Samuel Rotenberg, an EPA Regional Toxicologist. *Id*. at 210-24; C Ex 5.

Specifically, the contents of Drum No. 2 were found by OASQA to exhibit the characteristic of corrosivity[7] (EPA Hazardous Waste No. D002) by registering a pH value of 12.6 during inorganic analytical testing, Tr. I at 211-12; C Ex 5; the contents of Drum No. 3 exhibited the characteristic of ignitability[8] (EPA Hazardous Waste No. D001) and toxicity for Methyl Ethyl Ketone ("MEK")[9] (EPA Hazardous Waste No. D035), Tr. I at 212-14, 216-17; C Ex 5; and the contents of Drum No. 4 exhibited the characteristic of ignitability (EPA Hazardous Waste No. D001). Tr. I at 217-18; C Ex 5.

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[4] The material in Tank D did not exhibit any hazardous characteristics. *See* C Ex 5.

[5] The contents of Drum No. 5 exhibited the characteristic of corrosivity (EPA Hazardous Waste No. D002) and the characteristic of toxicity for chromium (EPA Hazardous Waste No. D007). Tr. I at 218-220; C Ex 5. However, the Presiding Officer determined that the material in Drum No. 5 was beneficially used by Bil-Dry and, as such, was not discarded waste. Initial Decision ("Init. Dec.") at 19.

[6] Some solid wastes are identified as hazardous based on the characteristics exhibited by the specific waste stream. 40 C.F.R. §§ 261.20-261.24; 25 Pa. Code §§ 261.20-261.24. The four characteristics which may render a material hazardous are the following: ignitability, corrosivity, reactivity and toxicity. *Id*. Some wastes generated from certain sources, processes, or uses are "listed" as hazardous based on the propensity of the constituents of such wastes to present a hazard, *see* 40 C.F.R. §§ 261.30-261.33; 25 Pa. Code §§ 261.30-261.33, and each listed waste is assigned a numeric code.

[7] The EPA standards for corrosivity testing designate materials which have pH values of greater than 12.5 (caustic) or lower than 2 (acidic) as hazardous in nature. 40 C.F.R. § 261.22; Tr. I at 166, 211.

[8] The EPA standard for ignitability in hazardous waste determinations is a flashpoint (FP) of less than 60 degrees Celsius. Materials which ignite and burn at less than this temperature are considered to be hazardous waste. 40 C.F.R. § 261.21; Tr. I at 212-14; C Ex 5.

[9] MEK is a colorless, flammable liquid used in the production of protective surface coatings, adhesives, paint removers and special lubricating oils. Tr. I at 213-14, 224-25; C Ex 5. Exposure to MEK can occur following releases into the air, water, land or groundwater and can enter the human body through breathing contaminated air, consumption of contaminated food or water, or absorbed through skin contact. *Id*. Breathing MEK for short periods of time can have adverse effects on the nervous system, ranging from headaches to unconsciousness depending upon levels of exposure. *Id*. Direct, prolonged contact with liquid MEK irritates the skin and damages the eyes. *Id*. Concentrations greater than 200 parts per million ("ppm") are considered to be toxic according to EPA. *Id*.

Results of OASQA's Analysis of Drum Samples[10]

DRUM	SAMPLE NO.	SAMPLING RESULT	STANDARD	HAZ. WASTE CODE
2	96041102	pH = 12.6 (corrosivity)	2 > pH > 12.5	D002
3	96041103	FP = 21C (ignitability)	FP < 60˚C	D001
3	96041103	MEK = 36,400 ppm (toxicity)	MEK = 200 ppm	D035
4	96041104	FP = 57C (ignitability)	FP < 60˚C	D001

6. *Analysis of Tanks A-C*

The contents of Tank A exhibited the characteristic of ignitability (EPA Hazardous Waste No. D001), Tr. I at 222-23; C Ex 5; the contents of Tank B exhibited the characteristic of toxicity for MEK (EPA Hazardous Waste No. D035), Tr. I at 223; C Ex 5; and the contents of Tank C exhibited the characteristic of ignitability (EPA Hazardous Waste No. D001) and toxicity for MEK (EPA Hazardous Waste No. D035). *Id.*

[10] *See* C Ex 5.

Results of OASQA's Analysis of Tank Samples[11]

TANK	SAMPLE NO.	SAMPLING RESULT	STANDARD	HAZ. WASTE CODE
A	96041108	FP = 57˚C (Ignitability)	FP < 60˚C	D001
B	96041109	MEK = 3,160 ppm (Toxicity)	MEK = 200 ppm	D035
C	96041110	MEK = 8,200 ppm (Toxicity)	MEK = 200 ppm	D035
C	96041110	FP = 43˚C (Ignitability)	FP < 60˚C	D001

7. *PADEP's Notice of Violation to Bil-Dry*

On May 30, 1996, PADEP sent a notice of violation ("NOV") to Bil-Dry, citing 14 potential violations of the Pennsylvania SWMA, 35 Pa. Const. Stat. section 6018.101 *et seq*., and the regulations thereunder at Title 25 of the Pennsylvania Code. *See* C Ex 8. The notice did not impose any obligation upon Bil-Dry and served to provide an opportunity for Bil-Dry to come into compliance with the provisions of the SWMA through voluntary action. More particularly, the NOV expressly stated that it "[did] not impose any obligation upon Bil-Dry Corporation" and that PADEP "suggests" that Bil-Dry submit a report addressing the violation to PADEP. *See id.*

In response to PADEP's NOV, Bil-Dry sent a letter dated June 14, 1996, to Inspector Bouch, stating that despite the condition of the containers, the drums contained useable raw materials. Respondent's Exhibit ("R Ex") 26. Bil-Dry also stated that the absence of a readable marking system was attributed to heavy rain and snow during the previous winter which resulted in a wearing-off of previously made marks. *Id*. In addition, Bil-Dry offered to remove all materials from the facility's previous paint production processes, repackage all materials from drums showing signs of wear, apply for and adhere to all permit regulations affecting its operations, develop or update pollution prevention, spill contingency and emergency action plans, and empty and close the tanks on the facility's property. *Id.*

[11] *See* C Ex 5

8. *The Region's June 12, 1996 Request For Information*

On June 12, 1996, the Region requested information regarding the tanks from Bil-Dry, pursuant to RCRA §§ 9001 *et seq*. (Regulation of Underground Storage Tanks) and 40 C.F.R. part 280 (Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks). C Ex 18a.

Bil-Dry responded by stating that it was not aware of the presence of the tanks until the Region's December 11, 1995 inspection, that it did not consider itself to be the current owner/operator of the tanks, and it was unable to provide any information concerning their operation, contents or construction. C Ex 18b. Bil-Dry also requested copies of the Region's laboratory analyses of the samples taken from the tanks. *Id*.

9. *The Region's August 29, 1996 Request for Information*

On August 29, 1996, Bil-Dry received a letter from the Region requesting information regarding the type, generator or producer, amount and date of acquisition and use, purpose for acquisition, current and previous condition and date of storage and sampling for each container that had been at the open-roofed area at the facility since its acquisition. C Ex 19a. In addition, among other things, the Region requested that Bil-Dry furnish all documents related to the containers on the site, records regarding the transport of materials in the containers from the facility, methods of storage, the existence of hazardous waste determinations, the contents of Drums Nos. 1 through 7, and what action had been taken in response to PADEP's June 14, 1996 letter. *Id*.

C. *Procedural Background*

1. *Notice to PADEP*

Prior to issuing an administrative complaint, the Region notified PADEP of its intention to initiate an enforcement action against Bil-Dry as required by RCRA § 3008(a)(2), 42 U.S.C. § 6928(a)(2). *See* Affidavit of Nancy Roncetti ("Roncetti Aff.") ¶ 3; Affidavit of Christopher B. Pilla ("Pilla Aff.") ¶ 7. PADEP agreed that the Region should take the lead enforcement role and pledged to provide assistance in that effort. *See id*.; C Ex 6 at 3.

2. *The Region's Complaint*

On September 30, 1996, the Region issued an administrative complaint in which it alleged that Bil-Dry was in violation of RCRA Subtitle C, 42 U.S.C. §§ 6921-6939e, and the regulations at 40 C.F.R. parts 260-271, as well as several of Pennsylvania's HWM regulations. *See* C Ex 14. The complaint

listed seven counts of violations of the Pennsylvania HWM regulations and two counts of violations of the federal[12] restrictions on land disposal of certain materials, and recommended a civil penalty of $231,800.[13] *Id*.

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[12] Although Pennsylvania has an authorized HWM program, the Region enforces the federal regulations pertaining to Land Disposal Restricted ("LDR") wastes, because these regulations were enacted pursuant to the Hazardous and Solid Waste Amendments of 1984 ("HSWA") *after* Pennsylvania was granted final authorization. Accordingly, since Pennsylvania has not been authorized to implement and enforce these regulations, the Federal regulations continue to apply. 42 U.S.C. § 3006(g); 40 C.F.R. part 268, subpart C.

[13] Count I alleged that Bil-Dry is the owner and operator of a hazardous waste storage facility for which a permit or interim status is required under 25 Pa. Code section 270.1(a). The Region requested a multi-day penalty component for this violation of $250 per day for a total of $30,000 based on the duration period of December 11, 1995, through April 10, 1996 (120 Days).

Count II alleged that Bil-Dry violated 25 Pa. Code section 262.11 by failing to determine that its ignitable (D001), corrosive (D002), chromium (D007) and MEK (D035) wastes, were hazardous wastes. The Region requested a multi-day penalty component for this violation of $250 per day for a total of $30,000 based on the duration period of December 11, 1995, through April 10, 1996 (120 Days).

Count III alleged that Bil-Dry violated 40 C.F.R. § 268.7(a) by failing to determine that its chromium and MEK wastes were LDR. The Region requested a multi-day penalty component for this violation of $250 per day for a total of $30,000, based on the duration period of December 11, 1995, through April 10, 1996 (120 Days).

Count IV alleged that Bil-Dry's failure to properly store LDR waste, as required by 40 C.F.R. § 268.50, could have posed a significant risk to human health and the environment. The Region requested a multi-day penalty component for this violation of $250 per day for a total of $30,000, based on the duration period of December 11, 1995, through April 10, 1996 (120 Days).

Count V alleged that Bil-Dry's failure to establish a schedule for inspections at the facility in compliance with 25 Pa. Code section 265.15(b) constituted potentially significant harm to the RCRA regulatory program, human health and the environment.

Count VI alleged that Bil-Dry violated 25 Pa. Code section 265.112(a) by not having a closure plan for the facility, which represented a significant potential harm to human health and/or the environment because of possible delays in the closure process. The Region requested a multi-day penalty component for this violation of $250 per day for a total of $30,000, based on the duration period of December 11, 1995, through April 10, 1996 (120 Days).

Count VII alleged that Bil-Dry violated 25 Pa. Code sections 265.142(a)-(c) by failing to have a written cost estimate for closing the facility and/or by failing to update or adjust its cost estimate, incrementally contributing to the harm caused by Bil-Dry's failure to develop a closure plan in the first instance.

Count VIII alleged that Bil-Dry violated 25 Pa. Code sections 265.171, 265, 173(a), and 265.178, by storing hazardous waste in containers in poor condition; by storing at least one container of hazardous waste that was not covered with a lid when it was not necessary to add or remove hazardous waste; and by storing hazardous wastes in containers which were kept in a storage containment area without a container system capable of collecting and holding spills, leaks and precipitation. The Region requested a multi-day penalty component for this violation of $250 per day for a total of $30,000, based on the duration period of December 11, 1995, through April 10, 1996 (120 Days).

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The complaint also contained a compliance order mandating that Bil-Dry cease storing hazardous waste at the facility, conduct a hazardous waste determination for all materials currently stored at the facility, obtain a hazardous waste identification number, submit a closure plan for the hazardous drum and tank storage area, establish financial assurance for closure of the facility, and submit a written report stating whether or not Bil-Dry complied with the activities set forth in the compliance order. *Id.* at 11-12.

3. *Bil-Dry's Answer to the Region's Complaint and Response to Request for Information*

On October 30, 1996, Bil-Dry answered the Region's complaint by asserting that it did not consider itself to be the owner or operator of a hazardous waste treatment, storage or disposal facility and, consequently, a permit or application for interim status under Pennsylvania or federal law was unnecessary. C Ex 17. Bil-Dry also stated that the materials at issue were not hazardous waste and therefore Bil-Dry was not in violation of either Pennsylvania or applicable federal laws covering hazardous waste, but admitted that there was no containment system. *Id.* Finally, Bil-Dry stated that it considered the proposed penalties to be excessive and unreasonable, the payment of which would jeopardize the company's existence. *Id.*

On November 19, 1996, Bil-Dry responded to the Region's August 29, 1996 request for information regarding the containers stored in the open area at the rear of the facility. C Ex 19b. In the letter, Bil-Dry stated that the Region's request was "extremely broad" and that while Bil-Dry had answered the request to the best of its ability, nothing in its response should be interpreted as an admission that Bil-Dry was storing hazardous wastes, as it had concluded that the materials were useable raw materials. *Id.* Bil-Dry also asserted that the drums had been the property of Harrad Paints, the previous owner of the property, and were in generally good shape. *Id.* However, Bil-Dry stated that "[r]ather than getting into a dispute with the EPA, Bil-Dry decided that the better alternative would be to have the drums tested for disposal and disposed." *Id.* Bil-Dry claimed that it had removed and disposed of the material in the tanks, as well as 150 drums. *Id.* Moreover, Bil-Dry stated that a further 110 drums were awaiting analysis pending disposal, and had no documentation regarding the drums other than that which was provided to the inspectors during the April 9-10 inspection. *Id.*

(continued)

Count IX alleged that Bil-Dry violated 25 Pa. Code section 267.11 by failing to file a bond payable to PADEP to prevent the creation of a Superfund site at the facility. The Region requested a multi-day penalty component for this violation of $250 per day for a total of $30,000, based on the duration period of December 11, 1995, through April 10, 1996 (120 Days).

By the end of November 1996, Bil-Dry had disposed of all of the drums that were the subject of the Region's complaint. Tr. II at 426-29. Bil-Dry had not determined the chemical identity of the contents of Drums Nos. 2-4 prior to their disposal. *Id*. at 411-12.

4. *The Evidentiary Hearing*

On December 2-3, 1997, an evidentiary hearing was conducted before the Presiding Officer in Philadelphia, Pennsylvania, pursuant to 40 C.F.R. part 22. On September 2, 1998, the Presiding Officer issued an Order Requiring Further Briefing based on the decision of the U.S. District Court for the Western District of Missouri in *Harmon Indus., Inc. v. Browner*, 19 F.Supp. 2d 988 (W.D. Mo. 1998), *aff'd*, 191 F.3d 894 (8th Cir. 1999) ("Harmon"). The Region filed its brief on September 24, 1998, and Bil-Dry submitted a brief that was not considered by the Presiding Officer to be filed in a timely manner.

D. *The Initial Decision*

On October 8, 1998, the Presiding Officer issued an Initial Decision in which he found Bil-Dry liable for all nine counts of the Region's complaint. The Presiding Officer determined that Bil-Dry's management, storage and disposal of hazardous wastes in Drums Nos. 2-4 and Tanks A-C rendered its facility a hazardous waste management facility. The Presiding Officer held that as an owner and operator of a hazardous waste management facility, and as a generator of hazardous waste, Bil-Dry was required, but failed, to comply with the permitting, management, and administrative obligations imposed by the authorized Pennsylvania HWM regulations at 25 Pa. Code section 75.259 *et seq.*, which are directly enforceable under RCRA § 3008(a). In addition, the Presiding Officer held that Bil-Dry failed to determine that its chromium and MEK wastes were LDR, and failed to properly store LDR waste as required by the federal regulations at 40 C.F.R. §§ 268.7(a) and 268.50, respectively. As such, the Presiding Officer found Bil-Dry liable and assessed a civil penalty of $103,400, which was calculated on a per count basis.[14]

[14] The Presiding Officer held that the Region's recommended penalty of $231,800 was inappropriately calculated because the Region failed to meet its burden of proof under section 22.24 of the Consolidated Rules of Practice (40 C.F.R. Part 22) to show that all the violations at issue occurred as of the December 11, 1995 inspection. Init. Dec. at 33. According to the Presiding Officer, the Region failed to prove that any violations pertaining to Drums Nos. 2-4 occurred as of December 11, 1995, at the time of Inspector Jones' inspection. *Id*. Instead, the multi-day violation was found to have begun as of April 9, 1996. *Id*. at 33. The Region did not appeal this holding.

E. *The Appeal*

Bil-Dry's appeal, which was filed on November 5, 1998, raises four issues: (1) whether the Presiding Officer erred when he held that EPA could bring an enforcement action against Bil-Dry when PADEP had already issued an NOV to Bil-Dry; (2) whether the Presiding Officer erred when he held that Drums Nos. 2-4 contained hazardous waste; (3) whether the Presiding Officer erred when he held that Bil-Dry was liable for the hazardous material in the tanks; and (4) whether the Presiding Officer erred when he held that Bil-Dry had the ability to pay a civil penalty in the amount of $103,400. Appellant Bil-Dry Corporation's Appeal Brief ("Appellant's Brief") at 5, 15, 39, 43.

Bil-Dry urges the Board to reverse the Presiding Officer's Initial Decision and to rule that Bil-Dry was not liable for the violations at issue in the Region's complaint, and/or assess no civil penalty against Bil-Dry. *Id*. at 49.

The Region filed its Reply Brief on November 25, 1998. Reply Brief of Complainant, United States Environmental Protection Agency, to Respondent, Bil-Dry Corporation's Notice of Appeal and Appeal Brief ("Appellee's Brief").

III. *DISCUSSION*

We now turn to the issues presented on appeal. First we address the issue of whether the Region had the authority under RCRA to bring an enforcement action against Bil-Dry after PADEP issued an NOV to Bil-Dry. We will then address the issues of whether Drums Nos. 2-4 contained hazardous waste, whether Bil-Dry was the generator of the hazardous waste in Tanks A-C, and whether Bil-Dry was the owner of Tanks A-C. Finally we turn to the issue of the penalty calculations raised by Bil-Dry. The Board generally reviews the Presiding Officer's factual and legal conclusions on a de novo basis. *See* 40 C.F.R. § 22.30(f).[15]

[15] Although the Board generally reviews the Presiding Officer's factual and legal conclusions on a de novo basis, the Board may apply a deferential standard of review to issues such as the Presiding Officer's finding of fact where the credibility of witnesses is at issue, *see In re Tifa Ltd*, 9 E.A.D. 145, 151 n.8 (EAB 2000); and decisions regarding discovery, *see In re Chempace Corp.*, 9 E.A.D. 119, 134-35 (EAD 2000).

A. *The Region's Authority Under RCRA To Initiate an Enforcement Action Against Bil-Dry*

1. *The Region Was Authorized to Initiate an Enforcement Action Against Bil-Dry*

Bil-Dry, relying on the District Court and Eighth Circuit *Harmon* decisions, argues that the Region was not authorized to take enforcement action against Bil-Dry because PADEP is the agency authorized by EPA to administer the RCRA hazardous waste program in Pennsylvania. Appellant's Brief at 11-12. Bil-Dry argues that the Region was not authorized to act unless PADEP failed to act, and that PADEP, rather than the Region, should have brought an enforcement action against Bil-Dry. *Id*. Bil-Dry asserts — without citation — that "RCRA's clear, unambiguous language shows that Congress intended authorized States to be the enforcers of RCRA, and that the EPA could act in limited circumstances, including when a State failed to take action against a violation." Appellant's Brief at 6.

The Presiding Officer, in his Initial Decision, held that the District Court's *Harmon* decision[16] contradicted the unambiguous language of RCRA, the statute's legislative history, and a long line of judicial and administrative rulings to the contrary, and was, in any event, not controlling in this action. Init. Dec. at 13. As such, the Presiding Officer declined to adopt the Court's rationale and concluded that the Region was fully authorized to initiate the enforcement action against Bil-Dry. *Id*.

This Board and the Agency have addressed this issue on numerous occasions. Most recently, in *In re Harmon Electronics, Inc.*, we stated that:

> We need not dwell for long on this statutory argument. It is well settled that, even when the authorized State has taken action, RCRA nevertheless authorizes the Agency to take its own action. Harmon has not offered any persuasive reasons to open this well-established reading of the statute, and we decline to do so.[17]

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[16] The Eighth Circuit affirmed the District Court's *Harmon* decision after the Presiding Officer issued his Initial Decision on October 8, 1998.

[17] In a footnote accompanying this statement, we elaborated as follows:

> This issue received in-depth consideration by EPA as early as 1986, when EPA's General Counsel rendered a legal opinion that addressed the same arguments that Harmon is raising now and concluded that RCRA authorizes the Agency to bring an action in an authorized State even if the State has already prosecuted the same respondent for the same violations. Memorandum entitled: "Effect on EPA Enforcement of Enforcement Action Taken By State With Approved RCRA Program" from Francis S. Blake, General Counsel, to Lee M. Thomas, Administrator (May 9, 1986) ("Blake Memorandum").

Continued

7 E.A.D. 1, 9-10 (EAB 1997), *rev'd*, *Harmon Indus., Inc. v. Browner*, 19 F. Supp. 2d 988 (W.D. Mo. 1988), *aff'd*, 19 F.3d. 894 (8th Cir. 1999).

We recognize, of course, that the Eighth Circuit, in deciding an appeal of the District Court's *Harmon* decision, took the contrary view. *See Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999). That decision, while controlling precedent within that Circuit, is not controlling here, since Pennsylvania is in the Third Circuit. *See Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F.Supp 457, 460-61 (E.D. Pa. 1972) (finding that decisions in other circuits or other districts are entitled to serious consideration, but are not binding); *Thompson v. Calmar S.S. Corp.*, 216 F.Supp 234, 237 (E.D. Pa. 1963) (holding that federal District Court is not bound by decision of Court of Appeals for another circuit), *aff'd* 331 F.2d 657 (3d Cir. 1964), *cert. denied*, 379 U.S. 913.[18] In the wake of the Eighth Circuit's *Harmon* decision, EPA's General Counsel has reaffirmed that while *Harmon* is final and is binding on EPA in that particular case, the Agency would not adopt the Eighth Circuit's interpretation of RCRA nationwide.[19]

(continued)

Since that time, numerous Agency decisions have affirmed this position. *See, e.g. In re Gordon Redd Lumber Co.*, 5 E.A.D. 301, 308 (EAB 1994) ("Nevertheless, under the statute, even if the State brings an enforcement action for violations of the State's program, the Agency retains authority to bring its own enforcement action for such violations."); *In re Southern Timber Prod., Inc.*, 3 E.A.D. 371, 378 (JO 1990) ("The Agency has long interpreted RCRA as authorizing a federal enforcement action in an authorized State even where the State has 'acted' in some limited fashion. * * * [N]othing in the statute precludes federal enforcement to secure an adequate penalty."); *In re Martin Electronics*, 2 E.A.D. 381, 385 (CJO 1987) ("[E]ven if a State's enforcement action is adequate, such State action provides no legal basis for prohibiting EPA from seeking penalties for the same RCRA violation. EPA's decision to defer to prior State action is a matter of enforcement discretion and policy."). In addition, the regulations implementing RCRA clearly contemplate federal enforcement when the parallel action of an authorized State results in an inadequate penalty. *See* 40 C.F.R. § 271.16(c) ("Note: To the extent the State judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA, when authorized by the applicable statute, may commence separate actions for penalties."). Finally, the Agency's authority to bring an action, even after State action for the same violation, has also been upheld at the judicial level. *See, e.g., EPA v. Environmental Waste Control, Inc.*, 710 F.Supp. 1172, 1186 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

[18] We note that in *U.S. v. Power Engineering Co.*, the U.S. District Court for the District of Colorado expressly declined to follow the Eighth Circuit's *Harmon* decision, concluding that "the [Eighth Circuit's] *Harmon* decision incorrectly interprets the RCRA." No. CIV.A.97-B-1654, 2000 WL 1909372, at *15 (D. Colo., Nov. 24, 2000).

[19] Letter from Gary S. Guzy to Congressman David M. McIntosh at 3 (May 22, 2000).

Under the circumstances, we see no compelling reason to reopen this issue in the context of this case. Moreover, for the reasons discussed in the next section, we think this case is clearly distinguishable from the facts before the Eighth Circuit in *Harmon*, such that the principle articulated there would not apply to this case.

2. *This Case Is Distinguishable from Harmon Because It Does Not Involve Overfiling*

Bil-Dry argues that like Region VII's actions in *Harmon*, the Region "overfiled"[20] in the present case, and thus, the Eighth Circuit's *Harmon* decision is controlling. Appellant's Brief at 5. We conclude that the facts of *Harmon* are clearly dissimilar from the facts of this action because, among other things, PADEP did not initiate an enforcement action against Bil-Dry. In this case, PADEP agreed that the Region should take the lead in any enforcement action against Bil-Dry, and thus deferred any action of its own. As such, we find that the Eighth Circuit's rationale in *Harmon* would not be applicable to the facts of this case in any event.

a. *Harmon*

In 1990, U.S. EPA Region VII ("Region VII") requested that the State of Missouri take enforcement action against Harmon Industries, Inc. ("Harmon Industries") after the company disclosed that its employees had been illegally dumping hazardous waste at its facility for several years. When Missouri rejected Region VII's request to seek a civil penalty, Region VII notified Missouri that it would initiate its own enforcement action. Region VII subsequently filed a complaint on September 30, 1991. Eighteen months later, on March 5, 1993, Missouri filed a Petition against Harmon Industries, together with a proposed consent decree. On that same date, a Missouri Circuit Court judge approved and entered the consent decree approving the settlement agreement between Harmon Industries and Missouri. The final consent decree issued by the State court addressed the same violations that were the subject of Region VII's unresolved enforcement action. On December 12, 1994, an EPA Administrative Law Judge issued an Initial Decision[21] holding that Harmon Industries was liable for a civil penalty of $586,716. Harmon Industries appealed to this Board, which affirmed the ALJ's

[20] Overfiling refers to EPA's bringing an enforcement action after a State has brought a similar action on the same matter. *See In the Matter of Int'l Paper Co.*, Dkt. No. CAA-R6-P-9-LA-98030 (ALJ, Jan. 19, 2000) ("Overfiling is, at its essence, a claim that a regulated entity is being fined twice for the same conduct by a primary regulating authority and a related authority which derives its authority by a delegation from the primary authority.").

[21] *In re Harmon Electronics, Inc.*, Dkt. No. RCRA VII-91-H-0037 (EPA Dec. 12, 1994).

Initial Decision, including the $586,716 civil penalty, on March 24, 1997.[22]

Harmon Industries appealed the Board's Final Decision on June 6, 1997. The U.S. District Court for the Western Division of Missouri held, and the Eighth Circuit agreed in *Harmon Indus., Inc. v. Browner*, 191 F.3d 894 (8th Cir. 1999), that since Region VII had not withdrawn authorization of Missouri's hazardous waste disposal program, it could not overfile unless Missouri had failed to act. Significantly, the Eighth Circuit stated that EPA may take action in an authorized State if the State "fails to initiate any enforcement action." 191 F.3d 894, 901 (1999).

b. *PADEP Did Not Bring an Enforcement Action Against Bil-Dry and Assisted the Region in its Enforcement Efforts*

Bil-Dry argues that "[t]his is not a case where the EPA acted to enforce a civil penalty against Bil-Dry because PADEP failed to act. Indeed, it was PADEP, not the EPA, which originally sent Bil-Dry a notice of violation." Appellant's Brief at 12. Implicit in this argument is the assumption that the NOV constituted an enforcement action. We disagree.

The NOV issued by PADEP to Bil-Dry, by its express terms, was not the first step in an enforcement action. The NOV was merely a notice to Bil-Dry of the violations PADEP had observed during its inspection of Bil-Dry's facility.[23] *See e.g., Fiore v. Commonwealth Dep't of Envtl. Res.*, 510 A.2d 880, 882-83 (Pa. Commw. Ct. 1986) (holding that a notice of violation detailing results of inspection and specific regulations being violated does not constitute an action or adjudication). Specifically, the NOV provided that:

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[22] *In re Harmon Electronics, Inc.*, 7 E.A.D. at 55.

[23] We note that the RCRA Civil Penalty Policy provides that:

> For purposes of this section [(c)History of noncompliance], a "prior violation" includes any act or omission for which a formal or informal enforcement response has occurred (e.g. EPA or State notice of violation * * *).

See RCRA Civil Penalty Policy (October 1990) at 35. However, this provision does not address the issue of a State's enforcement action in the *Harmon* context. Rather, this RCRA penalty provision addresses the narrow issue of what consideration should be given a prior state or federal notification for a subsequent violation when calculating a civil penalty. In this context, the prior notice is deemed relevant as evidence of the respondent's knowledge of the regulations and his or her failure to take steps to comply voluntarily with them. *See In re Ocean State Asbestos Removal*, 7 E.A.D. 522, 546 (EAB 1998) ("A violation [of the Clean Air Act's asbestos work practice standards] occurring after a prior notice is considered more serious: 'the companies * * * should know the regulations at that point, and it's more serious if they continue to violate.'")

> This letter does not impose any obligation upon Bil-Dry Corporation and *shall not be construed as an appealable decision or adjudication* of the Department of Environmental Protection.

C Ex 8 at 2-3 (emphasis added). Moreover, the NOV was written in discretionary language, which underscored its non-coercive nature:

> The Department *suggests* that Bil-Dry Corporation submit to the Department within fifteen (15) days of receipt of this Notice of Violation a written report addressing the circumstances under which these violations occurred * * *.

Id. (Emphasis added). Furthermore, the NOV provided that:

> This Notice of Violation does not waive, either expressly or by implication, the power or authority of the Commonwealth of Pennsylvania to prosecute for any and all violations of law arising prior to or after the issuance of this letter or the conditions upon which the letter is based. This letter shall not be construed so as to waive or impair any rights of the Department of Environmental Protection, heretofore or hereafter existing.

Id. It is unquestionable that the terms of the NOV manifest PADEP's intention to reserve its right to file an enforcement action at a later date.

Further distinguishing this case from *Harmon* is PADEP's agreement that the Region should assume the lead enforcement role in the enforcement action against Bil-Dry, and its subsequent cooperation with the Region in those efforts, rather than proceeding independently. *See* Roncetti Aff. ¶ ("I informed Mr. Pilla [of the Region] that PADEP agreed to EPA assuming the lead enforcement role and initiating an action against Bil-Dry concerning the aforesaid violations * * * [and that] PADEP would cooperate with and assist the Agency with its enforcement action."); Pilla Aff. ¶ 7; C Ex 6 at 3. Specifically, the record contains evidence that after the RCRA and Pennsylvania HWM violations were discovered at the facility, the Region and PADEP began communicating with each other and coordinated their investigatory and enforcement action. *Id*. PADEP did not propose a formal agreement with, file a complaint against, or initiate an enforcement action against Bil-Dry. Roncetti Aff. ¶ 4. To the contrary, PADEP, after being provided notice by the Region as required by RCRA § 3008(a)(2), 42 U.S.C. § 6928(a)(2), agreed that the Region would file an enforcement action against Bil-Dry. *Id.* at 6. Accordingly, we find that the facts of the case at bar are thoroughly dissimilar from the facts of *Harmon*. The situation that troubled the court in *Harmon* — that of two potentially "competing" enforcement actions — is simply not present in this case. Consequently, the Eighth Circuit's *Harmon* decision is not a bar to the action.

B. *Bil-Dry's Liability For the Improper Management and Storage of Drums Nos. 2-4*

We now turn to the issue of whether the Presiding Officer correctly concluded that the contents of Drums Nos. 2-4 were not raw materials as asserted by Bil-Dry, but were instead discarded/abandoned materials and, therefore, solid waste, which exhibited hazardous characteristics and, as such, were hazardous waste.[24] In reaching this conclusion, the Presiding Officer considered Bil-Dry's handling of the drums, and its complete lack of information and documentation concerning the history of the drums and the chemical identity of their contents. Init. Dec. at 16-18. Bil-Dry disputes the Region's contention that Drums Nos. 2-4 were unmarked, argues that it used the contents of Drums Nos. 2-4 as raw materials, and specifically disputes the Region's finding that the contents of Drum No. 2 exhibited the hazardous characteristic of corrosivity.[25] Appellant's Brief at 27-39.

First, we address the issue of whether the Presiding Officer used the correct definition of "hazardous waste." We will then address the issue of whether Drums Nos. 2-4 contained usable raw materials as Bil-Dry alleges, or solid waste as the Presiding Officer found; the determination of this issue will include a discussion of Bil-Dry's lack of knowledge regarding the chemical identity of the materials in Drums Nos. 2-4, Bil-Dry's failure to prove it used the materials in Drums Nos. 2-4, and Bil-Dry's failure to properly label Drums Nos. 2-4. Finally we will turn to the issue of whether the Presiding Officer correctly held that the Region met its burden of proving that the materials in Drums Nos. 2-4 exhibited hazardous characteristics, and as such, were hazardous waste.

1. *Pennsylvania's Definition of "Hazardous Waste"*

Bil-Dry argues that the Presiding Officer erred by using RCRA's definition of "hazardous waste" rather than Pennsylvania's definition of "hazardous waste," because Pennsylvania's definition is allegedly narrower than the RCRA definition, and does not include materials which are "accumulated prior to being discarded."[26] Appellant's Brief at 20. Because this phrase in the RCRA definition is not included in the Pennsylvania definition, Bil-Dry argues that the materials in Drums Nos. 2-4 do not fit within Pennsylvania's definition of "hazardous waste." *Id.* at 21. While we agree that it would be error to rely on the federal definition of "haz-

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[24] As we will discuss in greater detail in this section, in order for a material to constitute a "hazardous waste" it must first satisfy the definition of a "solid waste."

[25] The issue of whether Drum No. 2 exhibited the hazardous characteristic of corrosivity will be discussed *infra*, section III.B.4.

[26] We note that the outcome of this issue is irrelevant to Bil-Dry's liability for Counts III and IV, because these Counts alleged violations of the federal restrictions on LDR wastes. *See supra* notes 12 and 13.

ardous waste" rather than the State's definition, we find that Pennsylvania's definition of "hazardous waste" is broad enough to include materials that are "accumulated prior to being discarded."

The issue of whether Pennsylvania's definition of "hazardous waste" includes materials that are "accumulated prior to being discarded" has not been at issue in any federal or state administrative or judicial proceeding. Consequently, we will apply general rules of statutory and regulatory construction to the language of 25 Pa. Code section 260 to assist us in determining whether the evidence in the record supports a finding that Drum Nos. 2-4 contained "hazardous waste."

When construing an administrative regulation, the normal tenets of statutory construction are generally applied. *Black & Decker Corp. v. Commissioner*, 986 F.2d 60, 65 (4th Cir. 1993). The plain meaning of words is ordinarily the guide to the definition of a regulatory term. *T.S. v. Bd. of Educ.*, 10 F.3d 87, 89 (2d Cir. 1993). Additionally, the regulation must, of course, be "interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements." *Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990) (quoting *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)).

The terms of Pennsylvania's authorized regulations do not expressly address whether the term "hazardous waste" was intended to include — or exclude — materials that are "accumulated prior to being discarded." The Pennsylvania authorized regulations broadly define "hazardous waste" as:

> any garbage, refuse, sludge from an industrial or other waste water treatment plant, sludge from a water supply treatment plant, or air pollution control facility and other discarded material including solid, liquid, semi-solid or contained gaseous material resulting from municipal, commercial, industrial, institutional, mining or agricultural operations * * * which * * * may:
>
> (i) cause or significantly contribute to an increase in mortality or morbidity in either an individual or the total population; or
>
> (ii) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed.

25 Pa. Code § 260.2. These regulations further define "hazardous waste" in pertinent part, as "solid waste * * *." 25 Pa. Code § 261.3. Therefore, in order for a material to constitute "hazardous waste," it must first satisfy the definition of a "solid waste." The authorized regulations define "solid waste" as:

> waste, including, but not limited to, municipal, residual or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials.

25 Pa. Code § 260.2.

We reject the contention that just because Pennsylvania's definition of "solid waste" does not explicitly mention material that is accumulated prior to being discarded, while the federal definition does, such material is exempt from regulation in Pennsylvania. Although RCRA sets minimum requirements for state programs, there is no requirement that state authorities be worded or structured exactly the same as the applicable federal authorities. *See In the Matter of Hardin County*, Dkt. No. RCRA-V-W89-R-29 (ALJ, May 27, 1993) (quoting 44 Fed. Reg. 34,257 (June 14, 1979)). On its face, the state definition of "solid waste" would appear to be broad enough to cover such materials. This conclusion is confirmed by extrinsic evidence of EPA's approval of Pennsylvania's HWM program.

Although RCRA explicitly permits States to impose more stringent regulations than the federal scheme of RCRA, *Baumgardner Oil Co. v. Commonwealth*, 606 A.2d 617, 623 (Pa. Commw. Ct. 1992) (citing 42 U.S.C. § 6929), the federal guidelines establish the minimum hazardous waste standards below which a state hazardous waste program may not operate. *State ex rel. Iowa Dept. of Water, Air and Waste Mgmt. v. Presto-X Co.*, 417 N.W. 2d 199, 200 (IA Sup. Ct. 1987).

Specifically, the statute provides that a state program may not be authorized if the Administrator finds that the program "is not equivalent to the federal program * * *." 42 U.S.C. § 6926(b). In addition, the federal regulations require the Attorney General of a State that seeks authority to carry out a RCRA Subtitle C program to submit a statement that the laws of the State meet the Agency's regulatory requirements. *See* 40 C.F.R. § 271.7. Most notably, the state program must control all of the hazardous wastes controlled under 40 C.F.R. part 261. 40 C.F.R. § 271.9(a). The Legal Statement for Final Authorization submitted by Pennsylvania's Attorney General included the following statement:

> State statutes and regulations define hazardous waste so as to control *all the hazardous waste controlled under 40 C.F.R. § 261 * * *.*

Pennsylvania's Legal Statement for Final Authorization at 1 (October 4, 1985) (emphasis added).

At the time of Pennsylvania's authorization, the federal regulations defined "solid waste" to include "other waste material." 40 C.F.R. § 261.2(a)(1984). The term "other waste material" was further defined as:

> any solid, liquid, semi-solid or contained gaseous material * * * which (1) is discarded or is being accumulated [or] stored * * * prior to being discarded.[27]

40 C.F.R. § 261.2(b)(1984).

When EPA issued its Notice of Final Determination on Pennsylvania's Application for Final Authorization of the State's Hazardous Waste Management Program, the Agency stated that "Pennsylvania's hazardous waste management program satisfies all of the requirements necessary to qualify for Final Authorization." 51 Fed. Reg. 1791 (Jan. 15, 1986).

If, as Bil-Dry argues, Pennsylvania's broad definition of "hazardous waste" does not include material that is accumulated prior to being discarded, an entire category of waste subject to the federal regulations would not be subject to the authorized Pennsylvania regulations. This result would be inconsistent with RCRA's establishment of a floor for state regulation of hazardous wastes,[28] the regulatory requirement that the state program control all of the hazardous wastes controlled under Part 261, and Pennsylvania's Attorney General's statement that Pennsylvania's statutes and regulations define hazardous waste so as to control all the hazardous waste controlled under Part 261.

Consequently we reject Bil-Dry's argument that the presence of detailed language in the Federal regulation is proof that the absence of equivalent language in Pennsylvania's authorized regulations manifests Pennsylvania's intent to exclude such materials from the scope of its regulatory authority.

2. '*Discarded Material*' *Is Not Limited to* '*Material Resulting From Operations*'

Bil-Dry also argues that "the definition of hazardous waste clearly states that 'discarded material' is material which 'results from' operations, which is clearly not the case with the material in the drums at issue." Appellant's Brief at 21. We disagree.

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[27] A material is "discarded" if it is "abandoned," "recycled" or considered "inherently waste-like." *Id*.

[28] *See Old Bridge Chems., Inc. v. New Jersey Dept. of Envtl. Prot.*, 965 F.2d 1287, 1296 (3rd Cir.), *cert. denied*, 506 U.S. 1000 (1992).

As stated previously, the authorized regulations define "solid waste" as:

> waste, including, but not limited to, municipal, residual or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials.

25 Pa. Code § 260.2. The authorized regulations adopt part of the federal definition of "solid waste" and part of the federal definition of "hazardous waste" as its definition of "hazardous waste"; they define "hazardous waste" in pertinent part, as:

> any garbage, refuse * * * *and other discarded material* including, solid, liquid, semi-solid, or contained gaseous material *resulting from municipal, commercial, industrial, institutional, mining, or agricultural operations* * * * which * * * may:
>
> (i) cause or significantly contribute to an increase in mortality or morbidity in either an individual or the total population; or
>
> (ii) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed.

Compare 25 Pa. Code § 260.2, *with* RCRA § 1004(27) and (5); 42 U.S.C. § 6903(27) and (5)(emphasis added).

The Region notes that an argument identical to the one being made by Bil-Dry here was rejected outright in *In the Matter of Lackland Training Annex San Antonio, Texas*, wherein the ALJ noted that:

> The statutory definition [of a solid waste] does not indicate any exclusive list of sources of solid waste. Solid waste is not limited to material resulting from 'industrial, commercial, mining, and agricultural operations' and 'community activities.' Respondent's argument that the preceding words, '...discarded material, including, solid, liquid, semisolid, or contained gaseous material,' necessarily renders the list of sources exclusive is not persuasive.

Dkt. No. RCRA VI-311-H, slip op. at 32 (ALJ, May 12, 1995).

In addition, Bil-Dry's assertion that "discarded material" is limited to material "resulting from" operations ignores the term "including" which follows the term "discarded material" in the definition. Courts have repeatedly interpreted the term "including" as one of enlargement, and not one of limitation. *See Cruz v. Chesapeake Shipping, Inc.*, 932 F.2d 218, 225 (3rd Cir. 1991) ("Use of the word

"includes" is a term of enlargement, and not a word of limitation").[29]

As such, we find that "discarded material" is *not* limited to material resulting from "industrial, commercial, mining, and agricultural operations" and "community activities."

3. *Bil-Dry Handled The Contents of Drums Nos. 2-4 as Waste Material*

a. *Bil-Dry Was Unable To Identify the Contents of Drums Nos. 2-4*

Bil-Dry argues that the materials in Drums Nos. 2-4 were not waste because these materials were raw materials that it utilized at the facility. *See* Appellant's Brief at 34-39.

There is overwhelming evidence, however, that Bil-Dry could not identify the contents of Drums Nos. 2-4 either during the inspections conducted by PADEP and the Region, or at the time of their disposal. Specifically, during Inspector Bouch's April 1, 1996 inspection, when asked what was in the drums, Mr. Mazza stated that he did not know (*see* Tr. I at 148), and that samples had been taken but the results had not yet been received. *Id*. at 139. Similarly, during Inspector Jones' December 11, 1995 inspection, Mr. Mazza stated that he did not have any records concerning the drums or their contents. Tr. I at 66. As the General Manager of the facility, Mr. Mazza was presumably the person responsible for on-site operations. As such, Mr. Mazza would have known whether the materials in the drums were, in fact, used in Bil-Dry's production processes. Yet, Bil-Dry did not call Mr. Mazza as a witness.

In addition, before Bil-Dry disposed of Drums Nos. 2-4, it never determined their contents. Tr. II at 411-12. Bil-Dry now argues, however, that it can identify the contents of Drums Nos. 2-4. *See* Appellant's Brief at 34-39. However, Bil-Dry completely misses the point: assuming *arguendo* that Bil-Dry can now identify the material in Drums Nos 2-4, it does not change the fact that it did not even attempt to do so until *after* the Region had initiated its enforcement action. Thus, it is implausible that Bil-Dry could have "occasionally" utilized the materials in

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[29] *See also, Exxon Corp. v. Lujan*, 730 F.Supp. 1535, 1545 (D. Wyo. 1990) ("The use of the word 'includes' rather than 'means' in a definition indicates that what follows is a nonexclusive list which may be enlarged upon"), *aff'd*, 970 F.2d 757 (10th Cir. 1992) ; *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, n. 9 (1978) (definition with the word "include" is inclusive rather than exclusive); *American Surety Co. of New York v. Marotta*, 287 U.S. 513, 517 (1932) ("In definitive provisions of statutes and other writings, 'include' is frequently, if not generally, used as a word of extension or enlargement rather than one of limitation or enumeration").

Drums Nos. 2-4 for years, when during that period, Bil-Dry did not know what the drums contained.

Moreover, Bil-Dry fails to provide credible evidence to support its identification of the materials in Drums No. 2-4. Rather, it relies on the "opinion" of Mr. Sode. Specifically, Bil-Dry points to Mr. Sode's testimony that "my opinion [regarding Drum No. 2] is it's dilute sodium hydroxide solution" (Tr. II at 380), which was based on "testing that I performed with materials from the drum." *Id*. However, this alleged testing of Drum No. 2 was, in Bil-Dry's own words, "a pH analysis," *see* Appellant's Brief at 30-31, and not testing to determine the chemical identity of the drum's contents. Thus, Bil-Dry fails to show how the results of this alleged testing established the identity of the contents of Drum No. 2.

With regard to Drum No. 3, Bil-Dry relies on the testimony of the Region's expert, Mr. Rotenberg, who stated that it was "possible" that it was a blend of solvents (*id*. at 233), and Mr. Sode's opinion that it was a blend of solvents based on the Region's test which showed a characteristic of ignitability with a low flashpoint. *See* Appellant's Brief at 37.

Finally, Mr. Sode expressed his opinion that Drum No. 4 was a copolymer, based on the materials that were used by Bil-Dry at the facility, and the Region's test which showed a characteristic of ignitability. Tr. II at 408.

As can be seen, Bil-Dry offers no reliable evidence to support Mr. Sode's opinions. Moreover, Mr. Sode's testimony that he was "based in Michigan" and "visited Bil-Dry's facility several times each year, at least twice in '94, and I believe there were three times in '95," Tr. II at 365-66, raises questions as to whether he was sufficiently familiar with the daily operations of the facility such that he would know what materials were stored there.

In addition, as we noted above, we fail to see how any after-the-fact analysis of the Region's test results supports the contention that the contents of the drums were actually being used as raw materials.

b. *Bil-Dry Offered No Credible Evidence That It Actually Utilized the Contents of Drums Nos. 2-4*

Based on Bil-Dry's management and handling of the drums as discussed in Section III.B.3.a. and c, and its inability to identify their contents, the Presiding Officer correctly held that the Region had met its burden of proving that the drums at issue contained solid waste. However, Bil-Dry offered rebuttal evidence in an attempt to establish that the materials were being beneficially used and, as such, were not solid waste. *See* Appellant's Brief at 29-39.

Specifically, Bil-Dry asserts that the materials in Drums Nos. 2-4 do not qualify as solid waste, as it occasionally used these materials for solvent, wallpaper paste and maintenance paints. Appellant's Brief at 34-39. Specifically, Bil-Dry offers the testimony of Mr. Rodgers, who stated that he personally used materials from the drums located in the back area of Bil-Dry's facility, including a high pH sodium hydroxide (Tr. II at 447), to prove that Drum No. 2, which was stored in the rear of the facility, contained dilute sodium hydroxide solution. Appellant's Brief at 34-35. In addition, because Mr. Rodgers testified that he personally formulated products "several times" using a solvent from Bil-Dry's facility (Tr. II at 452), Bil-Dry argues that Drum No. 3 must have contained a "blend of solvents." Appellant's Brief at 37.

However, Pennsylvania requires more than a mere declaration that a certain material is a useful raw material. *See Starr v. Dep't of Envtl. Res.*, 607 A.2d 321, 324 (Pa. Commw. Ct. 1992) ("[T]he value-based analysis [that tires are not waste because they are a marketable commodity capable of being profitably recycled for various further uses] ignores the absurd result that a party could escape environmental regulations by simply declaring his waste has value.").

In addition, the preamble to the federal rulemaking which defined the term "solid waste" as set forth in 40 C.F.R. part 261 provides that:

> Records ordinarily are kept documenting use of raw materials and products * * *. The Agency consequently views with skepticism situations where secondary materials are ostensibly used and reused but the generator or recycler is unable to document how, where, and in what volumes the materials are being used and reused.

50 Fed. Reg. 614, at 638 (Jan. 4, 1985).

The record, however, is devoid of evidence such as logs, purchase orders or receipts showing how Bil-Dry acquired and/or used the materials in Drums Nos. 2-4. Moreover, during Inspector Jones' December 11, 1995 inspection, Mr. Mazza, the General Manager of the facility, stated in no uncertain terms that he did not have any records concerning the drums at the rear of the facility (where Drums Nos. 2-3 were located). Tr. I at 65. Accordingly, we affirm the Presiding Officer's determination that Bil-Dry failed to prove that it utilized the materials in Drums Nos. 2-4.

c. *Evidence of the Condition of Drums Nos. 2-4*

The Presiding Officer held that the condition of the drums establishes that Bil-Dry treated their contents as waste material. Init. Dec. at 17. On appeal, Bil-Dry argues that only Drums No. 2-4 are at issue in this case, and since Drums No.

2-4 were in good condition, the evidence of the condition of other drums is inconsequential. Appellant's Brief at 17.

First, there is overwhelming evidence that many of the drums at the facility were in terrible condition: rusted, uncovered, exposed to the elements, dangerously tilted and free of labels.[30] Bil-Dry admitted that its "housekeeping" was "terrible." Tr. II at 443. Nevertheless, the Region chose to sample only seven drums; none of which were in terrible condition.

Specifically, Drum No. 2, while it appears to be rusted, did not appear to be leaking, and contained a lid. *See* C Ex 4, photographs 19 & 20. Similarly, Drum No. 3, while slightly rusted, contained a lid and did not appear to be leaking. *See* C Ex 4, photograph 21. Moreover, Drum No. 4 is undeniably a new drum. *See* C Ex 4, photograph 22. As such, we reject the Region's claim that Drums Nos. 2-4 were in poor condition.[31]

However, we are persuaded that Bil-Dry treated the materials in Drums Nos. 2-4 as solid waste, in part by the Region's assertion that the drums at issue were not properly labeled. *See* Appellee's Brief at 40. We note that the issue of whether Drums Nos. 2-4 were labeled is relevant to the general issue of whether they contained waste or usable materials, as well as to the more specific issue of Bil-Dry's liability for Count IV, which alleged that Bil-Dry failed to properly manage the LDR wastes in the drums. *See* C Ex 14 at 6-8.

Although Bil-Dry argues that the drums were marked, (*see* Appellant's Brief at 27), in a letter dated June 14, 1996, to Inspector Bouch, Bil-Dry verified

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[30] *See* C Ex 3 at photographs 14-20; C Ex 4 at photographs 1-13; 18-20. In addition, during Inspector Jones December 11, 1995 inspection, he observed approximately 100 drums stored in a building adjacent to an open area at the rear of the facility, which he noted to be "rusty" and "in poor condition," Tr. I at 64-65, 104; C Ex 3; (2) during Inspector Bouch's April 1, 1996 inspection, she noted that a large percentage of approximately 130 drums within the building at the rear of the facility were rusted and in poor condition, Tr. I at 139-140; C Ex 6; and (3) also during the April 1, 1996 inspection, Inspector Bouch observed an open roofed area containing between 100 and 150 drums stacked three pallets high six pallets wide and two pallets deep, most containing three or four drums, which were noted to be in poor condition, some with materials hanging out of the top and down the side. Tr. I at 143; C Ex 6. Additionally, Inspector Maldonado testified that the drums appeared to be "extremely corroded." Tr I at 243.

[31] Count VIII alleged that Bil-Dry (1) stored hazardous waste in drums that were in poor condition; (2) stored hazardous waste in at least one drum that was not closed; and (3) failed to have a containment system. *See* C Ex 14 at 10. The Presiding Officer held that Bil-Dry "failed to provide the level of containment for Drums 2-4, as necessary to protect human health and the environment * * *." Init. Dec. at 17. Since Bil-Dry admitted in it's Answer to Findings of Fact and Conclusions of Law that a containment system was not present, *see* C Ex 17, our finding that Drums Nos. 2-4 were not in poor condition and contained lids does not affect Bil-Dry's liability for Count VIII.

the initial observations of Inspector Bouch[32] regarding the lack of a legible marking system when it stated that:

> [T]he *absence of a readable marking system* was attributed to heavy rain and snow during the previous winter which resulted in a wearing-off of previously made marks. * * * Bil-Dry will * * * *properly label* the new drums.

R Ex 26. (Emphasis added).

On appeal, however, Bil-Dry claims that the drums were marked, and offered an undated, anonymously authored inventory sheet to prove the existence of "a [marking and record-keeping] system which Bil-Dry used and understood." Appellant's Brief at 28; *see* C Ex 4. However, there are serious questions regarding the authenticity of this inventory sheet. Mr. Sode, Bil-Dry's Senior Process Engineer, testified that:

> It is a handwritten inventory of materials that at one time or another had been at the Bil-Dry facility. * * * I was supplied this inventory at my first visitation to Bil-Dry Corporation to aid me in my classification and groupings of the drums at the location.* * * The plant manager at the time, Mr. Mazza [provided the inventory]. * * * [It] is a partial listing of the drums located at the Bil-Dry facility.

Tr. II at 370-71. In addition, in a letter dated December 13, 1996, Bil-Dry informed the Region that "[t]here is no date on the inventory — it most likely dates back to when the purchase took place, sometime in late 1985 or early 1986." *See* C Ex 15 ¶ 1.[33]

First, we note that if Drums Nos. 2-4 did, in fact, contain raw materials, the inventory list would have been current, rather than an obsolete list of materials "that at one time or another had been at the Bil-Dry facility."

Moreover, it is telling that during the Region's inspection on December 11, 1995, and PADEP's inspection of April 1, 1996, Mr. Mazza, the general manager of the facility — who Mr. Sode testified provided him with the inventory sheet — stated that he had no documents regarding the drums or their contents, Tr. I at 66, and in fact, did not produce an inventory of the drums. In fact, Inspec-

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[32] During PADEP's April 1, 1996 inspection, Inspector Bouch did observe markings on drums located both inside the building and in the open roofed area, but was unable to determine their meaning, and described them as "chicken scratch" numbers or markings. Hearing Tr. I at 139, 141-42.

[33] This C Ex 15 refers to Pre-Hearing Exchange exhibit 15.

tor Bouch specifically requested an inventory from Mr. Mazza and was told that he did not have one at the facility. *Id*. at 153.

We also find it curious that the inventory sheet was not produced until the *third* inspection of the facility on April 9-10, 1996. *See* Tr. I at 71. Not surprisingly, given Mr. Sode's statement that the "inventory" was a list of materials that "at one time or another had been at the facility," Inspector Jones determined during the April 9 inspection, that the inventory sheet did not correlate with the drums at the rear of the facility where Drums Nos. 2-3 were located. Tr. I at 71-72.

Thus, we see no error in the Presiding Officer's finding that, based in part on the storage and condition of Drums Nos. 2-4, it was reasonable to conclude that the contents of the drums was waste material.

We also see no error in the Presiding Officer's finding that Bil-Dry failed to properly manage the LDR wastes in the drums as alleged in Count IV, which was based in part on Bil-Dry's failure to properly label the drums. The Pennsylvania SWMA provides, in pertinent part:

> It shall be unlawful for any person or municipality who generates, transports, stores, treats or disposes of hazardous waste to fail to: * * * (2) Label any containers used for the storage, transportation or disposal of such hazardous waste so as to identify accurately such waste.

35 P.S. § 6018.403. Similarly, the regulations at 40 C.F.R. § 268.50(a)(1)(i) require that:

> [E]ach container is clearly marked to identify its contents and the date each period of accumulation begins.

Id. As we stated previously, Inspector Bouch testified — and Bil-Dry admitted — that the drums lacked a legible marking system. *See* R Ex 26; Tr. I at 139, 141-42.

For the foregoing reasons, we affirm the Presiding Officer's finding that Bil-Dry has failed to demonstrate through documentary or testimonial evidence, that the contents of Drums Nos. 2-4 were legitimately used or recycled raw materials.

d. *Bil-Dry Disposed of Drums Nos. 2-4 as Hazardous Waste*

In August 1996, as part of the disposal of more than 260 drums and their contents as "hazardous waste," Bil-Dry disposed of Drums Nos. 2-4; records of

analyses performed on the contents of the drums as part of the disposal process and the Uniform Hazardous Waste Manifests for the disposal of these drums list their contents as hazardous wastes and include their appropriate EPA hazardous waste numbers. R Ex 23; *see also* 40 C.F.R. §§ 261.24(b), 261.33(f).

Bil-Dry does not address its disposal of the 260 drums in its Appeal Brief. We note, however, that in a letter dated November 19, 1996, Bil-Dry informed the Region that it had disposed of the drums to avoid "getting into a dispute with the EPA." C Ex 19b.

However, if these 260 drums did, in fact, contain valuable raw materials, it seems that the pragmatic course of action would have been to properly label the drums, and/or repackage the material contained in corroded or damaged drums. In fact, in a letter dated June 16, 1996, Bil-Dry assured PADEP that it would come into compliance with the provisions of the SWMA by "repackag[ing] all materials from drums showing signs of wear, and properly label[ing] the new drums." R Ex 26.

Bil-Dry also informed PADEP that it would dispose of the materials from the paint production operations "if a buyer for those materials cannot be found." *See id.* However, Bil-Dry never offered evidence to show that it had sought a buyer for the materials.

In addition, the evidence in the record shows that Bil-Dry did not dispose of the drums until *after* the Region had requested detailed information regarding their contents. After disposing of the drums, Bil-Dry continued to insist that they had contained raw materials. *See* C Ex 19b. As the drums were now in an unknown location, neither Bil-Dry nor the Region could further test their contents to determine their chemical identity or confirm that they had ever been used at the facility. As such, we find that Bil-Dry's handling of Drums Nos. 2-4 supports the Presiding Officer's conclusion that they contained waste material.

4. *The Contents of Drums Nos. 2-4 Exhibited Hazardous Characteristics*

The Pennsylvania regulations implementing the SWMA provide that a solid waste is a hazardous waste if it is not excluded from regulation as a hazardous waste,[34] and if it exhibits one or more of the characteristics of a hazardous waste,[35] is a listed hazardous waste,[36] or is a mixture of a solid waste and a listed hazard-

[34] 25 Pa. Code § 261.3, citing 261.4.

[35] 25 Pa. Code § 261.3, citing §§ 261.20-.24.

[36] 25 Pa. Code § 261.3, citing §§ 261.30-.34.

ous waste.[37] The four characteristics which may render a material hazardous are ignitability, corrosivity, reactivity and toxicity.[38]

As we noted previously, OASQA performed an analysis in May-June 1996, on the samples taken from Drums Nos. 2-4, and each of these samples exhibited at least one hazardous characteristic according to Dr. Samuel Rotenberg, EPA Regional Toxicologist. C Ex 5.

Moreover, Bil-Dry and the Region stipulated that (except for the pH analysis performed on the sample from Drum No. 2): (1) a proper chain of custody was maintained for all samples, including Drum No. 2; (2) the equipment and materials used for the analyses of all samples, except concerning the pH analysis on the sample from Drum No. 2, were properly calibrated and maintained; and (3) the methodology utilized for the analyses of all samples, except concerning the pH analysis on the sample from Drum No. 2, was correct, in accord with accepted and required standards. C Ex 1 ¶ 17.

Regarding Drum No. 2, we are not persuaded by Bil-Dry's contention that Drum No. 2 did not contain hazardous waste, because the EPA standard for corrosivity is a pH value of greater than 12.5 or lower than 2, and Bil-Dry's own analysis yielded a pH value of 12.17.[39] Appellant's Brief at 30-33. Unlike the Region's corrosivity analysis[40] for Drum No. 2, Bil-Dry's corrosivity analysis for Drum No. 2 cannot be authenticated.

First, Bil-Dry cannot establish a valid chain of custody for the substance analyzed by Mr. Sode. The substance that Mr. Sode tested was not part of a "split

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[37] 25 Pa. Code § 261.30-.34.

[38] *Id.*

[39] In April 1997, Mr. Sode, Bil-Dry's Senior Process Engineer, allegedly conducted a pH analysis on a sample Bil-Dry alleges was drawn from Drum No. 2 by Mr. Mazza at the direction of Mr. Sode, sometime after the Region's April 9-10 inspection.

[40] Bil-Dry has argued on appeal that the OASQA report contains a discrepancy because Ms. Klebasko, an Environmental Scientist, estimated that the sample from Drum No. 2 had a pH value of 11.8. Appellant's Brief at 32-33. However, we believe that Bil-Dry has mischaracterized the OASQA report. First, Ms. Klebasko stated in the report that her preliminary estimation was conducted for the sole purpose of determining whether a PCB/Pesticide analysis was able to be performed on the sample. C Ex 5, Section: Organics, p. 3. Ms. Klebasko neither used an Orion pH meter nor complied with the RCRA methodology for performing a corrosivity analysis; instead she used a litmus paper test, which is a method expressly rejected by the EPA for the performance of corrosivity analyses due to its subjective and imprecise results. Tr. I at 170. During testing by OASQA, using an Orion band electrometric pH meter according to RCRA methodology SW-846, the contents of Drum No. 2 was found to exhibit the characteristic of corrosivity by registering a value of 12.6. OASQA's analysis was properly calibrated to take into account the presence of sodium in high alkaline solutions, temperature, positioning of electrodes, and the age of the sample. Tr. I at 171-175.

sample" of the material collected by the Region's inspectors from Drum No. 2 in April of 1996. Tr. I at 77. Moreover, Mr. Sode did not personally collect the substance on which he performed the pH test. Tr. II at 382. Rather, Mr. Sode testified that he believed — but could not confirm — that Mr. Mazza, a person with no experience or training in the collection of samples from drums, allegedly obtained the substance in question and sent it via United Parcel Service ("UPS") to Mr. Sode's office in Michigan. *Id*. Since Mr. Mazza did not testify at the hearing held in this matter, there was no verification of Mr. Sode's assertion.

Furthermore, Bil-Dry failed to introduce any evidence concerning the sampling methodology or machinery used by Mr. Mazza, thus raising questions regarding the reliability of the collection technique and possible contamination of the sample. Bil-Dry also failed to offer evidence of the alleged shipment of the samples to Mr. Sode via UPS or of the tests performed on the sample allegedly taken from Drum No. 2. With regard to the tests, rather than offering test results in a detailed laboratory report as EPA has, Bil-Dry offered "photograph[s] of the pH meter with the pH result on it." Tr. II at 389; *see* R Ex 24-27.

Apart from the self-serving testimony of Mr. Sode, Bil-Dry does not offer evidence to establish precisely when the sample was taken, where and how the sample was stored for those 12 months, how Bil-Dry was able to verify that the sample was, in fact, taken from Drum No. 2, and how and when the test was conducted. As such, in the face of the Region's throughly documented test results, we are not persuaded by Bil-Dry's assertion that the contents of Drum No. 2 did not exhibit the hazardous characteristic of corrosivity.

For the foregoing reasons, we affirm the Presiding Officer's finding that Drums Nos. 2-4 contained hazardous waste, and his conclusion that Bil-Dry is liable for Counts I-IX as they relate to Drums Nos. 2-4.

C. *Bil-Dry's Liability for the Hazardous Waste in Tanks A-C*

1. *Bil-Dry is the Owner of Tanks A-C*

We are not persuaded by Bil-Dry's argument that it is not liable for the hazardous material in Tanks A-C because it is not the owner of these tanks. *See* Appellant's Brief at 40. In Bil-Dry's own words:

> In the present case, no material was put in the USTs while Bil-Dry owned the property. The material was already there when Bil-Dry purchased the property, and Bil-Dry had no knowledge that the USTs existed. * * * Bil-Dry never took in material in the USTs, nor did anyone bring in material while Bil-Dry owned the property. Bil-Dry does not believe it owns the USTs or the material in the tanks. Mr.

> Joseph Mazza told Inspector Jones that he had no knowledge of any tanks on the facility, nor did Mr. Rodgers or Dr. Moon.

Appellant's Brief at 40-41.

First, the Pennsylvania regulations define an "owner" as "the owner of an underground storage tank holding regulated substances on or after November 8, 1984." 25 Pa. Code § 245.1(iii). EPA's regulations interpreting RCRA define an owner as "the person who owns a facility or part of a facility." 40 C.F.R. § 260.10.

The Pennsylvania regulations define "facility" broadly to include "[c]ontiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing or disposing of hazardous waste." 25 Pa. Code § 260.2. We also note that the definition of "facility" in the federal regulations is identical to the definition in the Pennsylvania regulations. *See* 40 C.F.R. § 260.10.

Bil-Dry's property at 5525 Grays Avenue is a "facility" under both the state and federal regulatory definitions as it contains structures — the tanks — that were used to dispose[41] of "hazardous wastes." Bil-Dry acknowledges that it has been the owner of 5525 Grays Avenue since 1985. C Ex 1 ¶ 4. As the owner of a facility that was used to dispose of hazardous waste, Bil-Dry is subject to the provision of the Pennsylvania Code which requires that an owner of a hazardous waste storage, treatment, or disposal facility obtain a permit from the PADEP. That section provides in pertinent part:

> A person or municipality may not *own or* operate a hazardous waste storage, treatment or *disposal* facility unless the person or municipality has first obtained a permit for the facility from the department * * *.

25 Pa. Code § 270.1 (emphasis added).

Initially we note that we are not persuaded by Bil-Dry's claim that it had no knowledge that the tanks existed. The record contains evidence that at the time of the Region's first inspection on December 11, 1995, Bil-Dry had owned the facil-

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[41] "Storage" is defined as "the containment of waste on a temporary basis in such a manner as not to constitute disposal of such waste. It shall be presumed that the containment of waste in excess of one year constitutes disposal. This presumption can be overcome by clear and convincing evidence to the contrary." 25 Pa. Code § 260.2. Since Mr. Jones' description of the tanks suggests to us that they had contained the waste for more than one year, and since there was no evidence to prove that this containment of waste in excess of one year did not constitute disposal, we presume that the waste in the tanks were disposed of, rather than being stored.

ity for 10 years. C Ex 1 ¶ 4. According to Inspector Jones, he first observed the tank caps, vent pipes, fill pipes, and a dispenser from outside the fenced-in loading area, prior to entering the Bil-Dry facility. *See* Tr. I at 59, 65-66; C Ex 3. Furthermore, Joseph Mazza, Bil-Dry's facility manager conceded to Inspector Jones that the equipment seemed to indicate the presence of tanks on the property. Tr. I at 60-62.

In any event, Bil-Dry's argument that its alleged ignorance of the existence of the tanks should shield it from liability for violating the Pennsylvania Code, directly conflicts with cases decided under RCRA. As a threshold matter, we have previously held that the Commonwealth of Pennsylvania's hazardous waste program applies to owners of facilities that store hazardous waste. Specifically, we have said that "[t]he Pennsylvania program 'like RCRA, requires that *owners* and operators of treatment, storage, and disposal facilities obtain permits and operate in compliance with them.'" *In re Rybond, Inc.*, 6 E.A.D. 614, 630 (EAB 1996). In addition, we have held that an owner's knowledge of the existence of the violation is *not* relevant to a finding of liability. *See In re Hawaiian W. Steel, Ltd.*, 2 E.A.D. 675, 680 (Adm'r 1988) ("Notice is not a prerequisite to liability for failure to obtain a permit under RCRA"). Moreover, we have held that "RCRA is a strict liability statute * * * [that] authorizes the imposition of a penalty even if the violation is unintended." *Rybond*, 6 E.A.D. at 638, (citing *In re Humko Products, An Operation of Kraft, Inc.*, 2 E.A.D. 697, 703 (CJO 1988)). Accordingly, Bil-Dry's alleged lack of knowledge of the tanks is not relevant to the issue of its liability for violating the statute. As such, we affirm the Presiding Officer's finding that Bil-Dry is the owner of the tanks.

2. *Bil-Dry is Not the Generator of the Hazardous Waste in Tanks A-C*

Bil-Dry argues that the Presiding Officer erred when he ruled that Bil-Dry was the "generator" of the hazardous waste in Tanks A-C, because Bil-Dry did not fit the regulatory definition of a "generator" of hazardous waste.[42] Appellant's Brief at 39. The Region argued, and the Presiding Officer agreed, that although Bil-Dry did not produce the hazardous waste in the tanks, Bil-Dry is the person "whose act first caused a hazardous waste to become subject to regulation." Appellee's Brief at 54-55. According to the Presiding Officer, Bil-Dry caused the hazardous waste to become subject to regulation because it decided "to abandon or discard the tanks after its purchase of the facility in 1985." Init. Dec. at 14. We disagree and reverse the Presiding Officer's Initial Decision finding that Bil-Dry was a "generator" of hazardous waste.

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[42] We note that although we have already determined that Bil-Dry is the "owner" of the tanks, the issue of whether Bil-Dry is a "generator" is still relevant to its liability, as certain obligations only attach to "generators" of hazardous waste. *See* 25 Pa. Code § 262.11; 40 C.F.R. § 268.7(a).

Although RCRA does not define "generator," it does define hazardous waste generation as "the act or process of producing hazardous waste." RCRA § 1004(6); 42 U.S.C. § 6903(6). Supplementing this RCRA provision, EPA has developed regulations that define a "generator" as:

> [A]ny person, by site, whose act or process produces hazardous waste identified or listed in Part 261 of this chapter or whose act first causes a hazardous waste to become subject to regulation.

40 C.F.R. § 260.10.

In addition, a "generator" is defined in the Pennsylvania regulations as "a person or municipality who produces or creates hazardous waste." 25 Pa. Code § 260.2. We do not believe that Bil-Dry fits within either definition.

The Region simply did not satisfy its burden of proving that Bil-Dry is the person whose act first caused the hazardous waste to become subject to regulation. Rather, the Region's own inspector testified that the tanks were locked and appeared as if they "had been locked and sealed for a long time, [and the caps] had never been removed." Tr. I at 64. In addition, Bil-Dry offered the affidavit of its owner, Dr. Joon Moon, in which he averred that he was informed by the owner of Harrad Paint that the above ground storage tanks were the only tanks used in Harrad Paint's operations. *See* Affidavit of Joon Moon ("Moon Aff.") ¶ 4. This evidence suggests that Bil-Dry purchased the facility after the tanks had already been abandoned, and thus Bil-Dry was not the person whose act first caused the hazardous waste to become subject to regulation. Accordingly, we find that the Presiding Officer erred when he held that Bil-Dry was the "generator" of the hazardous waste in the tanks.

As such, we reverse the Presiding Officer's finding of liability for Count II and Count III as they relate to the tanks, but affirm them as they relate to Drums Nos. 2-4. We also affirm the Presiding Officer's finding of liability for Count I, and Counts IV[43]-IX with respect to Tanks A-C and Drums Nos. 2-4.

D. *The Appropriateness of the Penalty Imposed*

Bil-Dry asserts that the Presiding Officer erred when he held that Bil-Dry failed to meet its burden of persuasion on the "ability to pay" issue and assessed a civil penalty of $103,400. Appellant's Brief at 41. Bil-Dry, however, does not

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[43] Our determination that Bil-Dry did not "generate" the waste in the tanks does not affect the Presiding Officer's finding of liability with respect to Count IV as liability for that count attaches to both "generators" and "owners and operators" of hazardous waste treatment, storage or disposal facilities. *See* C Ex 14 at 6; 40 C.F.R. § 268.50(a).

question the method by which the Presiding Officer calculated the penalty of $103,400, apart from the determination as to ability to pay (and of course, the underlying finding of liability). Instead, Bil-Dry argues that: (1) the Presiding Officer erred by not considering the testimony of Dr. Joan Meyer, the Region's financial expert; (2) Dr. Meyer was biased in the Region's favor; (3) Dr. Meyer overstated Bil-Dry's cash flow from operations; and (4) Bil-Dry doesn't have the means to pay any penalty. *Id*. at 42-48. We affirm the Presiding Officer's finding that Bil-Dry failed to meet its burden of persuasion on the ability to pay issue.

1. *The RCRA Penalty Provision*

According to the RCRA penalty provision, the Agency must consider the seriousness of the violation and the violator's good faith efforts to comply with the applicable requirements. *See* 42 U.S.C. § 6928(a)(3). As in all civil penalty cases, the Region has the burden of proof on the appropriateness of the penalty. *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 537 (EAB 1994); *Premex, Inc. v. Commodity Futures Trading Comm'n*, 785 F.2d 1403, 1409 (9th Cir. 1986).

However, in contrast to a number of other environmental statutes,[44] RCRA does *not* include ability to pay as one of the factors EPA must consider in assessing a penalty, and therefore it is not an element of the Agency's proof. *See In re Central Paint and Body Shop, Inc.*, 2 E.A.D. 309, 313-314 (CJO 1987) ("RCRA, however, does not include ability to pay as one of the factors that EPA must consider in assessing a penalty, and Congress certainly knew how to include such a factor in an environmental statute if it so desired. The logical conclusion is that ability to pay is not an element of EPA's proof." (footnote omitted)).

Rather, EPA's RCRA Civil Penalty Policy of October 1990 (the "Penalty Policy") allows EPA to consider a Respondent's ability to pay, *if the Respondent presents sufficient information to substantiate its claim*. The Penalty Policy provides that:

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[44] For example, section 14(a)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") provides that:

> In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, *the effect on the person's ability to continue in business*, and the gravity of the violation.

7 U.S.C. § 136l(a)(4) (Emphasis added). Similarly, section 309(g)(3) of the Clean Water Act, in pertinent part, provides:

> In determining the amount of any penalty * * *, the Administrator * * * shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, *ability to pay* * * *.

33 U.S.C. § 1319(g)(3) (Emphasis added).

> The burden to demonstrate inability to pay rests on the Respondent, as it does in any mitigating circumstance. * * * If the respondent fails to fully provide sufficient information [to meet this burden] then * * * enforcement personnel should disregard this factor in adjusting the penalty.

RCRA Civil Penalty Policy (Oct. 1990) at 36; C Ex 13 at 36. Accordingly, as the proponent of a reduction in the penalty, Bil-Dry has the burden of persuasion on its alleged inability to pay.

We now turn to Bil-Dry's contention that the Presiding Officer erred in finding that Bil-Dry's proffered evidence is insufficient to demonstrate that Bil-Dry cannot pay the civil penalty assessed by the Presiding Officer.

2. *Bil-Dry Did Not Meet Its Burden of Persuasion On Its Inability to Pay Claim*

Bil-Dry argues that it is unable to pay the civil penalty assessed by the Presiding Officer in the amount of $103,400 "or any penalty whatsoever."[45] *See* Appellant's Brief at 41-49. In support of this claim, Bil-Dry provided four consolidated tax returns for FY 1993-1996, and the testimony of its president, William Rodgers. *See* R Ex 14-17; Tr. II at 455-70.

In the Initial Decision, the Presiding Officer summarized his conclusion as to inability to pay as follows:

> As the proponent of a reduction in the penalty, Respondent has the burden of persuasion on its alleged inability to pay, as it has control over information on its financial condition. In the instant proceeding, the only information offered by Respondent to support its inability to pay claim consisted of four consolidated tax returns for FY 1993 through 1996, and the testimony of its President, William Rodgers * * *. Generally, however, such self serving testimony is entitled to little weight. *In the Matter of F & K Plating Company*, RCRA Appeal No. 86-1A, 2 E.A.D. 443, 449 (Final Decision, October 8, 1987); *Central Paint, supra*.
>
> Respondent has failed to meet its burden. Other than making conclusory comments that a full penalty assessment would put Respondent out of business (Tr. 470), Rodgers failed to provide the type of

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[45] We note that Bil-Dry at times frames its argument in terms of inability to pay the penalty assessed by the Presiding Officer and sometimes as an assertion that it cannot pay any penalty.

> detailed analysis required to establish Respondent's inability to pay claim.

Init. Dec. at 23. While the Presiding Officer went on to briefly discuss the testimony of the Region's financial expert, Dr. Meyer, he ultimately held:

> Apart from the merits of Meyer's conclusions, they were offered in rebuttal of Respondent's case in chief. *They are therefore only relevant upon Respondent's having satisfied its burden of proving an inability to pay. This it has failed to do.* Respondent could have submitted evidence "such as examples of austere measures being taken at the business because of hard times, loan extensions obtained, or statements of back taxes owed." *Central Paint, supra*, at 318. *Short of this, its inability to pay an appropriate penalty is not established*.

Id. at 24. (Emphasis added).

The critical inquiry, then, is whether the Presiding Officer erred in finding that the information provided by Bil-Dry was inadequate to meet its burden of proof on the issue of its inability to pay the penalty. In determining the appropriate weight to be given to Bil-Dry's four consolidated tax returns for FY 1993-1996, we note that Dr. Meyer, testified that:

> Tax returns, of course, calculate the amount of the company's income that is subject to federal corporate taxation. The whole purpose of tax accounting is to minimize the federal income tax the company pays.

Tr. II at 302-03. With regard to financial statements, however, Dr. Meyer stated:

> Financial statements, on the other hand, are supposed to be prepared according to generally-accepted accounting principles, also known as GAAP. The purpose of financial statements is to provide an accurate representation of the company's financial state of affairs. Financial statements have more information in them, typically, than a tax return. * * * You'll find a statement of cash flows, which shows the company's cash position over the year. You'll also find notes to the financial statements which explain key transactions that have occurred throughout the year. * * * You'll also find details about the debt that's owed by the company to other lenders or you'd find out details about the debt that the company itself has extended to other entities.

Tr. II at 302-03. Financial statements would have provided a detailed picture of Bil-Dry's financial state and showed whether it could pay the proposed penalty. Nevertheless, Bil-Dry chose not to provide its financial statements in support of its inability to pay claim, and did not offer an explanation for its decision to with-

hold its financial statements. *See* Tr. II at 302, 466. Instead, Bil-Dry offered evidence that, while sufficient to show how much of its income is subject to federal corporate taxation, was not sufficient to establish any hardship that would render Bil-Dry unable to pay the proposed penalty.

With regard to the testimony of Bil-Dry's president, William Rodgers, he stated — without supporting documents — that: (1) there are no loans available to Bil-Dry (Tr. II at 460-61); (2) Bil-Dry would have gone out of business without the short-term loans it acquired, and cannot pay the loans it currently has (*id*. at 461-462); and (3) the management fee that Dr. Meyer classified as discretionary, was booked in previous years as an "administrative charge." *Id*. at 468-69.

However, Mr. Rodgers sought to rebut the testimony of Dr. Meyer in his testimony, without Bil-Dry having first met its initial burden of persuasion on the issue. In any event, Mr. Rodgers' rebuttal testimony failed to explain *how* the proposed penalty would cause Bil-Dry to suffer an undue financial hardship, that is, prevent Bil-Dry from paying its ordinary and necessary business expenses. Mr. Rodger's testimony was not supported by the evidence in the record, and as such, as the Presiding Officer found, is "entitled to little weight." Init. Dec. at 23; *see In re F & K Plating Co.*, 2 E.A.D. 443, 499 (CJO 1987) ("[U]nsupported self-serving testimony is generally entitled to little weight"). Consequently, Bil-Dry did not meet its burden of persuasion on its ability to pay claim, and we affirm the Presiding Officer's finding on this issue.

3. *Bil-Dry's Arguments Regarding Dr. Meyer Are Without Merit*

a. *The Presiding Officer Chose Not To Rely On The Testimony of Dr. Meyer Because Bil-Dry Did Not Satisfy Its Burden on the Ability to Pay Issue.*

Bil-Dry argues that the Presiding Officer erroneously failed to "consider any of Dr. Meyer's testimony."[46] Appellant's Brief at 42. However, the Presiding Officer not only examined Dr. Meyer's testimony, but also referenced it in his Initial Decision. *See* Init. Dec. at 23-24. Nevertheless, the Presiding Officer ultimately chose not to rely on Dr. Meyer's testimony because it was relevant only for rebuttal purposes *if Bil-Dry had demonstrated its inability to pay the proposed penalty*. As Bil-Dry did not satisfy its burden, however, the Presiding Officer decided that

[46] Among other things, Bil-Dry objected to Dr. Meyer's testimony on the basis that she was biased in the Region's favor because she is "a principal of Industrial Economics, which is the firm hired by the EPA to perform an 'ability to pay' analysis on Bil-Dry." Appellant's Brief at 42. That Dr. Meyer — like other professionals and expert witnesses — was compensated for her professional services does not convince us of any bias on her part. In any event, Dr. Meyer's testimony was not ultimately relied upon in the Presiding Officer's determination that Bil-Dry had failed to demonstrate that it could not pay the civil penalty assessed by the Presiding Officer.

Dr. Meyer's testimony was not relevant. In any event, as we will discuss Part III.3.b. below, we do not find anything in Dr. Meyer's testimony that would have compelled a contrary result.

b. *The Merits of Dr. Meyer's Testimony*

Since Bil-Dry did not provide its financial statements to prove that it is unable to pay the penalty, Dr. Meyer relied on the tax returns Bil-Dry provided and publicly available information about Bil-Dry, including Dun & Bradstreet reports to make her determination. Tr. II at 301. Based on this evidence, Dr. Meyer concluded that Bil-Dry could pay the penalty proposed by the Region by "curtailing certain discretionary expenses without experiencing financial hardship." *Id.* at 299.

Specifically, Dr. Meyer (1) examined the size of the penalty recommended by the Region relative to the size of the Bil-Dry corporation and determined that the penalty was approximately 6.5 percent of Bil-Dry's average, annual operating expenses of $3,500,000, which she concluded was not excessive relative to the size of the company (Tr. II at 305-06); (2) determined that Bil-Dry had not exhibited signs of "financial distress" in the recent past (*id.* at 311); (3) determined that Bil-Dry's sales had been fairly constant over the past four fiscal years (*id.* at 307); and (4) determined that Bil-Dry's labor costs[47] had been relatively steady over the past four fiscal years and increased in FY 1996. *Id.* at 308.

i. *Dr. Meyer's Testimony Regarding Taxable Income Losses*

Dr. Meyer rebutted Bil-Dry's argument that it had been experiencing financial difficulties because its FY 1995 and FY 1996 consolidated tax returns indicated taxable income losses of $36,026 and $66,170 respectively. *Id.* at 457. According to Dr. Meyer, if Bil-Dry had not incurred a number of highly questionable discretionary expenses, such as a management fee of $99,280 that had not been paid in any of the prior years, taxable income for both years would have been positive. *Id.* at 320.

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[47] With regard to labor expenses, Dr. Meyer testified that:

> When a company is on the rocks, having financial problems, sales are on a clear downward trend, you'll see that they try to cope by cutting back on their labor expenses. You'll see that for Bil-Dry that their labor expenses, again has been fairly steady. In fact, in the latest year for which we have information, fiscal year '96, labor costs rose.

Tr. II at 308.

Before addressing the issue of Bil-Dry's administrative expenses, however, we note that Bil-Dry's taxable income losses do not prohibit the imposition of a civil penalty for its RCRA violations. As was stated in *Central Paint*:

> A corporation does not necessarily need to show a profit to be able to pay a civil penalty imposed under RCRA. EPA has recognized this in penalty policies under other statutes such as the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et seq*.

See 2 E.A.D. at 317 n.13. In any event, we find that Bil-Dry has not offered adequate evidence to demonstrate that these taxable income losses rendered Bil-Dry incapable of paying the penalty assessed by the Presiding Officer.

ii. *Bil-Dry's Administrative Expenses*

Bil-Dry disputed Dr. Meyer's conclusion that Bil-Dry could pay the penalty by "curtailing certain discretionary[48] expenses without experiencing financial hardship." Tr. II at 299. Specifically, Bil-Dry argued that (1) the $99,280 management fee paid to Moon Chemical was booked in previous years as an "administrative charge"; (2) the single $100,000 salary payment to Dr. Moon was for his services from 1993-1996, which was not excessive for the owner of a company; and (3) the substantial advertising budget increase in 1996 was in response to the demands of Bil-Dry's client, New York Carpet World. *See* Appellant's Brief at 46-48.

With regard to the issue of the management fee of $99,280 to Moon Chemical[49] in FY 1996, we note that Bil-Dry attempted to introduce evidence [to support its assertion that such a "management fee" payment was made prior to FY 1996] for the first time during the evidentiary hearing. However, the Presiding Officer responded as follows:

> I issued an Order two weeks ago Friday that gave you until 12 noon on Monday to file with the [Region] any other evidence you may have on this issue [of the management fee]. So, if you have not entered that with opposing counsel, then at this time I have decided I can't entertain that.

Tr. II at 467. As such, we will not consider this evidence on appeal.

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[48] Dr. Meyer defined a "discretionary expense" as an expense that "the company doesn't absolutely have to make in order to produce its goods and services that it sells to its customer * * * [and which it] book[s] year after year." Tr. II at 308, 320.

[49] Moon Chemical is also owned by Dr. Joon Moon. *See* Tr. II at 319.

With regard to the officer salary payment of $100,000 to Dr. Moon in FY 1995, Bil-Dry argues that Dr. Moon "had not taken a salary since 1993 and did not take a salary in 1996. As a result, Dr. Moon was paid on average $25,000 per year from 1993 through 1996 * * *." Appellant's Brief at 47.[50]

Dr. Meyer, when asked on cross-examination whether the $100,000 payment could be averaged over four years as $25,000 per year, stated that "[t]hat is not the way it's represented on the company's books." *See* Tr. II at 349-50. She pointed out that if the company believed an officer deserved a salary each year, generally-accepted accounting principles required that the salary be booked each year, and if they were unable to pay it, regard it as an accrued expense on the balance sheet. *Id*. at 350. It is uncontested that this was not done.

In any event, even if we were to accept the idea that a reasonable salary for Dr. Moon should be viewed as non-discretionary, despite the failure of Bil-Dry to follow sound accounting practices as pointed out by Dr. Meyer, the most that Bil-Dry tries to justify as not being excessive is $25,000 per year. Appellant's Brief at 47. Using this salary amount to adjust the taxable income in 1995 in lieu of the clearly excessive $100,000 amount, yields a taxable income of positive $39,000, rather than the negative $36,000 Bil-Dry claimed on its 1995 tax return. *See* Tr. II at 317.

Lastly, Bil-Dry argues that its advertising budget increased substantially because Bil-Dry's largest customer, New York Carpet World, "demanded it." Appellant's Brief at 47. However, apart from the testimony of Mr. Rodgers, Bil-Dry offered no evidence to support this claim, and as such, Bil-Dry has not persuaded us that Dr. Meyer was incorrect in classifying its increased advertising expenses as "discretionary."

iii. *Dr. Meyer's Testimony Regarding The Bank Overdraft and Short-Term Loan*

In another attempt to discredit Dr. Meyer, Bil-Dry argues that she incorrectly classified a $145,585 bank overdraft liability in FY 1995 and a $240,487 short-term loan from a Bil-Dry affiliate as an "operating activity" rather than "cash flowing from financing activities," and then "fought giving a direct answer." Appellant's Brief at 44-45. However, a close examination of the transcript reveals

[50] This argument is confusing because Bil-Dry states that Dr. Moon "had not taken a salary since 1993," which implies that he *did* take a salary in 1993. However, Bil-Dry's argument that the $100,000 payment in 1995 represented a four-year average of $25,000 per year is logical only if Dr. Moon was not paid in 1993. Thus, we assume that Bil-Dry was merely inattentive in framing this argument, and intended to say that Dr. Moon had not taken a salary in 1993.

that when asked by Bil-Dry's counsel whether a short-term debt does not belong on the statement relating to operations, Dr. Meyer explained that:

> The reason I treated it this way is because it's included as a total other current liability by the company in its consolidated tax returns. If you look at a standard financial tax and look at how one is supposed to go about deriving — estimating a statement of cash flow, one is to include an increase or decrease in other current liabilities. That, indeed, is how Bil-Dry has booked that. And that is why I did it this way.

Tr. II at 335. Thus, rather than stating that she had been incorrect as Bil-Dry inaccurately claims she did (*see* Appellant's Brief at 44), Dr. Meyer clarified that a short-term debt (such as the bank overdraft), while it shouldn't ordinarily be included in determining cash flow from operations, was treated that way because of how Bil-Dry classified it in its consolidated tax return for FY 1995. *See* Tr. II at 334, 336.

By arguing that Dr. Meyer's conclusion as to the overdraft and the loan was erroneous, Bil-Dry is deviating from the position it took with respect to those debts when it prepared its consolidated tax return for FY 1995. However, we will hold Bil-Dry to its characterization of those debts as a "total other current liability," which is cash flowing from an operating activity rather than cash flowing from financing activities.

Consequently, we find nothing in Dr. Meyer's testimony that would compel us to find that the Presiding Officer erroneously found that Bil-Dry has not met its burden of demonstrating its inability to pay the penalty assessed by the Presiding Officer.

4. *Determination of Penalty Amount*

We assess a civil penalty of $89,150, rather than the $103,400 assessed by the Presiding Officer, since we reverse the portion of the Presiding Officer's Initial Decision finding liability for Counts II and III as they relate to Tanks A-C.[51]

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[51] The Presiding Officer assessed a civil penalty of $13,500 for Count II (Violation of 25 Pa. Code § 262.11 — Failure to Perform Hazardous Waste Determination). Section 262.11 requires "generators" of waste to make hazardous waste determinations. We find that Bil-Dry did not generate the waste in the tanks, and as such, Bil-Dry is not liable for Count II as it relates to the tanks. Therefore, we reduce the penalty for Count II to $6,750.

The Presiding Officer assessed a civil penalty of $15,000 for Count III (Violation of 40 C.F.R. § 268.7(a) — Failure to Perform LDR Waste Penalty Determination). Since 40 C.F.R. § 268.7(a) requires "generators" of waste to test waste or use knowledge of waste to determine if the waste is restricted from land disposal, and we find that Bil-Dry did not generate the waste

Continued

IV. *CONCLUSION*

Upon consideration of the issues raised on appeal by Bil-Dry, we reverse the portion of the Presiding Officer's Initial Decision finding liability for Counts II and III as they relate to Tanks A-C. However, we affirm the Presiding Officer's finding of liability for Counts II and III as they relate to Drums Nos. 2-4, and affirm his finding of liability for Count I, and Counts IV-IX as they relate to both Tanks A-C and Drums Nos. 2-4.

For these reasons a civil penalty of $89,150 is hereby assessed against Respondent, Bil-Dry. Respondent shall pay the full amount of the civil penalty within thirty (30) days of receipt of this final order. Payment shall be made by forwarding a cashier's or certified check payable to the Treasurer, United States of America, to the following address:

U.S. Environmental Protection Agency
Region III
Regional Hearing Clerk
P.O. Box 360515
Pittsburgh, PA 15251

So ordered.

(continued)
in the tanks, we also find that Bil-Dry is not liable for Count III as it relates to the tanks. Therefore, we reduce the penalty for Count III to$7,500.