

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

JAMAICA WATER SUPPLY COMPANY

Docket No. II RCRA-93-0212

and

DYNAMIC PAINTING CORPORATION

Respondents

INITIAL DECISION

RCRA - 40 CFR §§265.31, 262.34 - Where paint removal from a water tower resulted in lead-based paint chips being released onto neighboring residences, Respondent is liable for failure to minimize possibility of any unplanned release of hazardous waste or hazardous waste constituents. Respondent is liable for failure to label as hazardous waste a partially filled container of soil, rocks and paint chips, where Respondent admitted the waste was hazardous on a hazardous waste manifest and did not present any evidence to the contrary. Total penalty assessed is \$51,750.

APPEARANCES

On behalf of the Complainant:

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On behalf of the Respondent

Jamaica Water Supply:

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Before: Lotis, J., Chief Administrative Law Judge

I. Summary

Respondent Jamaica Water Supply Company contracted for paint removal and repainting of a water tower. The paint removal resulted in releases of paint chips onto Respondent's property and onto surrounding neighborhood residences.

A sample of paint chips was analyzed and found to contain lead in excess of 5.0 milligrams per liter. That finding, along with information in documents submitted to EPA by Respondent, establishes that the paint chips were hazardous waste. As a hazardous waste, requirements must be met for handling, storage and disposal as set forth in regulations promulgated under the Resource Conservation and Recovery Act (RCRA).

40 C.F.R. § 265.31 requires facilities to be operated and maintained in order to minimize the possibility of releasing hazardous waste. The evidence shows that paint chips were observed scattered in significant amounts on and around the site. The evidence fails to show that Respondent had taken adequate measures to ensure their containment. Respondent had fair notice of the conduct required under that regulation despite the fact that the regulations do not specify containment methods for paint removal from steel structures.

Respondent did not present evidence to controvert its statement on a hazardous waste manifest that paint debris waste consisting of paint chips, rocks and soil was hazardous waste. A partially-filled drum containing the paint debris waste was required to be labeled as hazardous waste and marked with the date that accumulation of hazardous waste began. Respondent's failure to comply with those requirements constitutes violations of 40 C.F.R. § 262.34.

A penalty of \$51,750 is assessed for these violations.

II. Background

This proceeding concerns the removal of paint in April 1993 from the Elmont Water Tower located in Elmont, New York. Jamaica Water Supply Company

(Respondent) owns the water tower, which is also known as Jamaica Water Supply Tank 20. It has a one million gallon capacity, and is used for the storage of drinking water. Paint removal and repainting activities were conducted by Dynamic Painting Corporation (Dynamic) under a contract granted by Respondent. The paint removal operation began in April 1993. A major issue presented by the parties in this case concerns the containment of paint chip debris to prevent contamination of soil with lead.

On April 19, 1993, an EPA representative, Anne Kelly, inspected the paint removal operations following a citizen complaint that paint chip debris had been scattered on the streets and lawns of the surrounding residences. She observed a high concentration of paint chips in the yards of two residences surrounding the water tower. She also observed some paint chips as far as two blocks from the tower. George Valentine, the foreman of Dynamic stated that he had rented a machine to vacuum the paint particles from the street, sidewalk and yard areas, according to Ms. Kelly's inspection report.

On the same day as the inspection, Respondent submitted to EPA a notification of hazardous waste activity report pursuant to section 3010 of RCRA. That provision requires persons who generate, transport, treat, store or dispose of hazardous waste to submit such notification. Respondent informed EPA that it generated between 100 and 1000 kilograms per month of D008 hazardous waste, which is defined as waste containing regulated amounts of lead. 40 C.F.R. § 261.24.

The next day, EPA sent Respondent a letter indicating that its paint removal operation was resulting in the release of paint chips to the surrounding neighborhood. The letter requested Respondent to cease paint removal until containment practices were modified to effectively minimize the release of paint chips, and to take steps immediately to remove the paint chips from areas surrounding the tower.

Another EPA inspector, John Hansen, visited the Elmont Water Tower on June 17, 1993 to determine compliance with state and federal regulations for management of hazardous waste. A 55-gallon drum containing rocks, soil and paint chips and labeled "Non-Hazardous Waste" was observed in a trailer at Respondent's facility. Mr. Hansen reported that he observed paint chips on the ground at the facility and on surrounding residential properties.

In July 1993, Respondent and Dynamic submitted information requested by the EPA under section 3007 of RCRA, 42 U.S.C. § 6927, relating to the paint removal, surface conditioning and painting of the Elmont Water Tower.

On July 8, 1993, Respondent submitted to the EPA analytical results of six soil samples and one sample of paint chips. These results showed that the paint chip sample contained 100 milligrams per liter (mg/l) of lead, as measured by the Toxicity Characteristic Leaching Procedure (TCLP), which level exceeds the regulatory threshold of 5.0 mg/l. 40 C.F.R. § 261.24. The soil samples did not exceed that threshold.

Based upon the inspections and the information obtained from the EPA's information request under section 3007 of RCRA, a complaint was issued against Respondent and Dynamic on September 28, 1993. The complaint was issued under the authority of section 3008 of RCRA, 42 U.S.C. § 6928, alleging violations of RCRA and hazardous waste regulations implemented thereunder.

The three counts of the complaint charged as follows: Count I, failure to label a container of hazardous waste accumulated in the trailer with the words "Hazardous Waste," as required by 40 C.F.R. § 262.34(a)(3); Count II, failure to mark the container of hazardous waste with the date that accumulation started, as required by 262.34(a)(2); and Count III, failure to maintain and operate the tower and facility to minimize the possibility of any unplanned release of hazardous waste or hazardous waste constituents to air and soil, as required by 40 C.F.R. § 265.31. For these violations, Complainant proposed a penalty of \$219,405.

Respondent and Dynamic denied the alleged violations in their answers to the complaint. The matter was set for hearing on December 6, 1995. Before the hearing, EPA settled the matter with Dynamic,¹ so only Respondent and Complainant participated in the oral hearings in this proceeding. During the December 6th hearing, counsel for Complainant and Respondent reported on the record that they had reached a settlement. However, settlement negotiations collapsed and another hearing was held on April 18, 1996.

By letter dated April 17, 1996, counsel for Complainant announced that it would not seek the full amount of the penalty proposed for Count III, \$209,907, but that it would seek instead a penalty of \$50,000 for the two days that it alleged Respondent was in violation of 40 C.F.R. § 262.31. Reasons stated for the decrease were "various factors, including the passage of time and the associated detrimental effect on Complainant's ability to prove the penalty

previously sought for Count 3." Thus, the total penalty sought against Respondent for the three counts is \$59,498.

III. Some Preliminary Matters

A flurry of unsolicited pleadings followed the briefing schedule. Respondent's Reply Brief suggested that Complainant failed to disclose evidence in its possession which is favorable to Respondent. Complainant submitted a request to file a supplementary reply on that issue. In response, Respondent stated that the soil sample analyses which were the subject of Complainant's request were immaterial and irrelevant and thus should be excluded. Nevertheless, Respondent attached a copy of the soil analyses. Pointing out that such response was a brief filed outside of the briefing schedule, Complainant again requested an opportunity to submit a supplementary reply.

These unsolicited pleadings are not authorized under either the procedural rules governing these proceedings, 40 C.F.R Part 22, or any order of the Presiding Judge. I find no reason to consider them. Consequently, the pleadings dated June 28, 1996, July 3, 1996 and July 18, 1996, will not be accepted. The record will stand as the parties made it.

IV. Position of the parties as to liability

Complainant asserts that the waste at issue, i.e., the paint chips and paint chip debris in the 55-gallon drum, is established as hazardous waste on the basis of the EPA inspection reports (Complainant's exhibits (CX) 1, 5), and four other items of evidence. The first is the Notification of Hazardous Waste Activity dated April 19, 1993. CX 9. The second is the laboratory analysis of the paint chip sample, indicating that it contained 41,000 mg/l (milligrams per liter) of total lead, and contained 100 mg/l of lead by the Toxicity Characteristic Leaching Procedure (TCLP). CX 4. The third is Respondent's response to EPA's information request, wherein Respondent answered "Yes" to the question of whether the lab analysis of the paint chip samples was "representative of the paint material removed from the Elmont Water Tower." CX 6, 7. The fourth is a hazardous waste manifest, dated August 13, 1993, for transporting 400 pounds of D008 hazardous waste, containing lead compounds, from the Elmont Water Tower facility. CX 11. Robert S. Swartz, Project Manager of Respondent, prepared or submitted the first three of the four items.

Complainant states that EPA could have taken samples following the inspections, but did not, having received indications that the waste was hazardous on those

official forms, in Respondent's response to the information request, and on the laboratory report. In these circumstances, Respondent cannot now claim that the waste materials from the Elmont Water Tower were not hazardous wastes, Complainant urges.

The observations reported by the inspectors of widespread dispersion of paint chips on the ground (CX 1, 5), and the photographs from the inspection (CX 2), establish a violation of section 265.31, in Complainant's view. Complainant maintains that the actual release in itself is evidence that Respondent failed to minimize the possibility of release, citing In re Ashland Chemical Co., Docket No. RCRA-V-W-86-R-13 (Initial Decision, June 22, 1987), slip op. at 28, 40 (violation of §265.31, failure to prevent releases, shown by evidence of soil contamination resulting from hazardous waste leakage from underground storage tanks); *on appeal of penalty*, RCRA (3008) Appeal No. 87-17 (Final Decision, October 25, 1989) ("Operating conditions that lead to an actual release of substantial proportions plainly constitute a major deviation" from the requirement of § 265.31.)

Complainant explains that section 265.31 is a regulation of general application, intended to cover a wide range of facilities and waste generation scenarios. EPA's witness Leonard Grossman, a senior enforcement specialist at EPA Region II, testified that various methodologies existed that could have eliminated or substantially reduced the release of paint chips. Tr. 219-222, 234-238.

Respondent's position is that the waste at issue was not shown to be hazardous, and that even if it was, Respondent did not violate RCRA and the hazardous waste regulations. Complainant did not present evidence on the type of containment system used, and thus could not show that it was inadequate, Respondent argues. Furthermore, there is no standard to determine whether containment was adequate, so imposing a penalty for inadequate containment is a violation of due process.

In particular, Respondent asserts that Complainant did not present sufficient evidence to establish the paint chips referenced in the complaint as hazardous waste. Respondent objected strongly to the admission of Complainant's exhibit 4, the analytical results of soil and paint chip samples, on grounds that the sampling results were not authenticated. Moreover, the location where the samples were obtained is unknown, and only one sample of paint chips was analyzed. Respondent argues that one data point is insufficient as scientific proof. Respondent argues further that EPA's established scientific methods --

as stated in a document known as SW-846 -- for taking, transferring and analyzing samples were not followed.

As to the EPA's question of whether the paint chip sample was representative, Mr. Swartz's affirmative response was incorrect and was hearsay, Respondent contends, and Respondent should not be bound by it. Instead, EPA should be bound by its own regulations at 40 C.F.R. Part 261, requiring hazardous waste determinations to be made in accordance with procedures set forth in SW-846.

Regarding Counts I and II, the material observed in the drum was a mixture of debris, including paint chips, which was not sampled and tested for determination of whether it was hazardous waste. Respondent asserts that it did not know if the waste was hazardous. Nevertheless, it took the precautions of submitting to EPA the hazardous waste notification and sending the waste mixture to a hazardous waste landfill, using a hazardous waste manifest. Mr. Swartz merely certified on the forms his belief that the material could contain lead, Respondent contends.

Furthermore, the drum was only 3/4 full. Respondent asserts that it was not required to be labeled and marked, and a hazardous waste determination was not required to be made, until the drum was full. Respondent refers to testimony of Joe Harris, its engineering consultant, who stated that if he were going to sample the waste, he would wait until the drum was full. Tr. 278.

As to Count III, Respondent's position is that EPA not only failed to establish the paint chips as hazardous waste, but did not set forth any enforceable standard for the type of containment system required in order to minimize possible releases of paint chips from paint removal operations. Moreover, as there were no witnesses having personal knowledge that the paint chips on the ground originated from the paint removal operations, Respondent suggests they may have fallen due to weathering.

Mr. Harris prepared a "Report on the Use of Mini-Containment in Conjunction with Power and Hand-Tool Cleaning, Tank # 20, Jamaica Water Supply Company." Respondent's exhibit (RX) 1. Respondent believes that his report and testimony establish that the containment system was adequate and not in violation of the federal regulations.

Mr. Harris stated in his report that a zero release of lead paint debris, or 100 percent containment, is not possible from an engineering standpoint. RX 1 pp. 1, 3. Respondent argues that it made a good faith effort to minimize waste

generation by choosing the conservative methods of spot repair and paint removal by hand and power tools and an "encapsulant system,"² with a "containment system of a certain level to minimize release." Tr. 269, 282-283.

Respondent emphasizes that no notice was provided by EPA of any standard for the containment of paint chips using those paint removal methods. Respondent cites General Electric Co. v. EPA, 53 F.3d 1324 (D.C. Cir. 1995) for the principle that the government may not deprive one of property by imposing criminal or civil liability absent notice. The paint removal and paint chip containment at the Elmont water tower were performed in accordance with industry practices, Respondent asserts.

Respondent believes that it is entitled to an inference that the containment system used by Dynamic was adequate. Respondent observes that EPA failed to call any witness, such as Mr. Valentine, to testify to material facts with regard to the containment system. EPA also did not call Mr. Swartz as a witness to authenticate the documents he submitted to EPA. The failure to call Mr. Valentine and Mr. Swartz as witnesses entitles Respondent to an inference that their testimony would have been unfavorable to EPA, Respondent urges.

In response, Complainant says that it received a letter on the eve of the hearing that Mr. Valentine would not be available to testify. Complainant retorts that Respondent could have, but did not, call any other witnesses, such as Mr. Valentine or Mr. Swartz.

V. Discussion and Findings

In order to establish a prima facie case of liability on Counts I and II, Complainant must come forward with evidence to show that the material in the drum was hazardous waste. Complainant must also establish that the container was required to be labeled and marked in accordance with 40 C.F.R. § 262.34 at the time of the inspection, and that Respondent is liable as the generator or is vicariously liable for the acts or omissions of Dynamic.

To establish a prima facie case as to Count III, Complainant must show (1) evidence of the release of hazardous waste or hazardous waste constituents, (2) that the fact that the release occurred indicates a failure to take adequate measures to minimize the possibility of such release, (3) that the release could threaten human health or the environment, and (4) that Respondent is liable as the generator or is vicariously liable for the acts or omissions of Dynamic.

As discussed below, Complainant has established a prima facie case of liability on all three counts of the complaint. Respondent has not come forward with evidence sufficient to defeat Complainant's case. Respondent's legal arguments do not provide a defense to liability for any of the three counts alleged in the complaint.

A. Whether the paint chips were hazardous waste

As described above, the record contains several items of evidence and testimony which indicate that the paint chips that fell from the tower contained lead in amounts, exceeding the regulatory threshold. Complainant has satisfied its burden of coming forward with evidence that the paint chips were hazardous waste. There is no persuasive evidence in the record to the contrary.³

First, the laboratory analysis of the paint chip sample shows that it contained lead in an amount exceeding the regulatory threshold. CX 4. The laboratory analysis document was properly admitted into evidence, meeting the applicable standard in 40 C.F.R. § 22.22, as it was not "irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value." It was sent by facsimile from Mr. Swartz to Ms. Kelly on May 17, 1993. Tr. 45; CX 4. In its response to EPA's information request, Respondent briefly described the samples, including one of "paint chips collected from the tank before work was started," and stated the name and address of the laboratory to which they were sent. CX 7. Respondent attached to its response a copy of the laboratory analysis. Id.

The information as to the reliability of the test results --chain of custody, sampling plan, duplicate sample -- was in the control of Respondent. The sampling report states that the analyses were performed according to EPA Method 1311, which is what is required by regulation, 40 C.F.R. § 261.24. CX 4. The sampling report indicates that the laboratory was certified by the State of New York. Id.

Second, Respondent admitted in its response to EPA's information request that the paint chip sample was representative of paint material removed from the tower. CX 6, 7.

Third, Respondent filed a Notification of Hazardous Waste Activity, which is a report that is required to be filed by persons generating hazardous waste, under RCRA § 3010. CX 9.⁴ The Notification and the hazardous waste manifest each contained a signed certification that the information on those forms is

accurate. Generally, reports or records which are required to be filed or kept by law may be used as admissions to establish liability. Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1115 n. 8 (4th Cir. 1988), *cert. denied*, 491 U.S. 904; Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F. Supp. 440, 451 (D.C. Md. 1985); Student Public Interest Research Group of New Jersey v. Monsanto Co. 600 F.Supp. 1479, 1485 (D.N.J. 1985).

Because these documents preceded the commencement of this proceeding, they are pre-litigation admissions which are not conclusive. Such admissions may be controverted or explained by the party making them. 4 Wigmore, Evidence §§ 1058-1059 (Chadbourn rev. 1972) ("an opponent whose admissions have been offered against him may offer any evidence which serves as an *explanation* for his former assertion of what he now denies to be the fact.").

However, unsupported speculation of error is inadequate; direct evidence must be presented. Public Interest Research Group v. Yates Industries, 757 F.Supp. 438, 447 (D. N.J. 1991)(Defendant must present direct evidence of reporting inaccuracies in Discharge Monitoring Reports (DMRs) required by NPDES permit issued under the Clean Water Act, and may not rely on unsupported speculation of measurement error); Bethlehem Steel 608 F. Supp. at 453 (affidavits indicating there might be inaccuracies in testing procedures did not defeat summary judgment on liability for noncompliance, as evidenced by DMRs, with NPDES permit conditions). A mere argument that the admission was not based upon personal knowledge does not sufficiently controvert or explain the admission. Pekelis v. Transcontinental & Western Air, Inc., 187 F.2d 122, 129 (2d Cir. 1951), *cert. denied*, 341 U.S. 951; 4 Wigmore, Evidence § 1053.

Thus, the argument that proper sampling methods were not followed and that consequently it was unknown whether the paint chips were hazardous waste does not controvert the admissions on the Notification of Hazardous Waste Activity, the laboratory report and the Respondent's response to EPA's information request. Respondent, as a person who generated a solid waste (paint chips), was required to determine if that waste is hazardous. 40 C.F.R. § 262.11⁵ To give merit to Respondent's argument would effectively allow generators to escape liability for hazardous waste violations by failing at the outset to perform properly the hazardous waste determination. See, Simkins at 1115 (NPDES permittee cannot successfully defend its failure to file DMRs required under the Clean Water Act by alleging that the underlying data was never collected in the first instance; liability could be avoided simply by failing at the outset to sample and to create and retain the necessary monitoring records).

Accordingly, it is concluded that the paint chips from the Elmont water tower were hazardous waste as defined in 40 C.F.R. § 261.31.

B. The waste in the drum

The inspection report of Mr. Hansen stated that two 55-gallon drums were observed in a trailer at the facility. CX 5. The report stated further, "Mr. Valentine indicated that one of the drums was a paint additive, and the other contained paint chips removed from the water tower mixed with soil." Id. The inspector "was told that the chips had been removed from the ground using a vacuum unit known to the industry as a 'Billy Goat.'" Id.

There is no evidence of any samples being taken of the material in the drum to determine whether it met the threshold toxicity for lead of 5.0 mg/l, as set forth in 40 C.F.R. § 261.31. The record shows only that a sample of paint chips alone met the threshold. CX 4.

The fact that the paint chips were mixed, or in effect diluted, with soil, and rocks does not establish that the waste mixture met the threshold. The proportion of paint chips to soil is unknown. Complainant merely speculated, without any factual support, that the mixture of the paint chips with soil "would have tested above the 5.0 mg/l threshold for lead." Complainant's Reply Brief at 3. Respondent's witness Mr. Harris, when asked hypothetically whether paint chips, soil, rocks and grass vacuumed from the ground would constitute a hazardous waste stream, speculated "it's probably fairly likely it's not." Tr. 278.

However, the hazardous waste manifest indicates that 400 pounds of lead-containing hazardous waste was generated by Respondent, and transported to a hazardous waste disposal facility in August 1993. Respondent did not deny testimony that the waste referenced on the manifest was from Elmont Water Tower. Tr. 179; Respondent's Post-Hearing Brief at 2; Respondent's Reply Brief at 6-7.

The manifest was a report required to be kept by law. 40 C.F.R. §§ 262.20 and 262.40. As such, it constitutes a non-binding admission by Respondent that the material in the drum was hazardous waste. Student Public Interest Group of New Jersey v. Monsanto Co., 600 F. Supp. at 1485; 4 Wigmore, Evidence §§ 10581059.

The fact that the manifest was submitted after the EPA inspections may indicate Respondent's desire to cooperate with EPA or to follow the inspector's

suggestion or guidance. It would seem unfair if Respondent were strictly held to such information, and could not subsequently contest it. See, In re U.S. Aluminum, Docket No. II EPCRA-89-0124 (Ruling on Motion for Partial Accelerated Decision, November 26, 1991), slip op. at 6-7; In re Pitt-Des Moines, Inc., Docket No. EPCRA-VIII-89-06 (Initial Decision, July 24, 1991); In re American Desk Manufacturing Co. Inc., EPCRA Docket No. VI-449S (Ruling Granting Complainant's Motion for Partial Accelerated Decision, October 31, 1995), slip op. at 8.

Nevertheless, Respondent did not present any evidence to contest the admission on the manifest. Respondent was required to determine whether the waste was hazardous and to keep records supporting that determination for three years after disposal. 40 C.F.R. §§ 262.11, 262.40. If the waste is hazardous, the regulations require the generator to prepare a hazardous waste manifest before transporting it for disposal. 40 C.F.R. § 262.20.

Respondent's failure to come forward with any evidence on the contents of the drum, particularly in view of these regulatory requirements, leads to the conclusion that the information on the manifest is correct. Respondent had the opportunity to present evidence in this hearing to rebut the information on the manifest. It did not do so. Therefore, absent evidence to the contrary, Respondent's identification of the waste as hazardous on the manifest is sufficient to establish that the material in the drum was hazardous waste.

The regulations provide, at 40 C.F.R. § 262.34(a)(2) and (a)(3):

Except as provided in paragraphs (d),(e)and(f) of this section, a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status, provided that:

* * * *

(2) The date upon which each period of accumulation begins is clearly marked and visible for inspection on each container;

(3) While being accumulated on-site, each container and tank is labeled or marked clearly with the words, "Hazardous Waste";

* * * *

The regulation is very clear that the container must be labeled or marked during the accumulation period. Logically, this means from the time waste is first deposited in the container. There is simply no basis for inferring that the container need not be marked or labeled until it is full.

The evidence in the record is sufficient to establish that material in the 55-gallon drum was hazardous waste and that it was not marked and labeled as required by 40 C.F.R. §§ 262.34(a)(2) and 262.34(a)(3).

C. Whether a violation of 265.31 has been established

As noted above, EPA inspector Anne Kelly observed a "high concentration of paint chips" in the yard at two private residences near the tower. CX 1. Some chips were observed as far as two blocks from the tower, "kind of dispersed for a couple blocks in that area." Tr. 27; CX 1. She could not estimate a numerical concentration of paint chips. Tr. 27-28. Her inspection report stated that Mr. Valentine, the General Foreman of Dynamic, agreed to clean the paint chips from the street, sidewalk and yard areas on a more regular basis. CX 1.

Although the job was close to completion when John Hansen conducted the second inspection two months later, he stated that he observed paint chips on the ground wherever he walked adjacently to the tower, and "noticed paint chips on the ground at all properties surrounding the tower." CX 5. The reports of the EPA inspectors and testimony describing the paint chips clearly connect the paint chips observed on the ground with the paint removal operation. Tr. 28, 63; CX 1, 5.

The only direct evidence of any containment system used at the facility was a large tarp observed by Ms. Kelly at the April 19 inspection. CX 2. A photograph of the Elmont Water Tower revealed that only a small portion of the tower was covered, and the covering appeared loose and flapping in the wind. Tr. 31-32; CX 2, 3. Ms. Kelly testified that the tarp was partially fastened to the surface of the water tower, blowing in the wind, at the time of Ms. Kelly's inspection. Tr. 31-32, 42; CX 2. However, paint removal work was not being done on that day, so the tarp may not be representative of the containment system used during paint removal operations. Tr. 60-61, 194.

The essential question is whether a violation of 40 C.F.R. § 265.31 can be established by the fact of the actual release of hazardous waste on the site and on surrounding residential properties.

40 C.F.R. § 265.31 states as follows:

Facilities must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous

waste or hazardous constituents to air, soil, or surface water which could threaten human health or the environment.

It is reasonable to make a presumption that if an unplanned release occurs at a facility, it was not maintained and operated to minimize the possibility of such a release. Such a presumption is justified because there is a rational nexus between the release of hazardous waste and the maintenance and operation of a facility. In re City of Detroit Public Lighting Dep't, et al., TSCA Appeal No. 89-5 at 25-26 (Final Decision, February 6, 1991)(rebuttable presumption that property owner caused the discharge of polychlorinated biphenyls on the property), *citing*, United Scenic Artists, Local 829, Brotherhood of Painters and Allied Trades, AFL-CIO, v. NLRB, 762 F.2d 1027, 1034 (D.C. Cir. 1985) ("Presumptions may, of course, be established by . . . administrative agencies, but their validity depends as a general rule upon a rational nexus between the proven fact and the presumed facts") ; McCormick on Evidence § 343 (3d ed. 1984) ("[J]ust as the burdens of proof are sometimes allocated for reasons of fairness, some presumptions are created to correct an imbalance resulting from one party's superior access to the proof.").

This presumption is particularly appropriate where a significant amount of hazardous waste was released or where the release occurred for a significant duration of time. Information as to the maintenance and operation of a facility, and as to the causation of the release, is within the control of the facility owner or operator. The hazardous waste generator, or the facility owner or operator, may rebut the presumption with evidence that the facility was properly maintained and operated.

Therefore, the evidence that the hazardous waste was released is sufficient for Complainant to make a prima facie case of a violation of section 265.31. The next question is whether Respondent has adequately rebutted Complainant's case.

Respondent's evidence was limited to containment systems in general, and only vague and circumstantial evidence concerning the paint removal methods and containment system used at the site.

The record suggests that even the highest quality containment systems are not infallible and cannot guarantee that no hazardous waste will be released. Tr. 215, 222; RX 1. Thus, it would appear that evidence that the release was of a very small amount, or evidence that the release was due to unforeseen and uncontrollable circumstances, may rebut the presumption that the facility, or

containment system at the facility, was not adequately operated or maintained as required by section 265.31.

The evidence shows that a significant quantity of paint chips was released not only on the ground immediately around the water tower, but also on the lawns of the nearby residences and on nearby streets. CX 1, 2, 5. The evidence shows also that the paint chips were not released on one day and promptly cleaned up. The paint chips were observed on the nearby lawns and streets on both days, April 19 and June 17, that the inspections occurred. CX 1, 5.

Respondent has not shown that the release occurred due to unforeseen and uncontrollable circumstances. The evidence suggests that there were high winds at the time of the paint removal operation, in April 1993. Tr. 62, 218; CX 1, 3; RX 1. High winds are not unusual at the time of year the paint removal occurred. Indeed, Respondent's evidence states that high winds are a factor that suggests using "mini-containment," a smaller sized containment system, over a more expensive and complete containment system. RX 1.

According to Mr. Harris' understanding, the tank was cleaned using water ("power wash") and power tools, such as "needle guns." Tr. 263-264. These methods apparently generate less waste than abrasive blasting, which removes all paint down to bare metal and generates a large amount of dust and debris. Tr. 254-255. On a previous job of removing all paint from another water tower by abrasive blasting, Respondent reported that it generated more than 7000 pounds of waste. In contrast, for the Elmont water tower, where hand and power tools were used, Respondent reported that only 400 pounds were generated. CX 7, attachment; CX 11; Tr. 188, 212.

Industry practices are described in a draft guide to containment of steel structures, prepared by the Steel Structures Painting Counsel ("SSPC"), attached to Mr. Harris' report. RX 1, Appendix B. Mr. Harris testified that at the time Respondent contracted with Dynamic, it was not standard industry practice to completely enclose the entire water tower structure. Tr. 270-272. He testified further that a totally enclosed containment system, i.e., hanging a shroud around the entire tank, would not be feasible for the Elmont water tower, as such structures are not designed to deal with containment loads. Tr. 273.

However, Mr. Harris gave testimony without having personal knowledge as to the methods Respondent actually used to minimize the release of paint debris. His report briefly discussed containment at the Elmont water tower. But, it was not

prepared until after the work at the tower ceased and after the present litigation commenced. Tr. 287. Mr. Harris had no personal knowledge of the actual containment system at the Elmont Water Tower. His knowledge of the containment system at the site was based apparently upon what he read in the contract between Respondent and Dynamic.

Mr. Harris described the system used at the Elmont Water Tower as "mini-containment." RX 1 p. 8. He testified that in his report (RX 1) he made "the comparison of what was requested in the Jamaica Water spec to what is outlined in the SSPC guide 6-I, table one." Tr. 285. Although the SPCC guide was not available at the time Respondent contracted with Dynamic, Mr. Harris testified that a "class five containment very well meets what they [Respondent and Dynamic] specify." Tr. 285. Class five containment is described as follows in the SPCC Guide 6I (RX 1 Appendix B p. 3, see also p. 8 Table 1):

This system provides a minimal level of dust and debris containment. It normally utilizes permeable walls with flexible framing, open seams and entryways, and natural air flow. It is generally comparable in cost to conventional open air blast cleaning with traditional tarping.

However, the contract did not specify the method of containment to be used, but broadly requested Dynamic to "use canvasses, tarpaulins, containment screens and any other equipment necessary to prevent the spread of debris beyond the property." CX 7, attachment for response number 10. Therefore, Mr. Harris' testimony and report are not persuasive as to the containment system actually used at the site.

Respondent believes that the fact that it used any containment method at all was laudable where power tools rather than abrasive blasting are used. Apparently, the SPCC guide addresses containment for abrasive blasting paint removal, and less stringent containment methods could be used for paint removal with power tools. RX 1, attachment for response number 10, p. 3 § 4.2.3; Tr. 267. Mr. Harris testified that standard industry containment practices for power tool paint removal methods were "very minimal" and "[m]aybe nonexistent," and that "a generator might not have anything more up than a hanging tarp just to knock debris down because, again, we're talking about fairly large macroscopic particles that might come off . . . about the size, minimally of a thirty-second to a sixteenth of an inch in diameter."⁶ Tr. 270-271.

However, even if the containment at Respondent's facility met or exceeded standard industry practice, it cannot be presumed to minimize the possibility

of hazardous waste release. Assuming arguendo that the system used by Dynamic met or exceeded the SPCC guidance, it was not shown to be adequate in the circumstances of Respondent's operation. Mr. Harris' testimony as well as the SPCC guide suggested that the appropriate method of containment depends on factors such as the equipment and methods used for paint removal and whether the facility is in a residential neighborhood and whether debris would fall beyond facility property. CX 1, attachment for response number 10, p. 3, § 4.2.4.; Tr. 267, 283. Respondent has not shown that the containment system used was appropriate with regard to those factors. It has not presented evidence of the specific equipment and methods actually used for paint removal and containment.

Moreover, even if an adequate containment system is implemented, it may become inadequate if not properly installed, maintained or operated. There is no evidence of installation, maintenance of operation of the containment system used by Dynamic. Therefore, testimony and evidence on industry standards for containment do not defeat Complainant's case.

Nor does the lack of regulatory guidance or standards relieve Respondent from demonstrating that the facility was properly maintained and operated. The fact that section 265.31 is drafted broadly to be applicable to many types of facilities and hazardous waste situations does not mean it fails to provide adequate notice to individuals in specific situations of the conduct required: to maintain and operate facilities in order to minimize the possibility of hazardous waste release. Complainant is not attempting in this proceeding to enforce any specific method of handling or containing hazardous waste.

Respondent's reliance on the adverse inference rule is misplaced. That rule, also called the "missing witness rule," or the "uncalled witness rule," set forth by the Supreme Court in Graves v. United States, 150 U.S. 118 (1893), states that if a witness is peculiarly within the control of one party and the witness' testimony would elucidate the facts at issue, and the party fails to call the witness, an inference may be drawn that the testimony, if produced, would be unfavorable to that party. U.S. v. Nahoom, 791 F.2d 841 (11th Cir. 1986). Application of the adverse inference rule is discretionary with the fact-finder. Wilcox v. Kerr-McGee Corp., 706 F.Supp. 1258 (E.D. La. 1989); Wigmore, Evidence, § 285 (Chadbourn rev. 1979).

The rule generally does not apply when the witness is available to both parties. United States v. Basic, 587 F.2d 577 (3rd Cir.), *cert. dismissed*, 435 U.S. 964 (1978); Tyler v. White, 811 F.2d 1204 (8th Cir. 1987)(Witness is

equally available to both parties where he is not presumptively interested in the outcome). Where there is likelihood of bias on the part of the missing witness in favor of one party, that witness, in a true sense, is not equally available, and thus an inference may be drawn against that party. United States v. Beekman, 155 F.2d. 580, 584 (2nd Cir. 1946)

In order for the adverse inference to be drawn, the proponent must establish the witness' unavailability, i.e., that the missing witness is peculiarly in the power of the other party to produce. This is done by showing either that the witness is physically available only to the other party or that the witness has a relationship to with the other party that practically renders his testimony unavailable to the proponent of the rule. Oxman v. WLS-TV, 12 F.3d 652 (7th Cir. 1993); Jones v. Otis Elevator Co., 861 F.2d 655 (11th Cir. 1988) (Employee of defendant was unavailable to the plaintiff because of the employer-employee relationship); United States v. Obayagbona, 627 F. Supp. 329, 344 (E.D. N.Y. 1985).

Respondent has not established the unavailability of Mr. Valentine as a witness on its behalf. Complainant apparently did not deem it necessary for him to be available for the hearing. He was not present at the hearing. The Consent Order between EPA and Dynamic provided, "If EPA deems it necessary, [Dynamic] shall also endeavor to have available, if a hearing is necessary, the foreman who was at the site during the alleged violations." Complainant's Post-Hearing Reply Brief at 25-26. When counsel for Dynamic appeared at the hearing and referred to that provision, Complainant's counsel stated on the record that he was not requiring Dynamic's presence at the hearing. Tr. 21. Mr. Valentine presumably would have been equally accessible by subpoena to both parties. Mr. Valentine was not peculiarly available to Complainant, but was at least equally available to Respondent. Thus, no inference will be drawn that the testimony of Mr. Valentine would be unfavorable to Complainant, due to its failure to call him as a witness.

In conclusion, Respondent has not successfully defeated Complainant's case as to the violation of 40 C.F.R. § 265.31.

D. Whether human health or the environment could be threatened by the failure to minimize the possibility of release

Complainant asserted that the scattering of the lead-containing paint chips could threaten human health, particularly children, by ingestion of the lead-contaminated waste. Tr. 32, 163. The harm to the human body from lead is well

known. The Secretary of the Department of Health and Human Services has called lead poisoning the "number one threat to the health of children in the United States." 61 Fed. Reg. 9065 (March 6, 1991).

Complainant claimed that leaving the paint chips on the lawns or soil surface could facilitate the paint chips further entering the soil and contaminating the environment. The soil samples taken by Respondent showed the presence of lead. CX 4.

Respondent pointed out Mr. Grossman's admission that there was no evidence of lead leaching from the paint chips. Tr. 225. Respondent argued that lead is a natural constituent of soil. Reply Brief of Respondent, dated June 21, 1996, at 7. There is no evidence in the record of soil samples taken before paint removal began.

Complainant need not prove actual harm to human health or the environment. It must show only that a release to air, soil or surface water "could threaten human health or the environment." 40 C.F.R. § 265.31. Complainant has provided evidence of a hazardous waste release onto soil which was not promptly cleaned up. CX 1, 2, 5. There is no evidence that all of the paint chip debris was removed from the soil. Mr. Hansen reported that some of the lawns were recently mowed, and fewer paint chips appeared on those lawns. CX 5. The record provides a sufficient basis upon which to find that the release could threaten the environment and human health.

E. Respondent's liability

Dynamic, the contractor, was responsible under the contract with Respondent, the owner, for handling the paint debris:

"At the end of EACH WORK DAY the stored debris shall be transported to an interim site as approved by the OWNER. The CONTRACTOR shall supply all material, labor, equipment, permits and fees that are necessary for the proper disposal of such containers at the completion of the cleaning phase of this project. The disposal of all debris and containers shall conform to all Federal, State and local agency regulations."

CX 7.

Dynamic was also responsible for the containment system, subject to some control by Respondent:

It is absolutely necessary that the CONTRACTOR provide a system which is capable of containing all the debris that is generated. The owner and/or tank inspector may, at the expense of the CONTRACTOR, stop the cleaning or painting operations at any time and order alterations in the containment system if, in their opinion, the containment requirements are not being met.

CX 7.

40 C.F.R. § 260.10 defines "generator" as "any person, by site, whose act or process produces hazardous waste identified or listed in Part 261.... or whose act first causes a hazardous waste to become subject to regulation." The preamble to an amendment of the rule defining that term discusses the potential for more than one party to be the generator of a hazardous waste. 45 Fed. Reg. 72024, 72026 (October 30, 1980):

[t]he operator of a . . . raw material storage tank . . . and the owner of the product or raw material, . . . and the person who removes the hazardous waste from a tank. . . are involved and EPA believes that all three (and any others who fit the definition of "generator") have the responsibilities of a generator.

.

[T]he Agency has concluded that the three parties should be jointly and severally liable as generators.

Respondent identified itself as the generator on the Notification of Hazardous Waste Activity and the Hazardous Waste Manifest, CX 9, 11. Respondent has not specifically contested Complainant's allegations of liability based upon Respondent's status as a generator. Accordingly, Respondent is liable for violations of 40 C.F.R. §§ 262.34(a)(2), 262.34(a)(3) and 265.31.

VI. Penalty

Section 3008(g) of RCRA sets forth the following with regard to assessment of a penalty:

Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

Section 3008(a) sets forth the criteria for the penalty assessment:

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

Mr. Grossman testified about the calculation of the penalty proposed by Complainant.⁷ A penalty of \$7,999 was proposed for Count I, and \$1,499 for Count II, reflecting among other things the small amount, one drum, of hazardous waste involved.

For Count III, Mr. Grossman explained that the actual release of hazardous waste, a very toxic chemical, onto the ground at residential properties should be considered serious in terms of the potential for harm to human health or the environment. Tr. 163-164. Mr. Grossman referred to the two inspections at which large quantities of paint chips were observed strewn over residences as far as two blocks away, and Ms. Kelly's photographs and testimony concerning them. CX 1, 2, 5. Complainant chose the highest penalty amount permissible under the statute to reflect the relative seriousness of the violation.

RCRA § 3008(g) authorizes a separate penalty assessment for each day of violation. Because the paint chips were observed on the ground on the two days that EPA inspected Respondent's facility, Complainant proposes a penalty of \$25,000 for two days, or \$50,000 for Count III.

In Complainant's opinion, Respondent made no good faith efforts to comply with the requirements, so the penalties should not be mitigated on that basis. According to the Complainant Respondent was or should have been aware that hazardous waste would be generated. It had painted two other water towers, generating lead-containing hazardous waste, within three years from the Elmont Water Tower job. Tr. 186-187; CX 7, attachments in response to question number 14, Notifications of Hazardous Waste Activity for Tanks 9 and 19. Respondent had mentioned the fact that the paint residue may contain elevated levels of lead in the contract with Dynamic. Tr. 189. Complainant suggests that Respondent should have analyzed the lead content of the paint prior to removal, and then designed an appropriate containment system. Respondent collected the paint chip sample on April 8 and received the laboratory results on April 30, 1993, long after Respondent had begun paint removal. CX 4, 7.

Respondent's position is that Mr. Grossman's opinion as to the penalty is entirely based upon unproven assumptions and thus should not be considered. Mr. Grossman did not prove but only made assumptions about the type of containment used at the site, and about the leaching of lead from paint chips. Tr. 221,

225. Mr. Grossman did not consider the reduction, as a result of using power tool and encapsulation methods, in total quantity of waste produced compared to abrasive blasting methods. Tr. 215, 224. Respondent points out hazardous waste manifests from paint removal jobs at the Elmont water tower and at other water towers it owns. CX 7. Respondent asserts that those manifests reveal that it reduced the quantity of waste produced. CX 7, 11; Tr. 188, 212-215.

The arguments of the parties with respect to the penalty have been carefully considered, and the penalties associated with the seriousness of the violations are as follows.

As to Count I, a penalty of \$5000, representing twenty percent of the maximum statutory amount, corresponds to the relative seriousness of the failure to label the drum as hazardous waste. This takes into consideration that the amount of hazardous waste was relatively small, consisting of only one 55 gallon drum of waste, that the drum was closed and bolted, and was located inside a trailer on the premises. CX 5.

Furthermore, there is no evidence that the waste in the drum was mishandled. Mr. Hansen reported that Mr. Valentine told him the waste was managed as if it was hazardous from the moment it was first drummed. CX 5. The waste was manifested and sent to a hazardous waste disposal facility in August 1993. CX 11. However, the penalty assessed should serve as a deterrent against the potential harm that could result had a person assumed that the waste was not hazardous and mishandled it.⁸

With regard to Count II, the failure to mark the drum with the date that waste accumulation started is not as serious a violation as that in Count I. Similarly, there was only one closed and bolted drum of hazardous waste, the drum was stored in a trailer, and was manifested and sent out for hazardous waste disposal several weeks after Mr. Hansen's inspection. There was no evidence of any actual harm to the environment resulting from the violation. The likelihood of harm resulting from a violation of this nature is relatively low. A penalty of \$2500, ten percent of the statutory maximum amount, represents the seriousness of this violation.

The violation of 40 C.F.R. § 265.31, resulting in an actual release of hazardous waste to the environment, on both facility premises and residential properties, merits the maximum penalty allowable under the statute. A determination that a violation is serious in terms of the penalty assessment does not require proof that lead has actually leached into the soil. However, a

large quantity of lead-based paint chips fell onto residential properties and was not immediately cleaned up. Moreover, there is no evidence to show that the paint chips were ever completely removed from the soil. These factors indicate that the violation is very serious. An appropriate assessment for Count III is \$25,000 for each of the two days of violation charged by Complainant.

Accordingly, the total penalty reflecting the statutory criterion of seriousness of the violations in counts I, II and III is \$57,500. The other statutory criterion of section 3008(a) is that the EPA take into account a respondent's good faith efforts to comply with applicable requirements.

Respondent initially made an effort to comply with the regulatory requirements in drafting the contract with Dynamic. Respondent took the precautions of specifying Dynamic's responsibilities to properly handle and contain the paint debris. Respondent clearly warned Dynamic in the contract that it is responsible for ensuring proper containment of the paint waste, and that the waste may be contaminated with lead. The contract specifically required Dynamic to properly contain the hazardous waste paint debris and to store and dispose of it in accordance with Federal and State requirements. The contract stated as follows, in part:

All power tool cleaning and/or sandblasting shall meet or exceed all Federal, State and local regulations. The existing exterior surfaces of the tank are coated with a number of layers of lead-based paint. The possibility exists that the paint residue may contain elevated percentages of lead and/or other toxins and will require containment and disposal methods established by these governing agencies.

* * * *

Containment equipment, complete in all respects, shall be provided by the CONTRACTOR. Equipment shall efficiently entrain and encapsulate debris resulting from the power tool cleaning and sandblasting operations so that they will not be discharged into the air or to the ground and will remain within the allowable limits of the governing agencies. Before proceeding with the specified power tool cleaning and/or sandblasting operations, the CONTRACTOR shall encapsulate the work by installing and maintaining suitable tarpaulins along the base of the tank which are capable of containing all removed paint, sand, and debris which shall then be collected and stored in tightly sealed and properly labeled containers. At the end of EACH WORK DAY the stored debris shall be transported to an interim site as approved by the OWNER.

* * * *

The disposal of all debris and containers shall conform to all Federal, State

and local agency regulations. The CONTRACTOR shall supply all material, labor and equipment necessary to completely contain the exterior of the tank to prevent paint chips, sand, rust, paint, etc. from traveling beyond the property line at the tank site. The CONTRACTOR shall use canvasses, tarpaulins, containment screens and any other equipment necessary to prevent the spread of debris beyond the property. Only canvasses or fiber reinforced tarpaulins shall be permitted for use in containment. The use of polyethylene sheeting shall NOT be permitted. Any canvasses, tarpaulins, etc. which become damaged and no longer keep all debris from dispersing shall be replaced prior to continuation of the work. The CONTRACTOR shall be aware of the importance of the containment requirements. It is absolutely necessary that the CONTRACTOR provide a system which is capable of containing all the debris that is generated. The owner and/or tank inspector may, at the expense of the CONTRACTOR, stop the cleaning or painting operations at any time and order alterations in the containment system if, in their opinion, the containment requirements are not being met.

CX 7, attachment for response number 10.

The contract indicates Respondent's intent to rely on Dynamic's judgment with regard to proper containment and waste handling. Respondent set forth specific instructions, precautions and warnings to Dynamic.

However, Respondent did not adequately follow through on its responsibilities. Respondent apparently did not adequately oversee Dynamic's operation despite the fact that Respondent knew that the waste contained lead. It did not report the violations and did not institute measures to remedy the violations before the EPA inspected the facility.

Although it failed to supervise the implementation of its contract with Dynamic, Respondent, at least at the contract's inception, made a good faith effort to comply by the inclusion of the contract provisions noted above. Therefore, a minor downward adjustment of ten percent is warranted. The total penalty as adjusted downward by \$5,750 is \$51,750.

VI. Compliance Order

As part of the complaint, Complainant proposed a compliance order to be imposed against Respondent and Dynamic. For the most part, it requires compliance with the regulations with which violations were charged in the complaint. Respondent has not contested any provisions of the compliance order. The proposed

compliance order, on the whole, appears reasonable and will be adopted with minor modifications.

VII. Conclusion and Order

1. Respondent is liable for failure to label a container with the words "Hazardous Waste" as required by 40 C.F.R. § 262.34(a)(3).
2. Respondent is liable for failure to mark a container with the date upon which the period of accumulation began, as required by 40 C.F.R. § 262.34(a)(2).
3. Respondent is liable for failing to maintain and operate its facility to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water which could threaten human health or the environment, as required by 40 C.F.R. § 265.31.
4. A penalty of \$51,750 is hereby assessed for the violations of 40 C.F.R. §§ 262.34(a)(3), 262.34(a)(2), and 265.31. Accordingly, Respondent is ordered to pay a civil penalty in the amount of \$51,750 pursuant to section 3008 of RCRA, for the violations alleged in the complaint. Payment of the penalty shall be made within 60 days from the date of this Order by submitting a cashier's or certified check payable to the Treasurer of the United States, to the Regional Hearing Clerk, EPA Region II, 290 Broadway, 17th Floor, New York, New York 10007-1866.⁹
5. Respondent shall within fifteen (15) calendar days of the effective date of this Order mark all containers of hazardous waste in storage at the tower, trailer, and facility, with the words "Hazardous Waste", or, in the case of satellite accumulation areas, with other words which identify the contents of the containers.
6. The Respondent shall within fifteen (15) calendar days of the effective date of this Order mark all containers of hazardous waste in storage at the tower, trailer, and facility (with the exception of containers of total volume less than or equal to 55 gallons that are located in satellite accumulation areas) with the date upon which each period of accumulation begins.
7. Respondents shall maintain and operate the tower, trailer and facility, so as to minimize the possibility of fire, explosion or any unplanned sudden or

non-sudden release of hazardous waste, or hazardous waste constituents to air, soil, or surface water. Additionally, Respondent must institute standard measures such that they will not allow hazardous waste debris to be released to air, soil or surface water at any other facility at which hazardous waste is generated by paint removal or other operation.

8. Respondent shall submit to EPA written notice of its compliance (accompanied by a copy of all appropriate supporting documentation) or noncompliance for each of the requirements set forth herein within fifteen (15) calendar days of the effective date of this compliance order. If the Respondent is in noncompliance with a particular requirement, the notice shall state the reasons for noncompliance and shall provide a schedule for achieving expeditious compliance with the requirement.

9. The Respondent shall submit the above required information and notices to the following addressees:

Mr. George C. Meyer, P.E., Chief
Hazardous Waste Compliance Branch
U.S. Environmental Protection Agency, Region II
26 Federal Plaza, Room 1000F
New York, New York 10278

Mr. John Hansen Hazardous Waste Compliance Branch
U.S. Environmental Protection Agency, Region II
26 Federal Plaza, Room 1000G
New York, New York 10278

Jon G. Lotis
Chief Administrative Law Judge

Dated: November 25, 1996
Washington, D.C.

¹ A Consent Agreement and Consent Order between EPA and Dynamic was executed on December 7, 1995.

² An "encapsulant system" was defined by witnesses at the hearing as an overcoating of paint, which forms a seal over existing layers of paint. Tr. 210, 255-256.

³ There was some testimony which tended to support Respondent's position when considered in isolation.

Complainant's witness Mr. Grossman, a senior enforcement specialist at EPA Region II, indicated that the method of paint removal used by Respondent, power tool cleaning, is used if it is not necessary to strip the paint down to bare metal. Tr. 207, 209. Respondent's witness Mr. Harris testified to the effect that only some layers of paint contain lead and that the lead-bearing paint may be applied unevenly, so that one paint chip sample is not representative of the paint chips at issue. Tr. 255, 260-263, 275-276.

However, this testimony when considered along with the rest of the testimony and evidence in this proceeding does not carry much weight. For example, all of the paint chips observed on the ground were orange on one side. Tr. 28, 30, 101; CX 1, 2. Mr. Harris indicated in his testimony that generally the primer coat of paint would be the lead-bearing layer and would be orange in color. Tr. 259.

⁴ Although Respondent argued after the hearing that Complainant failed to authenticate the documents Mr. Swartz submitted to EPA, it had no objection to the receipt of the Notification of Hazardous Waste Activity and the hazardous waste manifest into evidence at the hearing. Tr. 247-249.

⁵ 40 C.F.R. § 262.11 provides: A person who generates a solid waste, as defined in 40 CFR 261.2, must determine if that waste is a hazardous waste....."

⁶ However, this testimony is undermined by his testimony that spot repairing with a needle gun would pulverize the paint resulting in very, very small pieces of paint. Tr. 265.

⁷ Mr. Joel Golumbek, Chief of the New Jersey Hazardous Waste Section at EPA Region II, testified about the RCRA Civil Penalty Policy, dated October 1990 (Penalty Policy), used by EPA enforcement personnel to calculate penalties under RCRA. This policy was not published in the Federal Register. It constitutes a tool or device that the EPA enforcement personnel use to establish internal consistency in their approach to penalty levels. CX 10. Under the Penalty Policy, a gravity-based penalty is calculated first, and then that amount may be adjusted upward or downward based upon any of several factors. The gravity-based penalty is chosen from a matrix containing nine penalty ranges. The matrix is composed of axes reflecting the seriousness of the violation in terms of two factors: the potential for harm from the

violation and the extent of deviation from the regulatory requirement. Along each axis are three levels: major, moderate and minor. The penalties proposed by Complainant were calculated with reference to the Penalty Policy.

⁸ "A civil penalty must provide a meaningful deterrence without being overly punitive; it should be large enough to hurt; it should deter anyone in the future from showing a similar lack of concern with compliance." United States v. Environmental Waste Control, Inc., 710 F. Supp. 1172, 1244 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 495 U.S. 975 (1991); quoted by the Environmental Appeals Board, In re: Rybond, Inc., RCRA (3008) Appeal No. 95-3 (Final Order, November 8, 1996) ("[E]ven a reduced penalty will still 'hurt.'") .

⁹ Unless this decision is appealed to the Environmental Appeals Board in accordance with 40 C.F.R. § 22.30, or unless the Board elects to review this decision *sua sponte*, it will become a final order of the Agency 45 days after its service upon the parties.