3/31/94

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
ROI Development Corporation,	)	**Docket No.**
	)	**RCRA (3008) VIII-90-12**
	)	
Respondent	)	

INITIAL DECISION

Dated: March 31, 1994

RCRA: Pursuant to Section 3008(a)(3) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6928(a)(3), the Respondent ROI Development Corporation is assessed a total of $18,000 in civil penalties for: 1) illegal disposal of hazardous waste, namely 100 gallons of 1,1,1, trichloroethane, by shipment thereof on September 9, 1988, to the Mountain Air Refinery facility in La Barge, Wyoming, a facility not permitted as a treatment, storage or disposal facility, in violation of Section 3005(a) of RCRA, 40 U.S.C. §6925(a); 2) improper classification of the hazardous waste involved in the aforementioned shipment, in violation of Sections 262.20 and 263.10 of EPA's Regulations On Hazardous Waste Management, 40 C.F.R. §§262.20 and 263.10; and 3) failure to notify the receiving facility of the appropriate land disposal restriction treatment standards and applicable prohibition levels for the hazardous waste in the aforementioned shipment, in violation of Section 268.7 of EPA's Regulations on Hazardous Waste Management, 40 C.F.R. §268.7.

APPEARANCES:

For Complainant:	Ann C. Umphres, Esquire for U.S. Environmental Protection Agency Region VIII
For Respondent:	Robert H. Finch, Esquire Fleming, Anderson & Salisbury for ROI Development Corp.

I. PROCEDURAL HISTORY

This proceeding was initiated by a Complaint issued against the Respondent ROI Development Corporation (Respondent or ROI) by the Complainant, Region VIII of the United States Environmental Protection Agency (EPA), pursuant to Section 3008 of the Solid Waste Disposal Act, as amended by and hereinafter referred to as the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6928. Complainant alleges that ROI violated three provisions of RCRA when, on September 9, 1988, it shipped 100 gallons of hazardous waste, namely 1,1,1, trichloroethane, for disposal to an unpermitted facility in La Barge, Wyoming.

Complainant specifically alleges in Count I that Respondent illegally disposed of hazardous waste by shipment to a facility not permitted as a treatment, storage, or disposal facility in violation of Section 3005(a) of RCRA, 42 U.S.C. §6925(a). In Count II, Complainant alleges that Respondent's manifest for that shipment improperly classified that hazardous waste, in violation of Sections 262.20 and 263.10 of EPA's Regulations on Hazardous Waste Management (Regulations), 40 C.F.R. §§262.20 and 263.10. In Count III, Complainant alleges that Respondent failed to notify the receiving facility of the appropriate land disposal restriction treatment standards and applicable prohibition levels for the waste being shipped, in violation of Section 268.7 of the Regulations. For these alleged

violations, Complainant proposes a civil penalty in the amount of $75,000.

Following the formal prehearing exchange, Complainant filed a Motion for Accelerated Decision pursuant to Section 22.20(a) of the EPA Rules of Practice (Rules), 40 C.F.R. §22.20(a).[1] Complainant asserted that no genuine issues of material fact exist and that, therefore, Complainant was entitled to an accelerated decision as a matter of law establishing respondent's liability for the improper disposal, classification, and notification counts set out in the Complaint. Complainant also asked in this Motion that a civil penalty of $75,000 as proposed in the Complaint be assessed against the Respondent.

In a Stipulation in Response to Complainant's Motion for Accelerated Decision (Stipulation), ROI conceded that no genuine issue of material fact exists as to liability and that Complainant is entitled to an accelerated decision establishing Respondent's liability. However, ROI argued that substantial issues remain regarding whether the civil penalty proposed by the Complainant is appropriate for the violations involved.

Because the Respondent in its Stipulation admitted to the violations set out in the Complaint, the Presiding

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[1] The EPA Regulations and its Rules of Practice are contained in Volume 40 of the Code of Federal Regulations (C.F.R.). However, the 40 C.F.R. cite will not be given hereinafter unless it is needed for clarity.

Judge, pursuant to Section 22.20(a) of the Rules, granted Complainant's Motion for Accelerated Decision in part. As a result, in the October 7, 1991 Order Disposing of Outstanding Motions and Setting Further Proceedings (October 7, 1991 Order), a judgment was entered in favor of the Complainant on the issue of liability on all three Counts in the Complaint.

However, because factual and legal issues remain in dispute as to the appropriate amount of civil penalty to be assessed, the Motion for Accelerated Decision was denied insofar as it sought resolution of that matter. Thus, the remaining issues for disposition involve whether the penalty proposed by the Complainant is appropriate for the cited violations. Specifically, the penalty dispute centers on the following: (1) whether the facts establish three separate violations, therefore warranting three separate penalties; (2) whether the violations represent a major potential for harm, justifying assessment of the statutory maximum penalty; and (3) whether any adjustment factors from the Final RCRA Civil Penalty Policy (Penalty Policy) promulgated May 8, 1984, are applicable.

Pursuant to the October 7, 1991 Order, both parties agreed to forego a hearing on the penalty issues and to have the matter decided on the decisional record. Also in response to the October 7, 1991 Order, the parties designated the documents they wanted to be considered as

part of the decisional record.

The Complainant designated the following for inclusion in the decisional record: the Complaint; Complainant's Prehearing Exchange, including the 10 exhibits[2] submitted therewith; the Supplement to Complainant's Prehearing Exchange; Complainant's Motion for Accelerated Decision, including the Affidavit of John Works attached thereto; and Complainant's Response to Respondent's Stipulation to Motion for Accelerated Decision and the affidavit of Dr. Suzanne Wuerthele attached thereto.

On its part, ROI designated the following documents for inclusion in the decisional record: the 3 exhibits filed with Respondent's Prehearing Exchange; Respondent's Response to Complainant's Prehearing Exchange; Respondent's Stipulation to Motion for Accelerated Decision, including the affidavits of Dr. Frank Lambert and Daniel Valente attached to the Stipulation; Respondent's Supplement to Stipulation to Motion for Accelerated Decision; and a second affidavit of Dr. Frank Lambert (submitted with ROI's pleading designating items for inclusion in the record).

In addition, Complainant, after its designation of record, submitted a reply affidavit from Dr. Wuerthele in response to the second affidavit of Dr. Lambert, which ROI had included with its designation of record. Complainant

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[2] These exhibits will be cited hereafter by number as Complainant's Ex. 1, 2, etc. Similarly, Respondent's exhibits will be referred to as Respondent's Ex. 1, 2, etc.

requested that this reply affidavit be included in the decisional record as well. Respondent offered no objection to the inclusion in the record of this reply affidavit by Complainant's expert witness. In light of this, the reply affidavit of Dr. Wuerthele is also incorporated into the decisional record, which will consist of the documents designated by the parties and all orders issued in this proceeding by the Presiding Judge.

This Initial Decision consists of a description of the positions of the parties with respect to the penalty calculation issues, an analysis and resolution of the same, and an order disposing of the penalty calculation issues. Further, pursuant to a May 12, 1993 Order Requiring Supplemental Briefing, the parties submitted supplemental briefs on the applicability of the Paperwork Reduction Act (PRA), 44 U.S.C. §§3501 et seq., to this case. This issue will also be dealt with in this Initial Decision. Any argument by the parties not addressed specifically herein is rejected as either unsupported by the evidence or as not sufficiently persuasive to warrant comment. Any proposed finding or conclusion proffered by the parties not incorporated directly or inferentially into the decision, is rejected as unsupported in law or fact, or as unnecessary for rendering this Initial Decision.

II. THE POSITIONS OF THE PARTIES

1. COMPLAINANT'S POSITION

Complainant contends that three separate statutory and regulatory requirements of RCRA were violated in the course of the Respondent's September 9, 1988 shipment of hazardous waste (Complainant's Prehearing Exchange,[3] p. 8). Complainant maintains that, under the RCRA framework, each of the statutory and regulatory requirements involved is intended to achieve a distinct purpose. As a result, Complainant avers that the violations were not merely similar "record-keeping" violations as argued by the Respondent, but were distinguishable, presenting separate and distinct risks. (CPHE, p. 8; Complainant's Motion for Accelerated Decision,[4] p. 5.)

Based on the view that all three violations (i.e., improper disposal, classification, and notification) are distinguishable and present separate risks, Complainant focuses on the requirement in the Penalty Policy that penalties be assessed for distinguishable violations (Penalty Policy, pp. 11-12).

To determine the appropriate penalty amount for each Count, Complainant utilizes the Penalty Policy assessment matrix to calculate a gravity based penalty. Pursuant to the Penalty Policy requirements, Complainant considers both the potential for harm and the extent of deviation from a

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[3] Complainant's Prehearing Exchange will henceforth be referred to as CPHE.

[4] Hereinafter, the Complainant's Motion for Accelerated Decision will be referred to as "Motion".

statutory or regulatory requirement in evaluating the gravity based penalty for each violation. (Penalty Policy, pp. 6-8.) Complainant concludes that each violation is subject to the statutory maximum penalty of $25,000.00 per day (CPHE, p. 8). Complainant further alleges that one day of violation for each count is appropriate and arrives at a final penalty calculation of $75,000.00.[5] A summary of the Complainant's position on each Count follows, as well as Complainant's evaluation regarding the adjustment factors and the economic benefit of noncompliance.

A. Count I

Complainant concludes that the illegal disposal of hazardous waste under both the extent of deviation and the potential for harm factors warrants classification in the major/major[6] portion of the matrix in the Penalty Policy, p.10 (CPHE, p. 9). In justification of this assessment, Complainant asserts that the likelihood of exposure to humans, animals, or the environment is substantial when

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[5] Complainant's entire penalty calculation is summarized in Complainant's Ex. 5, which is the RCRA Penalty Computation Worksheet and the attachments therto.

[6] As noted above, in the Penalty Policy two factors are used to determine the seriousness of a violation: the potential for harm and the extent of deviation from a statutory or regulatory requirement. If the potential for harm is found to have a "substantial" likelihood of exposure, this factor is defined as "major"; if the likelihood of exposure is "significant", it is defined as "moderate"; and if the likelihood of exposure is "low", this factor is defined as "minor". Similarly, as to the extent of deviation factor, a "substantial" deviation is defined as "major"; a "significant" deviation is defined as "moderate"; and "somewhat" of a deviation is defined as "minor". Penalty Policy, pp. 5-9.

waste is illegally disposed (CPHE, p. 9). Specifically, Complainant contends that the disposal of hazardous waste at an unpermitted, unregulated facility can place workers, surrounding residents, animal habitats, and the environment at great risk (CPHE, p. 9). To bolster the claim that the potential for harm presented by this violation is great, Complainant avers that significant environmental harm has occurred at the Mountain Air Refinery facility where the hazardous waste was improperly disposed (CPHE at p. 10). In particular, Complainant contends that the damage to the environment caused by the Mountain Air Refinery facility operations is a prime example of why generators must ensure that their waste is transported for disposal to a permitted facility (CPHE, p. 11). Complainant further states that the potential harm presented by Respondent's violations has been realized in light of the severe environmental problems that exist at the Mountain Air Refinery facility (Motion, p. 6).

Complainant also claims that such an illegal disposal has a substantial adverse effect on the statutory and regulatory purposes of the RCRA program because the very purpose of RCRA is to ensure that hazardous waste is properly disposed at regulated permitted facilities (CPHE, p. 10). Complainant also points out that, under the RCRA statutory and regulatory program, a generator is strictly liable for ensuring that its waste is properly disposed at a permitted facility (CPHE, p. 11). Finally, although no

specific rationale is given regarding the characterization of the extent of deviation as major, it is assumed that such rationale is implicit in the above discussion involving the adverse impact on the statutory program. As a result of the foregoing, Complainant contends that the gravity based penalty for Count I should be $25,000.00.

B. Count II

Complainant regards the improper classification on Respondent's manifest of the hazardous waste (manifested as "Oil N.O.S.") as both having a substantial potential for harm and constituting a substantial deviation from the requirements of RCRA, once again placing the violation in the major/major category of the penalty matrix (CPHE, p. 11).

Complainant argues that the manifest is the key to the RCRA objective of "cradle to grave" management of hazardous waste (CPHE, p. 11). Therefore, having the correct information on the manifest, particularly the type of waste being transported for disposal, is of paramount importance to the objectives of the RCRA program (CPHE, p. 11). Thus, the Complainant contends that the failure to properly classify the waste places people and the environment at great risk because of the potential for improper handling and improper response tactics in the event of an accident or an emergency (CPHE, p. 12). As a result, Complainant proposes a gravity based penalty for Count II of $25,000.00.

C. Count III

For the failure to notify the receiving facility of the appropriate treatment standards and applicable prohibition levels as required by RCRA land disposal regulations, Complainant once again contends that both the potential for harm and the extent of deviation posed by this violation place it in the major/major category of the penalty matrix (CPHE, p. 12).

In support of this assessment, Complainant avers that under RCRA, generators are responsible for determining whether their waste is restricted from land disposal and, accordingly, must ensure that the manifest is accompanied by the proper notification (CPHE, p. 12). Failure to do so, according to the Complainant, could lead to the improper and harmful disposal of the waste upon the land (CPHE, pp. 12-13). Furthermore, Complainant argues that the land ban certification is a seperate requirement serving a distinct purpose and presenting separate risks (Motion, p. 4).

In addition, Complainant claims that the land disposal violation in this case is considered a High Priority Violation (HPV) according to an EPA Land Disposal Restriction Violation Classification Guide (Jan. 21, 1991) and that a HPV classification, by definition, places the violation in the major/major category (CPHE, p. 13). Therefore, the Complainant recommends a gravity based penalty of $25,000.00 for Count III.

D. Adjustment Factors

Reviewing the adjustment factors available under the Penalty Policy, the Complainant asserts that no adjustment in the proposed penalty should be made.

Because the Complainant had no information at the time of calculating the penalty regarding circumstances that might constitute good faith, it concluded that no adjustment should be made for good faith efforts to comply. Furthermore, since the Complaint was filed, Complainant avers that no convincing evidence has materialized warranting such a good faith adjustment. (CPHE, pp. 13, 14.) Regarding Respondent's claim of a good faith effort to comply with RCRA requirements by changing its manufacturing process to eliminate the need to dispose of hazardous waste, Complainant cites the Penalty Policy, p. 17, to claim that merely coming into compliance is not a justification for a downward adjustment (CPHE, p. 14).

Similarly, Complainant suggests that no adjustment is warranted for the factor involving the degree of willfulness or negligence (CPHE, p. 14). Complainant reasons that, because RCRA is a strict liability statute and because of the nature of the violations as previously characterized, no adjustment is justified for lack of willfulness or negligence (CPHE, p. 14). On this matter, it should be noted that Complainant claims that no Material Safety Data Sheets (MSDS) were found in the files at the Mountain Air

Refinery facility nor with the transporter Ken's Oil (Motion, p. 4). Thus, Complainant takes the position that there is no evidence that the MSDS were attached to the manifest at the time of shipment (Motion, p. 4).

Finally, Complainant argues that no upward adjustment for history of noncompliance is appropriate in the absence of information concerning the Respondent's compliance history and that no downward adjustment is necessary for lack of ability to pay (CPHE, p. 14). Regarding the latter, Respondent has not claimed or submitted evidence to support a lack of ability to pay.

E. Economic Benefit

Regarding consideration of the economic benefit of noncompliance, the Complainant chose not to add the $1660.00 amount calculated for this factor because the penalty already assessed was the statutory maximum for one day of violation for each of the three counts (CPHE, p. 15). Adding the economic benefit amount calculated would have exceeded the statutory maximum penalty permitted.

2. RESPONDENT'S POSITION

First, Respondent asserts that the violations are indistinguishable and that multiple penalties are not appropriate under the Penalty Policy, p. 12, where the violations arise from one fact scenario (Respondent's

Response to Complainant' Prehearing Exchange[7], p. 2). Respondent maintains that the September 9, 1988 shipment of 1,1,1 trichloroethane constitutes the type of single fact scenario envisioned by the Penalty Policy and thus supports only the violation alleged in Count I (RCPE, pp. 2-3).

As to the charges set forth in Counts II and III relating to the improper classification of hazardous waste on the manifest and the failure to notify the disposal facility of the appropriate treatment standards, Respondent maintains that they do not, in and of themselves, warrant separate treatment because they are merely the elements upon which to base a single violation for improper disposal (RCPE, p. 3; Respondent's Stipulation to Motion for Accelerated Decision[8], p. 2). Accordingly, Respondent asserts that rather than separate counts, the facts involved in Counts II and III are merely the elements, or the underlying factual support, for the single violation of improper disposal specified in Count I (RCPE, p. 3; Respondent's Stipulation, p. 2). As a result, Respondent contends that only Count I is proper and the facts cited in Counts II and III should have been considered regarding the violation's placement on the penalty matrix (RCPE, p. 4).

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[7] This response by ROI to Complainant's Prehearing Exchange will be cited hereafter as RCPE.

[8] Hereafter, Complainant's Stipulation to Motion for Accelerated Decision will be referred to as Respondent's Stipulation.

Furthermore, Respondent asserts that, even if Counts II and III are considered separately from Count I, they should be considered collectively as a single violation (RCPE, p.4; Respondent's Stipulation, p. 2). Respondent alleges that Counts II and III essentially relate to the same problem, the improper completion of the shipping manifest for the September 9, 1988 shipment (RCPE, p. 4; Respondent's Stipulation, p. 2). Again, Respondent relies on that portion of the Penalty Policy, p. 12, which states that multiple penalties are not appropriate where the violations are not independent or substantially distinguishable.

Respondent also objects to Complainant's classification of the potential for harm represented by each of the violations as major, asserting that the potential for harm from any or all of the violations is minor (RCPE, p. 4). Respondent points out that the amount of material involved was only 100 gallons of 1,1,1 trichloroethane and claims that 1,1,1 trichloroethane is among the safest of the chemicals classified as hazardous by the EPA and is associated with only minor health risks (Respondent's Stipulation, p. 3; Affidavit of Dr. Frank Lambert attached to Respondent's Stipulation).

With respect to Count I, Respondent disputes the use of the overall condition of the Mountain Air Refinery facility to classify the potential for harm of the 100 gallon shipment as major (RPHE, p. 5). Respondent contends that

the inquiry as to the potential for harm should focus only on Respondent's shipment, not the potential affects of Respondent's shipment in combination with those of others who have contributed to the conditions at the disposal facility (RCPE, p. 5; Respondent's Stipulation, p. 3). Respondent asserts that the shipment of 100 gallons of 1,1,1 trichloroethane, in and of itself, presented only a minor potential for harm (RCPE, p. 5). Respondent also contends that the materials were properly loaded and shipped in a five thousand gallon tanker and that 1,1,1 trichloroethane is only hazardous to health when inhaled in high concentrations for great lengths of time (RCPE, pp. 5-6).

With respect to Counts II and III, Respondent once again characterizes the potential for harm as minor. Contending that these Counts merely involve improper record keeping, Respondent maintains that the purpose of the relevant statutory and regulatory requirements at issue was satisfied, even if the technical requirements of the Regulations were not (RCPE, p. 6). In support of this assertion, Respondent argues that the attachment of the MSDS to the shipment manifest provided the necessary information that the Respondent is cited for failing to include on the manifest itself (RCPE at p. 6; Respondent's Ex. 3.) Specifically, the MSDS contained the correct identity of the hazardous material, its characteristics, and the proper precautions to be undertaken by those who would be handling

it (RCPE, p. 6). Consequently, Respondent asserts that the attachment of the MSDS to the manifest mitigated any risks that might have been caused by the improper completion of the manifest, thus complying with the spirit and intent of RCRA (RCPE, p. 7).

To counter Complainant's assertion that there is no evidence that the MSDS were attached to the manifest at the time of the shipment, Respondent argues that ROI employees provided the transporter with the MSDS and, to the best of Respondent's knowledge, those sheets remained with the manifest throughout the shipment (Respondent's Stipulation, p. 4). Respondent cites the affidavit of Daniel Valente attached to Respondent's Stipulation as proof on this issue.

Finally, Respondent objects to Complainant's penalty calculation on the grounds that the relevant mitigating factors identified in the Penalty Policy favor a reduction of any penalty assessed herein.

First, Respondent claims a good faith effort to comply with the regulatory requirements of RCRA through Respondent's voluntary action, two years prior to the shipment date in question, to change its circuit board cleaning operations to a process that eliminated the need to dispose of hazardous materials (RCPE, pp. 7-8). The shipment in question, according to the Respondent, constitutes the total residue of hazardous waste resulting from the use of the discontinued cleaning process (RCPE, p.

8). As a result, Respondent characterizes this action as more than "merely coming into compliance" as asserted by the Complainant. Respondent maintains that this was a voluntary action undertaken to avoid the need to dispose of hazardous materials (RCPE, p. 8). Furthermore, Respondent claims that it had never before engaged in the shipment of hazardous materials and, because of the voluntary change in cleaning processes, never will again (RCPE, p. 8). Respondent emphasizes that this shipment was its first and only shipment of hazardous materials (RCPE, p. 9). Therefore, Respondent requests the reduction of any penalty by twenty-five percent, in accordance with the Penalty Policy, p.17.

Second, Respondent claims that a downward adjustment is justified based on a lack of willfulness in this incident. Respondent claims that when it realized it had hazardous materials needing proper disposal, Respondent contacted Four Star Disposal who represented itself as "E.P.A. licensed" in an advertisement (RCPE, p. 9; Respondent's Ex. 1). In turn, Four Star's transporter agent, Ken's Oil, provided the Respondent with a shipping manifest (RCPE, p. 9). According to the Respondent, the manifest contained an EPA identification number for both the transporter and the Mountain Air Refinery facility (RCPE, p. 9; Respondent's Ex. 2). Based on the above representations, Respondent avers that it believed the shipment was being handled in a manner consistent with the RCRA requirements (RCPE, p. 9). Thus,

Respondent contends that these efforts illustrate that these were not willful violations and were the result of the Respondent's inexperience in the area of shipping hazardous waste and the misrepresentations made by the transporter (RCPE, p. 9).

III. ANALYSIS AND RESOLUTION

1. PAPERWORK REDUCTION ACT

Initially, the issue of the impact of the Paperwork Reduction Act (PRA), 44 U.S.C. §§3501 et seq. can be resolved. The PRA requires that information collection requests to ten or more persons by Federal agencies be approved by the Federal Office of Management and Budget (OMB) and that such requests display an OMB control number, or, under Section 3512 of the PRA, a person cannot be subjected to any penalty for failing to supply the information.

In its briefing, the Complainant takes the position that a defense based on the PRA is an affirmative defense and, since it was not raised by the Respondent's Answer, it should be considered waived. Complainant also argues that Count I involves a statutory, not a regulatory, violation and, as such, is beyond the purview of the PRA. As to the other two Counts, Complainant alleges that there were valid OMB control numbers on the information requiring regulations involved, so the PRA is not applicable.

Respondent concurs that only Counts II and III are

involved for PRA purposes and asserts that Section 262.20 of the Regulations does not have an OMB control number, although Respondent does concede that the required manifest in the Appendix to the Regulation does have an OMB number. Respondent, therefore, suggests Count II should be barred by the PRA.

On analysis, the Complainant's suggestion that the PRA defense should be considered waived because not raised in the Respondent's Answer, is rejected. This argument is perhaps valid when the defense is first raised on appeal, but is not applicable when the defense is brought into issue at the trial level, as it has been here. However, it would appear that Count I, as argued by Complainant, is not subject to the PRA. Moreover, the Regulations involved in Counts II and III have, as set out in the Complainant's brief on the PRA, valid OMB numbers. And, even accepting the Respondent's contention that Section 262.20 of the Regulations did not have an OMB number itself, the fact that the prescribed manifest set out in the Appendix to that Regulation does have a valid OMB number, satisfies the requirements of the PRA since the basis for Count II is that the Respondent had an improper classification of its hazardous waste on the manifest involved.

In light of the above analysis, it must be concluded that the PRA does not bar any of the three Counts in the Complaint.

2. MULTIPLE PENALTIES

In reference to multiple penalties, the Penalty Policy, p.11 states:

> A separate penalty should be assessed for each violation that results from an independent act (or failure to act) by the violator and is substantially distinguishable from any other charge in the complaint for which a penalty is to be assessed. A given charge is independent of, and substantially distinguishable from, any other charge when it requires an element of proof not needed by the others.

This rationale correlates to the rule put forth in Blockburger v. U.S., 284 U.S. 299, 304 (1932) that, where the same act constitutes a violation of two distinct statutory provisions, the test to be applied to determine if there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

On the other hand, the Penalty Policy, p. 12 sets out that multiple penalties are generally not appropriate where the violations are not independent or substantially distinguishable. Indeed, where a charge derives from or merely restates another charge, a separate penalty is not warranted. For example, failure to specify test parameters and test frequency in a waste analysis plan constitutes a single violation because it involves a single factual event (failing to develop an adequate plan) and poses a single risk (storing waste improperly due to inadequate analysis). In such a situation, one penalty, rather than two, should be assessed, while the fact that two separate sections were violated will be taken into account in choosing higher

"potential for harm" and "extent of deviation" categories on the penalty matrix. Id.

Thus, the controversy between the two parties in the instant case centers on which of the foregoing Penalty Policy explanations controls with respect to Respondent's improper disposal of hazardous waste and the associated violations. It is clear that the violations revolve around a single factual incident, the September 9, 1988 shipment of hazardous waste. As a result, Respondent has taken the position that this incident constitutes the type of single fact scenario contemplated by the Penalty Policy and thus supports only the violation alleged in Count I (RCPE, pp. 2-3).

However, under the Penalty Policy, the existence of a single factual incident alone is an insufficient basis from which to determine that multiple penalties are not warranted. Indeed, the choice set out in the Penalty Policy, pp. 11, 12, is whether the violation is independent or substantially distinguishable from the other charges, requiring a separate element or elements of proof, or whether the violation derives from or merely restates another charge, making it duplicative or redundant. The existence of a single factual incident by itself, therefore, is not controlling with respect to this issue, for it is clear that a single factual incident could encompass several violations which are not duplicative.

In the present case, it is reasonable to conclude that the three Counts charged in the Complaint constitute separate

violations. While the three Counts arise from the same factual incident, all three involve separate elements of proof. Count I requires the establishment of the illegal disposal of hazardous waste, whereas Count II necessitates proof of the improper classification of the waste on the manifest, and Count III requires a showing that the Respondent failed to notify the receiving facility of appropriate treatment standards and applicable prohibition levels for the waste being shipped. The separate elements of proof required to establish the three charges in the Complainant satisfies the rationale justifying separate violations set out in the Penalty Policy, and meets the test for separate offenses set out in Blockburger v. U S, 284 U.S. 299, 304 (1932).

To illustrate this position, an analysis of each charged Count is appropriate. As to Count I, there is no dispute as to the appropriateness of this charged violation. Respondent explicitly acknowledges that the September 9, 1988 shipment of 1,1,1 trichloroethane did constitute an improper disposal of hazardous waste in violation of Section 3005(a) of RCRA, 42 U.S.C. §6925(a) (RPHE, p. 3). It is clear, therefore, that this violation stands on its own.

It is with respect to Counts II and III that the dispute in this case arises. Respondent first argues that the charges set forth in Counts II and II (i.e. the improper classification of hazardous waste on the manifest and the failure to notify the disposal facility of the appropriate treatment standards) are

merely the elements, or the underlying factual support, for the single violation of improper disposal specified in Count I and do not, in and of themselves, warrant separate treatment (RCPE, p. 3; Respondent's Stipulation, p. 2). This argument must be rejected. First, it does not follow that violation of the manifest requirement or the notification requirement, either singularly or simultaneously, will necessarily lead to, or are necessarily an underlying element of, an improper disposal. One scenario would be that an improper disposal identical to the instant case occurs, but the manifest requirements and/or the notification requirements have been met. In such a case, only one violation would exist. Similarly, an opposite situation could exist where the hazardous waste is properly disposed of at a permitted facility, but the manifest is, nonetheless, improperly filled out and/or the land disposal notification is absent or improperly completed. Again, one, and possibly two, violations would exist, and would be entirely independent of the disposal issue. Likewise, in the instant case, the violation alleged in Count I is separate from the violations alleged in Counts II and III, and each Count requires different elements of proof. Counts II and III cannot, therefore, be considered as merely a part of Count I.

In addition, Respondent asserts that, even if Counts II and III are considered separately from Count I, they should be considered collectively as a single violation because they essentially relate to the same problem, the improper completion

of the shipping manifest for the shipment in question (RCPE, p. 4; Respondent's Stipulation, p. 2). However, these arguments are not persuasive in light of the separate regulatory and statutory purposes of the two requirements at issue.

Regarding the improper classification of the hazardous waste on the manifest, Section 3002 of RCRA requires generators to ensure that the hazardous waste they produce is properly identified and transported to a permitted RCRA disposal facility. Indeed, the manifest system is the heart of RCRA's "cradle-to-grave" management system for hazardous waste, Ashland Chemical Company, Division of Ashland Oil, Inc., RCRA Appeal No. 87-17, p. 18 (October 25, 1989). RCRA specifically requires such a system, and Congress noted the importance of the manifest in establishing a clear record of hazardous waste generation, handling, and final disposition, id. at 18; see also F&K Plating Company, RCRA Appeal No. 86-1A, p. 8 (October 8, 1987).

Further, Section 262.20 of the Regulations places the responsibility for preparation of the manifest on the generator of the hazardous waste. Failure to identify properly the hazardous waste on the manifest may mean that the waste never enters the RCRA "cradle-to-grave" management program and leaves a generator liable for civil penalties, Crowell & Moring, RCRA Hazardous Wastes Handbook, 9th ed., Oct. 1991, pp. 3-1 and 3-5.

Turning to Count III, the land disposal restriction rules impose significant additional testing, tracking, and recordkeeping obligations on hazardous waste generators, as well

as treatment and land disposal facilities, id. at 7-14. Under Section 268.7 of the Regulations, generators are required to determine if their hazardous wastes are subject to land disposal restrictions, and if so, whether the appropriate treatment standards are met. Section 268.7 also provides that, where such standards are not met, the generator must submit a land ban notification to the receiving facility and must identify the EPA hazardous waste number, the appropriate "Best Demonstrated Available Technologies" treatment standard, the number of the accompanying manifest, and available waste analysis data. And, Section 268.7 requires that, if a generator determines that the treatment standards are met, he must sign and submit a certification so stating, along with the aforementioned notification.

Again, the requirements associated with Counts II and III of the Complaint impose separate regulatory obligations on the generator. And, similar to the conclusion asserted above, the violation of one is a separate matter from the violation of the other. In the instant case, the failure to notify the disposal site of the proper land disposal requirements and the failure to classify properly the hazardous waste on the manifest cannot reasonably be interpreted as a single instance of mere improper manifest documentation. The notification plan required under Section 268.7 is a different document than the manifest and the failure to include such a notification plan is clearly independent of the failure to fill out the manifest properly.

Also, there is precedent supporting the conclusion that Respondent should be assessed separate penalties for each of the charged violations. In FAA v. Landy, 705 F.2d 624, 635 (2nd Cir. 1983), cert. den. 464 U.S. 895 (1983), Landy challenged the number of violations being counted for failure to prepare a safety manual, which of necessity caused violation of other requirements, such as the need to furnish a copy of the manual to the FAA, to have other necessary items in the manual and to have the manual on the plane for use by the crew. Landy claimed the violations were double counted, id. However, the Court rejected the double counting argument. It was pointed out that a person who violates one manual requirement, for example, failure to provide a copy thereof to the FAA, but complies with the other requirements, is subject to only one fine. The Court then noted that it would be anomalous to reward a person who totally ignores the manual requirements by concluding that he, too, is subject to but a single fine when he simultaneously violates several regulations. Id. at 636.

The reasoning of FAA v. Landy was followed in Martin Electronics, Inc., RCRA Appeal No. 86-1, Order on Sua Sponte Review, pp.13, 14 (June 22, 1987). There, the Respondent was charged with failure to give notice to EPA of certain hazardous waste activities, of failing to file an application for interim status with EPA in connection with those activities, and of failing to file a proper closure plan. The Presiding Officer had found only one violation, stating that the Respondent was guilty

of one act, the failure to notify the Agency of the existence of the wastes on its property. Id. at 10. However, the Chief Judicial Officer (CJO) indicated that, in line with the Penalty Policy, each charge represented an independent RCRA requirement and required an element of proof not needed by the others, id. at 12, 13. The CJO concluded that the Presiding Officer was in error and found that, under RCRA Section 3008(g), separate penalties should be assessed for each violation. The CJO further stated that, to allow the Respondent to be charged only one penalty for the three violations, would be unfair to a respondent who only violated one RCRA requirement and is also charged one penalty. Id. at 14, 15.

Similar reasoning holds here. The Respondent should be assessed separate penalties for the three violations charged in the Complaint as they each result from an independent act or failure to act, and each Count is substantially distinguishable, on an evidentiary basis, from the others Counts in the Complaint. In line with FAA v. Landy and Martin, it must be concluded that an assessment of only one penalty for these three violations would be unfair to other respondents charged with a penalty for violating only one of these RCRA requirements.

3. ASSESSMENT OF PENALTY

The penalty calculation system under the Penalty Policy, pp.5-21, involves (1) ascertaining a gravity-based penalty for a particular violation, (2) considering the economic benefit of noncompliance where appropriate, and (3) adjusting the penalty

for the following factors; good faith, degree of willfulness and/or negligence, history of noncompliance, ability to pay, and any unique factors.

The gravity-based penalty is calculated according to the seriousness of the violation under RCRA. As noted previously (see Footnote 6, supra), the seriousness of the violation is based on two factors: the potential for harm, and the extent of deviation from a statutory or regulatory requirement. Potential for harm is evaluated by considering likelihood of exposure to hazardous waste posed by violation and the adverse effect of noncompliance on the statutory or regulatory purposes or procedures of the RCRA program. The extent of deviation from RCRA or its regulatory requirement is determined by considering the degree to which the violation renders inoperative the requirement violated. Id. at 5-6, 8.

Both potential for harm and extent of deviation are characterized as major, moderate, or minor and an appropriate monetary range for the gravity-based penalty is identified from a penalty matrix set forth in the Penalty Policy, p. 10. The exact penalty amount selected within each cell of the gravity based penalty matrix is left to the discretion of compliance and enforcement personnel in any given case. At this stage in the process, compliance/enforcement personnel consider only the seriousness of the violation in selecting the penalty amount within each range. The reasons the violation was committed, the intent of the violator, and other factors related to the violator

are only considered at the adjustment stage. Id.

Although the Penalty Policy is not binding on the Presiding Judge in assessing a civil penalty, the Penalty Policy must be considered and, in this case, can be used as a foundation for the conclusions set forth herein. See Sandoz, Inc., RCRA Appeal No. 85-7 (Final Decision, February 27, 1987).

A. Count I

As stated previously, the Complainant characterized the illegal disposal of hazardous waste violation as major/major according to the gravity-based penalty matrix, and assessed the highest possible penalty. However, the Complainant's rationale for this choice is not persuasive. Specifically, Complainant's focus on the status of the Mountain Air Refinery facility and the significant environmental harm allegedly found there in calculating the potential for harm is misplaced. Any potential for harm calculation in this case should concentrate on the potential impact of the 100 gallons of 1,1,1 trichloroethane involved in the illegal disposal. Respondent is strictly liable only for the potential harm of its illegal shipment under the RCRA program, not the overall condition of the facility to which Respondent improperly sent the waste.

In addressing the issue of the potential for harm posed by the 100 gallons of trichloroethane, the parties to this case have submitted a total of four affidavits contesting the relative toxicity of 1,1,1 trichloroethane. Despite this scientific conflict on the extent of toxicity, the 1,1,1, trichloroethane is

clearly a hazardous toxic waste and does present a potential for harm to human health and the environment. As to exposure, the 1,1,1 trichloroethane did involve a potential danger to persons involved in the transport of the material, to the general public and emergency response personnel in the event of an accident during transport, to persons unloading and disposing of the material, and to persons residing in the area, from air or groundwater contamination. Therefore, the improper disposal violation posed a likelihood of exposure to hazardous waste. However, given the relatively small amount involved (100 gallons), the mixture thereof with 4900 gallons of other liquids in the shipping tanker (see Stipulation, Affidavit of Dr. Lambert, p. 3), and the information on exposure effects and treatment on the MSDS accompanying the shipment, the potential for harm factor in the Penalty Policy should be considered as presenting a significant rather than a substantial risk under the assessment methodology in the Penalty Policy. Accordingly, this factor is evaluated as moderate in the matrix in the Penalty Policy, p. 10.

In determining the extent of deviation from RCRA requirements for Count I, it would appear that any illegal disposal of a restricted waste, especially given the toxic potential of the waste, would constitute substantial noncompliance and a major deviation from regulatory requirements. Thus, characterizing the extent of deviation from the statutory requirements as major in this case is appropriate.

Therefore, the appropriate penalty cell for this Count is the moderate (potential for harm)/major (extent of deviation) range on the penalty matrix. The Penalty Policy, p. 6 directs that consideration of the quantity of wastes is appropriate in determining the potential for harm. Because this violation involves only 100 gallons of 1,1,1 trichloroethane, a penalty at the lower end of the range is appropriate. Thus, the penalty for the violation stated in Count I will be assessed at $8,000.

Before a final penalty can be arrived at, however, the adjustment factors contained in the Penalty Policy must be considered. In this regard, the Penalty Policy, p. 16 provides that penalty mitigation may be justified based on good faith, the lack of willfulness and/or negligence, history of noncompliance ability to pay and other unique factors. Based on the record, certain downward adjustments are in order in this case.

To begin with, and this applies to all three Counts contained in the Complaint, the history of noncompliance factor is not involved herein. Since no evidence exists as to the nature of Respondent's compliance history, this factor is not at issue in this cause. Likewise, consideration of ability to pay has not been raised by either party and, therefore, has no bearing on any penalty assessment as to any of the Counts.

However, there is justification in the record to support a downward adjustment as to Count I based on Respondent's good faith efforts to comply and lack of willfulness to dispose

improperly of the waste.[9] Specifically, it is clear that Respondent made a good faith effort to dispose of the 1,1,1 trichloroethane in accordance with the RCRA requirements. Respondent contracted with Four Star Disposal, which represented itself to be EPA licensed and experienced in hazardous waste removal. Pursuant to this contract, Four Star contracted with Ken's Oil to remove the hazardous waste materials and deliver them to a disposal site. As a part of this service, Ken's Oil provided Respondent with a manifest on which both Ken's Oil and the disposal facility were designated with EPA identification numbers.

In addition, Respondent supplied Ken's Oil with a set of MSDS which listed the waste as 1,1,1 trichloroethane. Although Complainant asserts there is no evidence of the inclusion of the MSDS with the shipment, the affidavit of Mr. Daniel Valente stands as sworn testimony to the existence of such. Accordingly, and, for the purposes of this decision, the MSDS will be considered to have accompanied the shipment. Thus, it is reasonable to find that Respondent had no intention of misleading anyone as to the composition of the waste being disposed nor of willfully violating the pertinent disposal regulations. It is warranted to find that Respondent believed that Ken's Oil and the disposal facility were properly licensed and that delivery of the waste to the disposal facility constituted a proper disposal

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[9] Because the information supporting both the good faith and lack of willfulness factors appears to overlap in this case, the analysis under each Count will consider them concurrently.

under the requirements of RCRA.

Finally, one more circumstance presents itself as unique to this particular case and warrants consideration under Count I as a mitigating factor. According to the Respondent, the disposal in question was a one-time transaction, consisting of the disposal of waste accumulated from a manufacturing process which had been discontinued, in favor of a process which yields no hazardous waste. Thus, the disposal violation constitutes the only incidence of generation and/or disposal of a hazardous waste ever conducted by ROI.

In consideration of the foregoing, the $8,000 penalty chosen from the penalty matrix shall be adjusted by 25%, reducing the final assessed penalty for Count I to $6,000.

2. Count II

Complainant characterized the improper classification of the hazardous waste on Respondent's manifest as presenting both a substantial potential for harm and a substantial deviation from the requirements of RCRA, and assessed the highest penalty under the major/major category range.

Again, this seems particularly harsh relative to other violations which appropriately fall within the same matrix cell. If it were the case that the Respondent failed entirely to provide a manifest, such a classification would be warranted. However, Respondent's shipment did contain a manifest, although improperly completed with respect to the identification of the waste intended for disposal. In addition, the inclusion of a

MSDS which explicitly identified the hazardous waste as 100 gallons of 1,1,1 trichloroethane serves to lessen the plausibility of characterizing the extent of deviation as major.

Nonetheless, the misidentification of a hazardous waste on the manifest assuredly disrupts EPA's ability to track accurately the generation and disposal of a hazardous waste, particularly when the receiving facility is itself not a properly permitted facility. See Ashland Chemical Company, Division of Ashland Oil, Inc., RCRA Appeal No. 87-17, at 18 (October 25, 1989). Indeed, failure to have the correct information on the manifest make tracking the origin and disposal of hazardous wastes more difficult, and for this reason, the violation is considered as having a significant potential for harm as measured by possible adverse effects on the RCRA program, id., p. 17. Likewise, the extent of deviation from the RCRA program, while not total and, thus, not substantial, is correctly characterized as significant.

And, although the manifest was provided and prepared by Ken's Oil, the transporter, the burden of complying with the manifest requirements rests squarely on the generator, ROI. This factor can, though, appropriately considered during the adjustment analysis.

Accordingly, the penalty to be selected from the penalty matrix for the violation stated in Count II is $6,500, the midpoint of the penalty range for a violation presenting a moderate potential for harm and a moderate extent of deviation

from the relevant RCRA requirement.

However, the penalty assessment for Count II is not complete until the adjustment factors are considered. Although Respondent is strictly liable for the proper completion of the manifest, it can be concluded, based upon the representations made by Four Star and Ken's Oil, that the Respondent reasonably believed that the manifest had been properly completed. In addition, the attachment of the MSDS, which did provide the necessary information Respondent is cited for failing to have on the manifest itself, namely the correct identity of the hazardous material, can correctly be seen as mitigating some of the risks that might have been caused by the improper completion of the manifest.

Therefore, based on the lack of willfulness involved with the manifest violation and the inclusion of the forthright classification of the waste on the attached MSDS, the $6,500 penalty selected from the penalty matrix shall be adjusted by 25%, reducing the final assessed penalty for Count II to the amount of $4,875.

C. Count III

For the failure of Respondent to notify the receiving facility of the appropriate treatment standards and applicable prohibition levels as required by RCRA land disposal regulations, Complainant characterized the violation as falling at the highest level within the major/major category of the penalty matrix.

As mentioned earlier, the notification requirements under

Section 268.7 are additional to and separate from the manifest requirements. Generators are responsible for determining whether their waste is restricted from land disposal and must ensure that the manifest is accompanied by the pertinent records. Failure to do so could lead to the improper and harmful disposal of the waste upon the land. As a result, this violation, which entails a total lack of compliance with the regulatory requirement, must be found to be substantial. However, based on the rationale followed with respect to Count I, the potential for harm posed by the waste at issue is more appropriately characterized as moderate.

The extent of deviation for this violation, however, is substantial and, thus, major. Indeed, the failure to provide the proper and required form of notification or certification constitutes a significant deviation from the pertinent requirements to such an extent that there is substantial noncompliance.

Thus, the initial penalty to be selected from the penalty matrix for the violation stated in Count III is $9,500, the midpoint of the penalty range for a violation presenting a moderate potential for harm and a major deviation from the relevant RCRA requirement.

Regarding any possible adjustments, the attachment of the MSDS to the shipment manifest provided not only the correct identity of the hazardous material, but also its characteristics, and the proper precautions to be undertaken by those who would be

handling it. Moreover, in view of the small amount of the hazardous waste involved, only 100 gallons of 1,1,1 trichloroethane, and the Respondent's voluntary efforts not just to come into compliance with the Regulations, but to eliminate the waste disposal entirely, a downward adjustment on Count III is appropriate in this proceeding. Thus, the penalty to be assessed for the violation contained in Count III should be discounted by 25%, and reduced from $9500 to $7125.

Based on the preceding penalty assessment analysis of Counts I, II and III, the total of the civil penalties to be assessed against the Respondent is $18,000.

D. Economic Benefit

The Penalty Policy, p. 12 requires the consideration of the economic benefit of noncompliance to a violator when civil penalties are assessed. This economic benefit component is to be calculated and added to the gravity-based penalty in appropriate cases. Complainant had calculated this benefit as $1660 in Ex. C-5, p. 4, but had not added it to its proposed penalties since Complainant is already suggesting the maximum in penalties. This calculation is based on the cost of disposing of the 100 gallons of 1,1,1, trichloroethane at a permitted facility, less the cost of disposal of the material at the unpermitted site.

However, the Complainant's calculation of economic benefit is flawed since there is no indication of the cost to ROI of the actual disposal as an offsetting factor, so it cannot be established that the Respondent gained any economic benefit from

its violations. As a result, no increase in the penalties being assessed against ROI is warranted based on the economic benefit of noncompliance consideration.

V. ORDER

Based on the analysis, rulings, findings and conclusions contained herein, **IT IS ORDERED:**

1. That, pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. §6928 (a)(3), a civil penalty of $6,000 be assessed against the Respondent in connection with Count I of the Complaint, because the Respondent illegally disposed of hazardous waste, namely 100 gallons of 1,1,1, trichloroethane, by shipment thereof on September 9, 1988, to the Mountain Air Refinery facility in La Barge, Wyoming, a facility not permitted as a treatment, storage or disposal facility, in violation of Section 3005(a) of RCRA, 40 U.S.C. §6925(a).

2. That, pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. §6928 (a)(3), a civil penalty of $4,875 be assessed against the Respondent in connection with Count II of the Complaint, because the Respondent's manifest for the shipment described in Paragraph Numbered 1 above improperly classified the hazardous waste involved, in violation of Sections 262.20 and 263.10 of EPA's Regulations On Hazardous Waste Management, 40 C.F.R. §§262.20 and 263.10.

3. That, pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. §6928 (a)(3), a civil penalty of $7,125 be assessed against the Respondent in connection with Count III of the

Respondent, with regard to the shipment described in Paragraph Numbered I above, failed to notify the receiving facility of the appropriate land disposal restriction treatment standards and applicable prohibition levels for the hazardous waste being shipped, in violation of Section 268.7 of EPA's Regulations on Hazardous Waste Management.

4. That payment by the Respondent of the full amount of the $18,000 in civil penalties being assessed for the violations described in Paragraph 1, 2 and 3 above, shall be made within sixty days (60) of service of the final order of the EPA Administrator,[10] by submitting a certified or cashier's check payable to Treasurer, United States of America. Said check shall be mailed to:

EPA - Region VIII
(Regional Hearing Clerk)
P.O. Box 360859M
Pittsburgh, PA 15251

Daniel M. Head
Administrative Law Judge

Dated: March 31, 1994
Washington, DC

[10] Under Section 22.30 of the EPA Rules of Practice (Rules), 40 C.F.R. §22.30, the parties may file with the Regional Hearing Clerk a notice of appeal of this decision and an appellate brief within 20 days of service of this initial decision. This initial decision shall become the final order of the EPA Administrator within 45 days after its service, unless an appeal is taken by the parties or unless the Administrator elects, sua sponte, to review the initial decision pursuant to Section 22.30(b) of the Rules. After any appeal or sua sponte review, the order of the EPA Administrator shall be the final order in this cause.