8/18/93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

IN THE MATTER OF	:	
MRM TRUCKING	:	**DOCKET NUMBER: MWTA-II-89-0102**
Respondent	:	

Medical Waste Tracking Act of 1988, 42 U.S.C. §§ 6992 - 6992(k): Under the circumstances of this case, the civil penalty proposed is the appropriate penalty to be assessed.

Appearances:

Lee A. Spielmann, Esquire, Assistant Regional Counsel, Waste and Toxic Substances Section, Air, Waste and Toxic Substances Branch, Environmental Protection Agency, Region II, 26 Federal Plaza, New York, New York 10278, for complainant.

Mr. Frank Marziani, 1005 Wilde Avenue, Drexel Hill, Pennsylvania 19026, for respondent.

Before: J. F. Greene, Administrative Law Judge

Decided August 18, 1993

DECISION AND ORDER UPON MOTION

This matter arises under the Medical Waste Tracking Act of 1988, 42 U.S.C. §§ 6992 - 6992(k), which provides for the listing and tracking of medical waste, and regulations promulgated in accordance with authority contained therein, 54 **Fed. Reg.** 12326 (1989), codified at 40 C.F.R. § 259.73 (1990).

The complaint charged respondent with violations of 40 C.F.R. § 259.73(a)(2), which requires that transporters of regulated medical waste must "ensure that [such] waste . . . is not subject to mechanical stress or compaction during loading and unloading or during transit;" and 40 C.F.R. § 259.73(b)(3), which requires that the vehicle in which regulated medical waste is transported must be labeled in a particular manner.[1] Complainant sought a penalty of $22,500 for each alleged violation. Respondent denied both charges.

On September 5, 1991, complainant's motion for partial "accelerated" decision was granted with respect to liability for the violation of 40 C.F.R. § 259.73(a)(2) charged in the complaint.[2] It was held that (a) ". . . . compaction of the waste

---

[1] 40 C.F.R. § 259.73(a)(2) provides as follows: "Transporters must use vehicles to transport regulated medical waste that have met the following requirements: . . . (2) The transporter must ensure that the waste is not subject to mechanical stress or compaction during loading and unloading or during transit. . . ."

[2] **Order Upon Motion For Partial Accelerated Decision As To Liability** September, 1991.

has been sufficiently demonstrated when, as here, it is shown that outer cartons which contain regulated medical waste have been compacted" and that respondent failed to raise sufficient question as to the degree of compaction to overcome complainant's motion; (b) that respondent failed to ensure that the medical waste it was transporting had not been subjected to mechanical stress or compaction during loading, unloading, or transit; (c) accordingly, that respondent had violated 40 C.F.R. §259.73(a)(2).[3]

The parties have not been able to settle the remaining issue herein, i.e. the amount of the penalty to be assessed for the violation found. Complainant moved for judgment ("accelerated" decision) as to the amount of the penalty, urging that no material fact remains to be determined with respect to the penalty and that complainant is entitled to judgment in the full amount of the penalty as proposed in the complaint as a matter of law.[4]

"Accelerated decision" as to the amount of the penalty (or whether a penalty will be assessed for violations), as distinct from liability for the violations, is seldom granted. See **In the Matter of Jenny Rose, Inc.**, Docket No. IF&R-III-395-C, February 22, 1993. Generally there is reluctance to impose civil sanctions without providing the violator an opportunity for an oral

---

[3] In the same Order it was found that a violation of 40 C.F.R. 259.73(b)(3) had not been established. Complainant's motion for "accelerated" decision as to this charge was denied, and the count was dismissed, 40 C.F.R. §22.20(a).

[4] Complainant's **Memorandum in Support of Complaninant's Motion for Accelerated Decision**, March 12, 1993, at 5.

evidentiary hearing. Often credibility determinations must be made in order to determine the appropriate amount of the penalty, and, in this connection live testimony can be helpful. A principal consideration in detrmining whether a penalty may be assessed in the absence of such a hearing is whether it is reasonable to believe that additional relevant, material, and credible evidence would be obtained. See **In the Matter of Bestech, Inc.**, Docket No. IF&R-004-91-7073-C, March 13, 1992 (Judge Yost); **Environmental Protection Agency v. Streeter Flying Service, Inc.**, IF&R VII-612C-85P, August 27, 1985 (Judge Vanderheyden); **In re World Wide Industrial Supply,** FIFRA 1085-01-13-012P, January 9, 1986 (Judge Yost); **Rainbow Paint and Coatings, Inc.**, EPCRA Docket No. VII-89-T-609, August, 1991 (Judge Vanderheyden); **In re Swing-A-Way Manufacturing Co.**, Docket EPCRA-VII-91-T-650-E 9 (**Order Denying Motion for Accelerated Decision as to Penalty for Certain Counts**). It is seldom clear that there is nothing to be gained from an oral evidentiary hearing. Here, however, respondent did not respond to complainant's motion, although additional time beyond the usual period allowed by the rules of practice was provided.[5] Respondent was also given an opportunity to furnish, but did not furnish, reliable financial information such as could support a claim of inability to pay the proposed penalty,[6] since status reports filed in this matter suggested that ability to pay had been raised.

---

[5] See **Scheduling Order** of March 16, 1993.

[6] Id.

Under these circumstances, it is determined that holding an oral evidentiary hearing is not required. Respondent has the burden of showing that there is something to be gained by holding a hearing, and must at least respond when opportunities to do this are given. Here, however, no showing has been made. Accordingly, it is sufficient that respondent on more than one occasion has been given a "meaningful opportunity to present [its] case."[7]

Complainant asserts that the amount of the penalty ($22,500) proposed for the violation of 40 C.F.R. § 259.73(a)(2) was based upon and determined in accordance with the then-applicable U. S. Environmental Protection Agency [EPA] penalty policy, i.e. the 1984 Resource Conservation and Recovery Act [RCRA] gravity based penalty policy, and that the amount sought is appropriate in the circumstances of this violation.[8] Complainant urges that the "potential for harm" in this case was "major," in that the requirement to maintain containers of regulated medical wastes in good condition is based upon the importance of preventing exposure

---

[7] **Mathews v. Eldridge**, 424 U.S. 319, 349. See also 333: "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner,' quoting **Armstrong v. Manzo**, 380 U.S. 545, 552 (1965). See also the Court's discussion at 348-349.

[8] **Id.** at 6. Pursuant to 40 C.F.R. § 22.27(b), notice must be taken of the civil penalty guidelines issued under the specific statute pursuant to which the complaint was issued.

to medical wastes.[9] Likewise, complainant argues that since the regulation was not complied with, and the cartons of waste were compacted, the extent of deviation from the regulation is "major." Both the characterizaton of the potential for harm as "major" and the characterization of the extent of deviation from the requirement as "major" are reasonable in the circumstances here, where the assessment must be based upon the seriousness of the violation.[10] Accordingly, the resulting proposed penalty calculation of $22,500, derived from application of the policy, is appropriate for a violation which (a) was a major deviation from a regulatory requirement and (b) had major potential for harm.[11]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. No genuine issue of material fact remains to be determiend with respect to the issue herein, **i.e.** the amount of the penalty proposed to be assessed for the violation of 40 C.F.R. § 259.73(a)(2) previously found (see **Order Upon Motion In Partial accelerated Decision as to Liability**, September 5, 1991).

2. In the circumstances of this case, an oral evidentiary hearing

---

[9] See complainant's Exhibit 2 (labelled "Attachment I" of its **Motion of March 12, 1993**); Complainant's **Memorandum in Support of Motion for Accelerated Decision**, at 10.

[10] See **Affidavit of Mr. John Gorman** at 6; see also Exhibit A, **Final RCRA Civil Penalty Policy**, attached thereto, at 3. The penalty policy emphasizes that the potential for harm, rather than actual harm, is what must be considered. Id at 6; affidavit at 8.

[11] It is noted that EPA is authorized to seek up to $25,000 per day per violation of the Act.

on the penalty issue is not required.

3. The civil penalty proposed, $22,500, was determined in accordance with the appropriate EPA civil penalty policy, **i.e.** the RCRA civil penalty policy. The potential for harm in this violation was properly determined to be "major." The extent of deviation from the applicable regulatory requirement was properly determined to be "major." Accordingly, the total penalty amount $22,500 determined by reference to the applicable penalty policy is found to be reasonable and appropriate in the circumstances of this case.[12]

4. No reliable financial information has been provided which would show inability of respondent to pay the proposed penalty.

5. Complainant is entitled to judgment as a matter of law with respect to the penalty. Respondent is liable for the full amount of the penalty proposed.

ORDER

Accordingly, it is ORDERED that complainant's motion be, and it is hereby, granted and it is **FURTHER ORDERED** that respondent shall pay a civil penalty of $22,500 for the violation previously found, within sixty (60) days from the date of service of this Order, by forwarding to the Regional Hearing Clerk and a cashier's

---

[12] See complainant's Exhibits 2 and 3 ("Attachments I" and "II-A"), filed with **Notice of Motion for Accelerated Decision,** of March 12, 1993.

check of a certified check for the said amount payable to the United States of America which shall be mailed to:

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

J. F. Greene
Administrative Law Judge

Date: August 18, 1993
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Decision and Order Upon Motion was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on August 18, 1993.

Shirley Smith
Legal Staff Assistant
for Judge J. F. Greene

NAME OF RESPONDENT: MRM Trucking
DOCKET NUMBER: MWTA-II-89-0102

Ms. Karen Maples
Regional Hearing Clerk
Region II - EPA
26 Federal Plaza
New York, New York 10278

Lee A. Spielmann, Esq.
Office of Regional Counsel
Region II - EPA
26 Federal Plaza
New York, New York 10278

Mr. Frank Marziani
1005 Wilde Avenue
Drexel Hill, Pennsylvania 19026