10/24/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
ENVIRONMENTAL PROTECTION CORPORATION (EAST SIDE DISPOSAL FACILITY),	)	Docket No. RCRA-09-86-0001
	)	
	)	
Respondent	)	

DECISION AND ORDER

This matter is on remand by the United States District Court for the Eastern District of California, in a Memorandum Decision, Environmental Protection Corporation v. Lee Thomas, Administrator of the United States Environmental Protection Agency, No. CV F-87-447-EDP (E.D. Cal. July 13, 1988) (hereinafter Memorandum Decision). The underlying administrative proceeding arose upon a complaint filed by the United States Environmental Protection Agency, Region IX (sometimes complainant or EPA) against Environmental Protection Corporation (respondent) under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. Sections 6901 et. seq., as amended. The complaint charged respondent with failure to provide information to complainant in connection with its enforcement responsibilities, in violation of section 3007(a) of RCRA, 42 U.S.C. Section 6927(a) [1] In an accelerated decision

[1] RCRA Section 3007(a), 42 U.S.C. Section 6927(a) reads as follows, in pertinent part:

(continued...)

issued on April 8, 1987, the undersigned Administrative Law Judge (ALJ) found respondent to have violated RCRA Section 3007(a), and a civil penalty in the amount of $14,000 was assessed.

The District Court remanded the subject matter for further consideration concerning "(1) the imposition of the penalty; and (2) the correctness of the amount of penalty imposed in view of the Agency's default in pleading the basis of the the penalty assessment." Memorandum Decision at 7. The sole issue to be resolved here is the appropriateness of the penalty. Assessment of a civil penalty in this case is governed by RCRA Section 3008 (a)(1) and (3), 42 U.S.C. Section 6928(a)(1) and (3), which provides in pertinent part:

(a) Compliance orders

> (1) Except as otherwise provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation . . .
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> (3) . . . Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement

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[1](...continued)

(a) Access entry

For purposes of developing or assisting in the development of any regulation or enforcing the provisions of this chapter any person who generates, stores, treats, transports, disposes or otherwise handles or has handled hazardous wastes shall, upon request of any officer, employee or representative of the Environmental Protection Agency, duly designated by the Administrator, . . ., furnish information relating to such wastes and permit such person at all reasonable times to have access to, and to copy all records relating to such wastes.

> of this subchapter. 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.

Guidance in determining the amount of the penalty is provided also in the Final RCRA Civil Penalty Policy of May 8, 1984 (Penalty Policy) and the EPA General Enforcement Policy #GM-21 and #GM-22 (GM-21 and GM-22).

Complainant requests a penalty in the amount of $16,400, based on its computations according to the Penalty Policy. Respondent prays for a dismissal of the complaint by virtue of complainant's failure to include in its complaint a statement explaining the reasoning behind the proposed penalty pursuant to 40 C.F.R. Section 22.14(a)(5) (Resp. Br. at 6-8; Tr. 6-7). [2] In the alternative, respondent requests that the penalty not exceed $1,000. (Resp. Br. at 8).

I. Complainant's Violation of 40. C.F.R. Section 22.14(a)(5)

As to the issue of dismissal of the complaint, respondent points out that the District Court disagreed with the ALJ with respect to the ability to impose a penalty on respondent in light of complainant's violation of 40 C.F.R. Section 22.14 (Resp. Br. at 7). The District Court stated as follows:

> The Administrative Law Judge held that the purpose of 40 C.F.R. Section 22.14 is procedural only, and the Administrator's failure to comply with the same is not fatal

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[2] References to complainant's post hearing brief are hereinafter referred to as "Comp. Br."; references to respondent's opening brief also hereinafter referred to as "Resp. Br."; references to the Transcript of Hearing on March 8, 1989 are hereinafter cited as "Tr."

> to the ability to impose a penalty. Although not specifically focusing on this particular section of the Code of Federal Regulations, we believe the decision in Katzson Bros., Inc. v. United States Environmental Protection Agency, 839 F.2d 1396, 1400-01 (10th Cir. 1988) refutes this. There the court stated: "This complete absence of inquiry into the factual basis for the penalty is troubling . . . ." (citations omitted).
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> * * *
>
> It is this Court's opinion that the provisions of the Code of Federal Regulations have the purpose of providing defendant with a factual basis for the Agency's penalty determination, and to allow the person being penalized to mount a defense in the matter.

Memorandum Decision at 6, 7. The District Court does not suggest that a penalty should not be imposed on respondent. Rather, the Court merely suggests a consideration of the Katzson decision in deciding whether to impose a penalty and the amount of penalty, if imposed.

Clearly, respondent deserves an explanation of the penalty determination and an opportunity to defend against it. Complainant was required to "include in the case file an explanation of how the proposed penalty amount was calculated" as well as "a justification of any adjustments made after issuance of the complaint." (Penalty Policy at 5; GM-22 at 16). Complainant did not provide a factual basis for its original penalty of $14,000 proposed in the complaint. The ALJ is not without some responsibility here, however. In retrospect he should have required complainant to come forward with an explanation before proceeding further. The purpose of this proceeding was to require complainant to explain the basis for its proposed penalty, and provide an opportunity for respondent to

present its defense to the proposed penalty, acknowledging that the issue of liability has been resolved in favor of complainant (Memorandum Decision at 3). Therefore, the purpose of Section 22.14(a)(5) is satisfied.

The Katzson decision does not compel a finding that Complainant's failure to comply with 40 C.F.R. Section 22.14(a)(5) is sufficient to set aside the penalty. The Tenth Circuit in Katzson, using language similar to that in the Memorandum Decision, did not order the penalty amount to be reduced, but only directed EPA to reconsider its prior position, "anticipat[ing] that a careful review . . . will result in an appropriate determination of the penalty assessment." Katzson, 839 F.2d at 1401. The case was remanded to the EPA for a hearing and reconsideration of the severity of the penalty in light of mitigating factors. The Tenth Circuit held that the Administrator should adequately inquire into the factual basis for a penalty in their review of a default order. Some distinctions are necessary here. First, the instant matter is not a default order. Second, Katzson has been considered to be confined to the Tenth Circuit. (See In the Matter of Buerge Feed and Seed, IF&R Docket No. VII-764C-88. FIFRA Appeal No. 88-1, p. 6 n. 7 (August 31, 1988); In the Matter of Custom Chemical and Agricultural Consulting, Inc. and David H. Fulstone, IF&R Docket No. IX-6387-C-84-20, FIFRA Appeal No. 86-3, p. 16 n. 20 (March 6, 1989).

Courts other than the Tenth Circuit have addressed the issue of a complainant's default in administrative proceedings. In the

Matter of Millipore Corporation, Docket No. II-RCRA-85-0303 (Decision on Remand, April 30, 1987), respondent submitted a defective but curable Partial Closure Plan to close a hazardous waste storage facility. Complainant EPA detected the potential violation and did not notify the respondent in a timely manner as required. While the court acknowledged that "neither party is blameless" (Id. at 4), a civil penalty was assessed against the respondent nevertheless for failure to submit a closure plan 180 days prior to initiation of closure, as required by RCRA and its implementing regulations. In that case, EPA's default contributed directly to respondent's violation, since the latter could have corrected its closure plan had EPA not defaulted. While the penalty was reduced for good faith and other factors, the court decided a penalty must be assessed because of "the vital importance of compliance with Rule I-805-A-(3)(a) [the rule at issue in that case concerning the closure plan] to maintain the integrity of the EPA regulatory system . . . ." Id. at 5.

The regulation at issue in this case, requiring a company to submit information requested by the EPA, is also vital in maintaining the integrity of the EPA regulatory program. However, here EPA's default did not occur until after proceedings had begun against respondent; there was no nexus between complainant's default and respondent's violation. There is even greater reason in the present case than in Millipore to assess a penalty in spite of a default on the part of EPA.

As to the gravity of EPA's default, the failure to include in the complaint the basis for the proposed penalty, it is not of sufficient weight to subvert the assessment of a penalty. This issue was met in a civil penalty action under the Toxic Substances Control Act. In the Matter of Briggs and Stratton Corp., Docket No. TSCA V-C-001, -002, -003 (June 17, 1980); aff'd in part, TSCA Appeal No. 81-1 (February 4, 1981), the respondent filed a motion to dismiss on grounds that the complaint failed to include a statement indicating the appropriateness of the penalties therein proposed. The ALJ there denied the motion, holding that each of the complaints included a statement giving adequate notice of charges against the respondent, including the factors considered in determining the proposed penalty. The ALJ reasoned, at 26:

> In administrative proceedings the pleadings are required only to serve notice of the nature of the charges sufficient to enable the respondent to prepare his defense. The question is not the adequacy of pleading, but the fairness of the whole procedure. In administrative proceedings, adjudication may be based on facts arising subsequent, as well as prior, to the filing of the complaint [see Curtis Wright Corporation v. NLRB, 347 F.2d 61, 73 (16), (1965)]. Professor Davis states, 1 Davis, Section 8.04, page 523; 'The most important characteristic of pleadings in the administrative process is their unimportance.'

In the present case, the complaint charged respondent with one simple violation, the failure to supply requested information on 14 of 18 generator waste streams. The alleged violation was specified clearly enough in the complaint to adequately serve notice to respondent and enable it to prepare a defense. Now that the respondent has raised the issue of complainant's default in

failing to provide a factual basis for the penalty, respondent has been provided ample opportunity to defend its position at an evidentiary hearing, and with post-hearing briefs.

II. Calculation of the Penalty

The determination of the amount of a penalty is a two-step process according to GM-21, GM-22 and the Penalty Policy. The first step is to calculate a preliminary deterrence figure, pursuant to the goals of the penalty assessment: (1) deterrence; (2) fair and equitable treatment of the regulated community; and (3) swift resolution of environmental problems. (See GM-21 at 3-5). The preliminary deterrence figure is composed of the economic benefit component, which is not applicable in this case, and the gravity component. The second step is to adjust the primary deterrence figure by several factors. (See GM-22 at 2; Penalty Policy at 3). These factors include (1) good faith efforts to comply or lack of good faith; (2) the degree of willfulness and/or negligence; (3) history of noncompliance, (4) ability to pay, and (5) other unique factors. (See GM-22 at 3-4; Penalty Policy at 4).

A. The Gravity-Based Penalty

The gravity component of a RCRA penalty, based on RCRA Section 3008(c), 42 U.S.C. Section 6928(c), measures the seriousness of the violation in terms of two factors: (1) potential for harm, and (2) extent of deviation from a statutory or regulatory requirement (Penalty Policy at 5).

The potential for harm is determined by consideration of: (a) the likelihood of exposure to hazardous waste posed by noncompliance, or (b) the adverse effect noncompliance has on the statutory or regulatory purposes or procedures for implementing the RCRA program. (Penalty Policy at 6). The former subfactor is difficult to quantify in this case, therefore the latter shall be considered.

The degree of potential for harm is categorized into either major, moderate or minor potential for harm. In terms of the adverse effect noncompliance has on the statutory or regulatory purposes or procedures for implementing the RCRA program, the categories are defined respectively as (i) actions having a substantial adverse effect; (ii) actions having a significant adverse effect; and (iii) actions which have or may have an adverse effect. (Penalty Policy at 7). It is noted that potential harm is at issue, not actual harm; hence the question of whether or not the fourteen waste streams actually contained RCRA hazardous waste is irrelevant.

In placing respondent's RCRA violation into one of the three categories it is helpful to compare the facts of this case with the examples provided in the Penalty Policy as well as with other administrative decisions detailing RCRA penalty assessments. The failure of respondent to submit the information regarding fourteen waste streams had a potential to harm the environment if the waste streams contained hazardous waste, as defined in Section 1004(5) of RCRA, 42 U.S.C. Section 6903(5). However, EPA had notice that

respondent generated, treated, stored and disposed of RCRA hazardous waste, and EPA had inspected respondent's facility three months prior to EPA's request for information. These facts are most analagous to the facts described in Example 2 of the Penalty Policy, moderate potential for harm, rather than the other examples for minor and major potential for harm. (Penalty Policy at 7-8). Example 2 is a scenario in which a general precaution was taken, that is, a storage area was identified as a hazardous waste storage area, but an important and more specific precaution was not taken, that is, half of the waste containers in the storage area were not labeled as hazardous waste in violation of 40 C.F.R. Section 262.34. Similarly, in the present case, general precautions were taken: EPA was notified of respondent's hazardous waste activities, there was a recent inspection by EPA officials, and requested information was submitted regarding the four waste streams respondent deemed to be regulated by RCRA. The specific precaution of submitting information concerning the other fourteen waste streams was not taken.

In contrast, a major potential for harm is exemplified in the case of In the Matter of A.Y. McDonald Industries, Inc., Docket No. RCRA 85-H-002, RCRA (3008) Appeal No. 86-2 (July 23, 1987), in which a complete failure to notify EPA of its hazardous waste activity, disposing of hazardous waste without a permit or interim status, and a complete failure to implement groundwater monitoring were each characterized as having a major potential for harm. The

substantial adverse effect on the RCRA program was due to the crucial nature of the regulations violated. Id. at 25, 26, 30.

In the Matter of Martin Electronics, Inc., Docket No. RCRA-84-54-R, RCRA (3008) Appeal No. 86-1 (June 22, 1987), illustrates a moderate potential for harm. There, respondent was charged with failure to notify EPA of hazardous waste solvent activity at its facility and with failure to submit a Part A application for hazardous waste solvents. Both violations were classified as having a moderate potential for harm since the respondent had notified EPA of other hazardous waste activity at its facility. In that case as well as here, EPA was at least aware that the respondents generated and stored hazardous wastes. Id. at 16-17. The potential for harm was regarded as moderate also in In the Matter of Ashland Chemical Co., Docket No. RCRA-V-W-86-R-13 (June 22, 1987), for an incorrect address and identification number on certain manifests. EPA had notice of the respondent's activities, but the violation could impede the tracing of the origin and disposal of hazardous waste, the means by which RCRA's goals are to be accomplished. Therefore, adverse effects on the RCRA program were significant. Id. at 41.

While EPA had notice of some of respondent's hazardous waste activities in In the Matter of Elwin G. Smith Division, Cyclops Corp., Docket No. RCRA-V-W-85-R-002 (June 25, 1986), the failure of the respondent to submit a revised Part A application for storing quantities of hazardous waste beyond its authorized limit was considered a major potential for harm "because [RCRA's]

regulatory program is based fundamentally on facility's Part A permit application . . . The Part A procedure is basic to regulating hazardous waste . . . Failure to receive accurate information concerning the hazardous waste activities can seriously damage the regulatory program." Id. at 41. While the importance of submitting complete and accurate information to the EPA concerning hazardous waste cannot be emphasized enough, a failure to submit a Part A permit application is potentially much more harmful than the failure to submit information requested pursuant to an investigation of a facility, as in the present case.

While the ALJ agrees with complainant's selection of the moderate category regarding potential for harm, he does not concur in the characterization of respondent's conduct as "egregious" such that the ultimate effect is at the extreme level of the moderate category. (Tr. 107-108). The basis of complainant's characterization is the potential of harm if EPA found the wastes in the fourteen streams to be hazardous. (Comp. Br. at 4-5). However, account must be taken of the fact that EPA had inspected respondent's facility only three months prior to EPA's letter requesting information. (Resp. Br. at 3; Tr. 82). Moreover, respondent did possess the documents requested, albeit they were located at its headquarters in Bakersfield. (Comp. Br. at 9; Tr. 68, 84).

The next step in calculating the gravity-based penalty is to determine the extent of deviation from RCRA or its regulatory requirements. The extent of deviation is categorized as major if "the violator deviates from the regulation or statute to such an

extent that there is substantial noncompliance," moderate if "the violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended," or minor if "the violator deviates somewhat from the regulatory or statutory requirements but most of the requirements are met." (Penalty Policy at 8-9).

Complainant selected the moderate category for respondent's extent of deviation from Section 3007(a) of RCRA. Again, comparison of the facts of this case with the examples provided in the Penalty Policy as well as with precedent case law is helpful in determining the extent of deviation. According to the examples, total failure to supply a security system would result in classification into the major category, and a small oversight such as failing to lock on access route on a single occasion would be classified as minor. (Penalty Policy at 9). The present case does not fit into either of those categories, hence complainant's selection of the moderate category is accepted for the respondent's extent of deviation from RCRA Section 3007(a). Respondent met some of the requirements by responding promptly to EPA's request for documents, by supplying some of the documents requested, and by offering its rationale for not submitting the remainder of the documents requested. (Ex. R2).

Turning to administrative decisions on the subject of RCRA penalty assessments, one decision in particular helps to illustrate the moderate category of extent of deviation. In the Matter of Martin Electronics, Inc., supra, the extent of deviation was

classified as moderate for the respondent's failure to notify EPA or the state that respondent was generating and storing waste solvents. This classification was based upon respondent's partial compliance with the statutory requirement for notification by informing EPA of certain hazardous waste activity other than the waste solvents. The failure to submit a Part A application concerning the waste solvents was also considered a moderate extent of deviation, since the respondent addressed its other wastes in a Part A application. Id. at 16, 17. Clearly, the extent of deviation from the statutory requirement in the present case is consistent with the moderate extent of deviation as illustrated by the hypotheticals presented in the Penalty Policy and by Martin Electronics.

The final step in determining the gravity-based penalty figure is to select the penalty range by means of the penalty assessment matrix set forth in the Penalty Policy at 10. The axes on the matrix represent the potential for harm and extent of deviation factors, each of which are divided into major, moderate and minor categories, resulting in a nine-cell matrix. Each cell is assigned a penalty range. The cell representing a moderate potential for harm and moderate extent of deviation specifies a penalty range of $5,000 to $7,999. Complainant proposes that the highest amount within the range, $7,999, is appropriate for the violation. (Comp. Br. at 6; Tr. 107, 108). The rationale for this high a penalty is that "the example set by respondent in exercising its sole discretion in determining the nature of the wastes being treated, stored

and disposed of at the facility and then withholding the information that would permit EPA to make such a determination . . . if left unchallenged, would adversely effect the implementation of the RCRA regulations by complainant if such practices became widely known and adopted by the regulated community." (Comp. Br. at 6-7).

Complainant's witness at the hearing, Ms. Siewierski, completed the RCRA penalty calculation worksheet upon which the proposed penalty calculation is based. (Ex. C1, at 6-7; Tr. 16). She also had "considerable input" into the writing of the narrative portion of complainant's penalty calculation (Ex. C1 at 1-5; Tr. 17-18). Ms. Siewierski testified that the gravity-based penalty amount of $7,999 was chosen on the basis of the potential to undermine the RCRA program and that "Respondent did not take the opportunity to effect and educate the regulated community on the regulations." She also was of a mind that, because of the nature of the facility, respondent has a "golden opportunity" to "educate and effect [sic] a lot of the regulated community." (Ex. C1, at 5; Tr. 34, 39, 40, 56, 57, 59, 61).

The ALJ does not concur in the selection of the highest penalty amount within the range, as he does not agree that the violation at issue here undermines the RCRA program any more than the RCRA violations in the cases mentioned above in which the midpoint of the gravity-based penalty range was chosen almost invariably. See Martin Electronics, supra, at 16, 17, 20; Cyclops Corp., supra, at 39, 40, 41, 42, 43; A.Y. McDonald Industries,

supra, at 28, 31; Ashland Chemical Co., supra, at 42, 43; Millipore Corp., supra, (July 30, 1986) at 20; See also, In the Matter of National Coatings, Inc., Docket No. V-W-84-R-052, RCRA (3008) Appeal No. 86-5 at 9 (January 22, 1988). Complainant appears to maximize the significance of the violation by pointing out respondent's "golden opportunity" to set an example or educate the regulated community. Respondent is not required legally to be either an exemplar or mentor. Respondent is only obligated to adhere to the statutory and regulatory requirements applicable to its operations. Respondent failed to adhere to those requirements by violating Section 3007(a) of RCRA, 42 U.S.C. Section 6927(a), and is being penalized in an amount consistent with the severity of that violation. It is concluded that the midpoint of the penalty range, or $6500, is a condign penalty.

B. Adjustment Factors

The final step in calculating the penalty is to adjust the gravity-based penalty figure, that is, increase or decrease that figure by certain percentages, according to any applicable adjustment factors listed in the Penalty Policy. The ALJ concurs in complainant's thinking that multiple and multi-day penalties and economic benefit from noncompliance are not applicable in the present case. (Ex. C1 at 4, 7; Comp. Br. at 19; Penalty Policy at 12-16). The factors to consider for adjustment of the gravity-based penalty are (1) good faith efforts to comply/lack of good faith (degree of cooperation/noncooperation); (2) degree of willfulness and/or negligence; (3) history of noncompliance; (4)

ability to pay; and (5) other unique factors. (Penalty Policy at 16-21). Complainant did not include any adjustment for "other unique factors" or for "ability to pay," and respondent has not presented any evidence of financial inability to pay. (Ex. C1 at 6, 7). Respondent also has not presented any evidence that would merit a downward adjustment for "other unique factors." Only the remaining factors will be discussed.

1. Good Faith/Cooperation

Complainant suggests an upward adjustment of 40% for lack of good faith, or degree of noncooperation. According to the Penalty Policy, adjustments may be made in the 26% - 40% range "only in unusual circumstances." (Penalty Policy at 17). Complainant asserts that respondent withheld the information sought for almost one year after the complaint was filed in this case (Ex. C1 at 4), and that after seeking legal counsel, "knowingly and deliberately" rejected complainant's request "with respect to the bulk of information requested." (Comp. Br. at 8).

Respondent contends that complainant's suggested adjustment for lack of good faith is not warranted because there were no unusual circumstances, and furthermore, respondent had "solicited telephone communication should EPA have any questions regarding EPA response" and EPA never attempted to contact respondent "to discuss the relevancy, if any, of the information sought." (Resp. Br. at 10). When respondent received the complaint, Thomas M. Pruitt, chief chemist for respondent, immediately contacted Bruce Moore, counsel for complainant, to discuss the problem, but Mr. Moore told

Mr. Pruitt that "it was not [respondent's] option to deny any information that they [EPA] requested no matter what." (Tr. 78, 88-89; Resp. Br. at 10). Respondent apparently questioned the authority of the EPA to request documents pertaining to waste which respondent deemed non-hazardous under RCRA standards. The advice from respondent's counsel that it was not required to submit the documents is no defense. Respondent was warned in the letter from EPA requesting the information that failure to provide the information requested "may result in an order requiring compliance or a civil action for appropriate relief." (Ex. R1 at 3). Also contained in the letter was a phone number for respondent to call if there were any questions. (Id.) There is no evidence presented in the record that it made such a call until after the complaint was issued. Respondent was noncooperative with EPA, and an upward penalty adjustment is warranted. However, an adjustment of 40% for unusual circumstances is not warranted in that respondent provided an explanation for its non-submittal. An upward adjustment of 25% is appropriate in this case to reflect respondent's degree of noncooperation or lack of good faith.

2. Degree of Willfulness and/or Negligence

Complainant also adjusts the penalty upward by 40% for alleged willfulness because respondent "had full control over the events constituting the violation . . . [and] should have known the requirements respecting the information needs of Complainant," and because the information was in respondent's possession, albeit not

at the facility. (Ex. C1 at 4). Again, the Penalty Policy specifies that an adjustment of 26% - 40% may only be made in unusual circumstances (Penalty Policy at 18). Also specified are factors to be considered in assessing the degree of willfulness: (1) how much control the violator had over the events constituting the violations; (2) the foreseeability of the event constituting the violation; (3) whether the violator took reason-able precautions against the events constituting the violation; (4) whether the violator knew or should have known of the hazards associated with the conduct and (5) whether the violator knew of the legal requirement which was violated. Respondent's conduct indicates an affirmative answer to all five factors listed above, by virtue of the letter dated August 12, 1985 from EPA explaining the consequence of failure to submit the information (Ex. R1 at 3). This is also for the reason that respondent did not contact EPA before submitting its response, which would have been a reasonable precaution, and because the nature of respondent's business is such that it should be familiar with environmental statutes and regulations. However, there is no evidence that respondent has acted in a deceptive or egregiously contumacious manner that could be classified as "unusual." Respondent's degree of willfulness warrants a penalty adjustment of 25%.

3. History of Noncompliance

Complainant points out that respondent has a history of violations, one at each of its facilities. An action filed June 14, 1984 charging respondent with failure to implement groundwater

monitoring resulted in a settlement (Comp. Br. at 9-10; Ex. C1 at 4; Tr. 51, 63, 74, 75). Another action was filed against respondent's West Side facility, with a proposed penalty of $307,000. (Comp. Br. at 10; Tr. 49-50). Complainant suggests a 25% adjustment for history of noncompliance based on these actions.

The Penalty Policy allows an upward adjustment of up to 25%, or up to 40% if there are unusual circumstances. Prior noncompliance can range anywhere from one minor violation which is unrelated to the violation at issue, to numerous serious violations over long periods of time, including continuing and repetitive violations. [3] When the range of possible percentage adjustments, up to 40%, is placed along side the scope of prior noncompliance, one may more easily perceive the percentage of adjustment to be applied to each particular case. Neither of the prior actions against respondent appears to be for the same violation. One settled for a "modest" amount (Comp. Br. at 10), and they are apparently unrelated to the violation here. An adjustment of 10% is appropriate, since significant increases such as 25% should be reserved for those cases in which prior noncompliance does not quite rise to the level of "unusual," but is nevertheless very substantial.

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[3] Factors to be considered are: how similar the previous violation was, how recent the previous violation was, the number of previous violations, and violator's response to previous violation(s) in regard to correction of problem (Penalty Policy, at 19).

No further adjustments are warranted. The total percentage of adjustment to be applied to the gravity-based penalty is 25%, 25%, and 10%, for a total of 60%. The failure of respondent to submit the information requested regarding the fourteen waste streams does not warrant the penalty proposed in the complaint or on the RCRA penalty computation worksheet. [4] It is concluded that the gravity of respondent's violation of RCRA Section 3007(a), 42 U.S.C. Section 6927(a), demands a penalty of $6500 increased by 60%, or $10,400, to reflect respondent's lack of cooperation, degree of willfulness, and history of noncompliance. The default on the part of complainant warrants no penalty mitigation in view of the fact that there was no nexus between complainant's default and respondent's violation.

ORDER

A civil penalty of $10,400 is assessed against Environmental Protection Corporation for violation of the Resource Conservation and Recovery Act and its implementing regulations. Payment shall

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[4] The Consolidated Rules of Practice, 40 C.F.R. Part 22, state:

> If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

Id., Section 22.27(b). By implication, this rule applies also to the present case, in which a different penalty amount was proposed by complainant after the Memorandum Decision was issued (See Ex. C1). The specific reasons for the decrease herein assessed have been set forth in this Decision and Order.

be made within 60 days, unless otherwise agreed to by the parties, by cashier's check or certified check, for the full amount of the penalty, payable to the Treasurer, United States of America, and mailed to:

EPA - Region 9
(Regional Hearing Clerk)
P.O. Box 360863M
Pittsburgh, PA 15251

Frank W. Vanderheyden
Administrative Law Judge

DATED: October 24, 1989

Washington, D.C.