10/28/96

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	:	
	:	**Docket No. RCRA-II-93-0306**
B & B Wood Treating &	:	
Processing Co., Inc.	:	Judge Greene
	:	
Cataño, Puerto Rico	:	
	:	
Respondent	:	

Resource Conservation and Recovery Act, §3008 [42 U.S.C. § 6928--Civil Penalty: Penalty amount proposed in the complaint was found to have been calculated in accordance with the requirements of the Act and applicable penalty policy.

Where Respondent failed to provide credible evidence upon which an adjustment of the penalty amount could be based notwithstanding an Order of the Presiding Judge to do so, and failed to respond in a substantive manner -- or object -- to the motion for judgment as to the penalty, due process requirements are satisfied without an oral evidentiary hearing on the penalty issue.

Appearances:

For Complainant: Lee A. Spielmann, Esq.
Office of Regional Counsel
Region II -- EPA, 290 Broadway, 16th Floor
New York, New York 10007-1866

For Respondent: José Franco Rivera, Esq.
Capital Center Bldg., Office 401
Arterial Hostos Avenue #3
Hato Rey, Puerto Rico 00918

Before: J. F. Greene
Administrative Law Judge

Decided: October 28, 1996

ORDER GRANTING COMPLAINANT'S MOTION FOR "ACCELERATED DECISION" AND INITIAL DECISION[1]

This matter arises under Section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6928 ("RCRA" or "the Act"). The complaint alleges one statutory (RCRA), and four regulatory violations at Respondent's facility, B & B Wood Treating & Processing Co., Inc., in Cataño, Puerto Rico. These charges are summarized as follows:

1) Respondent failed to notify EPA that it generated hazardous waste, in violation of Section 3010 of RCRA, 42 U.S.C. § 6930;

2) Respondent failed to obtain a proper written assessment of its drip pad, in violation of 40 C.F.R. § 265.441(a);

3) Respondent failed to have a curb or berm around its drip pad, in violation of 40 C.F.R. § 265.443(i);

4) Respondent failed to properly document the cleaning of its drip pad, in violation of 40 C.F.R. § 265.443(i); and

5) Respondent failed to properly document that treated wood was properly held over the drip pad to allow drippage to cease, in violation of 40 C.F.R. § 265.443(k).

Complainant proposed a total civil penalty of $220,825.[2]

On August 25, 1994, Complainant moved for partial "accelerated" decision as to liability, based upon admissions by Respondent in stipulations and in its Answer to the complaint.

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[1] 40 C.F.R. § 22.20(b) provides that "[i]f an accelerated decision . . . is issued as to all the issues and claims in the proceeding, the decision constitutes an initial decision. . . ."

[2] Complaint at 9 (June 29, 1993).

On October 26, 1994, Complainant's motion was granted with respect to all counts of the complaint. Complainant now moves for "accelerated" decision as to the penalty. As of the date of this Order, nothing in opposition to the motion, and nothing in support of Respondent's penalty position has been received in response to Complainant's motion for judgment.

In a motion for summary determination, the question is whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as to liability as a matter of law. The question is "whether the evidence presents a sufficient disagreement to require submission to [a trier of fact] or whether it is so one-sided that one party must prevail as a matter of law."[3]

Section 3008(a)(3) of the Act provides that in assessing a civil penalty, the seriousness of the violation and any good faith efforts to comply with the requirements must be taken into account.[4] Here, as discussed below, Complainant justified its proposed civil penalty on the basis of EPA's RCRA Civil Penalty

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[3] Anderson v. Liberty Lobby, 477 U.S. 242, 251-252 (1986).

[4] Specifically, Section 3008(a)(3) provides that:

> in assessing [a penalty under Section 3008(a) of the Act], the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

Policy, dated October 1990. This policy sets forth the statutory considerations in more detail, and provides a framework for the penalty assessment in this case.[5] It is concluded that Complainant's calculation of the proposed penalty complies fully with the RCRA penalty policy and with Section 3008(a)(3) of the Act, 42 U.S.C. § 6928(a)(3). Accordingly, since no genuine issue of any material fact has been raised (Respondent did not respond to the motion) or detected upon the record as to the penalty, Complainant is entitled to judgment as a matter of law.

Determination of the Penalty Amount

The RCRA penalty policy provides for the calculation of a civil monetary penalty in two stages: (1) determination of a "gravity based penalty" ("GBP"), including a multi-day component, and (2) adjustments to the GBP to account for good faith efforts to comply, degree of willfulness or negligence, history of noncompliance, ability to pay, and any other unique factors.[6]

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[5] See In re Great Lakes Division of National Steel Corp., EPCRA Appeal No. 93-3, at 23-24 (EAB, June 29, 1994); In re House Analysis & Associates & Fred Powell, CAA Appeal No. 93-1, at 10 (EAB, February 2, 1993).

Section 22.37(b), 40 C.F.R. § 22.17(b), of the Consolidated Rules of Practice requires that the Presiding Judge "determine the dollar amount of the recommended civil penalty . . . in accordance with any criteria set forth in the Act. . . ." In addition, the Presiding Judge must consider any civil penalty guidelines issued under the relevant statute.

[6] See RCRA penalty policy at 1-3.

The Gravity-Based Penalty

The gravity-based penalty is derived from penalty ranges specified in a matrix. The matrix is composed of axes which represent the factors of (1) "potential for harm" to humans and to the environment from the violation, and (2) the "extent of deviation" from the requirements. These factors represent the "seriousness of the violation" under Section 3008 of the Act. There are three levels: "major," "moderate," and "minor" on each of the axes.[7]

For Count I of the complaint -- Respondent's failure to notify EPA of the generation of hazardous waste, in violation of Section 3010 of RCRA [42 U.S.C. § 6930] -- a penalty of $22,500 was proposed. Complainant considered the potential for harm to be "major," arguing that Respondent's failure to notify had a "substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the RCRA program."[8] Complainant is correct. As Complainant states:

> Prior to the September 1992 inspection, Respondent had not provided any notification; EPA was left totally in the dark as to Respondent's generation of hazardous waste in its normal operations. EPA had no record or even any knowledge of the nature (or extent) of Respondent's operations, and the Agency had no realistic way either of determining what Respondent generated or otherwise regulating such activities. As a consequence of Respondent having failed to notify EPA of its handling of a hazardous waste, EPA was

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[7] Id. at 19.

[8] RCRA penalty policy at 15.

> likewise unaware of Respondent's existence as a regulated facility. Because the threshold triggering of the RCRA program, the proper and mandatory EPA notification, had not occurred, Respondent's failure to notify EPA precluded any RCRA program involvement with, or oversight over, Respondent's generation of hazardous waste. This notification is part of a process which facilitates implementing the RCRA program, and initiates EPA oversight of such activities.[9]

The extent of deviation was also considered "major" because there had been "substantial noncompliance": Respondent had provided no notification whatsoever to EPA prior to the September, 1992, inspection. Applying the penalty matrix to these particulars, Complainant arrived at a proposed gravity based penalty of $22,500[10], which is reasonable in the circumstances.

For Count II -- failure to obtain a proper written assessment of its drip pad in violation of 40 C.F.R. § 265.441(a) -- Complainant proposed a penalty of $22,500. The potential for harm was considered "major" because, without an assessment, insuring compliance with the regulatory requirements for drip pads is extremely difficult. This creates a "substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the RCRA program,"[11] and poses a "'substantial risk of exposure' to Respondent's hazardous waste containing arsenic

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[9] Affidavit of Bart George, September 11, 1995, at ¶ 68.

[10] The cell on the penalty matrix for a "major"- "major" violation contains a penalty range from $ 20,000 to $25,000. The choice of the precise amount within each cell is left to the discretion of enforcement personnel. Here, Complainant selected, reasonably, the mid-point amount.

[11] RCRA penalty policy at 15.

and chromium. . . ."[12] The extent of the deviation was similarly regarded as "major" because there was "substantial noncompliance." Respondent had failed to have assessment of any kind. Properly applying the penalty matrix, Complainant proposed a penalty of $22,500.

For Count III -- failure to have a curb or berm around its drip pad, in violation of 40 C.F.R. § 265.443(i) -- Complainant proposed a penalty of $172,075. Complainant explained that while such a violation would ordinarily be considered to have "major" potential for harm, here it was classified as "moderate," because the potential for a release of hazardous waste was reduced by the location of the drip pad and its surrounding area.[13] For these same reasons, the extent of the deviation was deemed to be "moderate," rather than "major."

Complainant chose to seek a multi-day penalty for Count III. Under the penalty policy, there is a presumption in favor of

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[12] Memorandum in Support of Complainant's Motion for Accelerated Decision, September 11, 1995 [hereinafter Complainant's Memorandum], at 13.

[13] Complainant's Memorandum at 14; George Affidavit at ¶ 77.

multi-day penalties for "moderate"-"moderate" violations that are determined to have continued for more than one day.[14] In this case, application of the presumption was appropriate:

> EPA decided to seek multi-day penalties because of the ongoing and continuing nature of the violation. . . . Given that Respondent did not have a curb or berm at the time of [the] inspection (September 14, 1992), and given that the requirement for one became effective on June 6, 1991 -- a period of 15 months -- EPA concluded that the presumption should be applied here, and paramount among the reasons was for purposes of deterrence and preventing future non-compliance. For over 450 days, Respondent had failed to construct (or have constructed) a curb or berm around its drip pad.[15]

Complainant reasonably added the mid-point of the "moderate"- "moderate" cell of the general penalty matrix ($6,500) to the product of the mid-point of the "moderate"-

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[14] At page 23, the penalty policy provides as follows:

> Multi-day penalties are presumed appropriate for days 2-180 of violations with the following gravity-based designations . . . moderate-moderate . . . . Therefore, multi-day penalties must be sought, unless case-specific facts overcoming the presumption for a particular violation are documented carefully in the case files.

[15] George Affidavit at ¶ 79. The goal of deterring future non-compliance is a factor to be considered in determining whether to assess multi-day penalties. RCRA penalty policy at 24.

"moderate" cell on the multi-day matrix ($925)[16] and 179 days,[17] for a total penalty of $172,075.

For Count IV -- failure to document properly the cleaning of its drip pad, in violation of 40 C.F.R. § 265.443(i) -- Complainant proposed a penalty of $1,500. Complainant considered the potential for harm to be "minor" because during the inspection the drip pad appeared to be clean.[18] The extent of deviation was "major" because there had been "substantial noncompliance." At the time of the inspection Respondent had no documentation regarding cleaning procedures. Complainant chose the low-point ($1,500) of the penalty matrix.

For Count V -- failure to document that treated wood was properly held over the drip pad to allow drippage to cease, in violation of 40 C.F.R. § 265.443(k) -- Complainant proposed a penalty of $2,250. Here, Complainant determined that the potential for harm was "minor" inasmuch as the chances of exposure to waste had been minimized by "Respondent's apparent practice of storing recently treated wood along the treatment unit, a procedure that facilitates drippage occurring near the drip pad's collection system."[19] The extent of deviation was "major" because there had been "substantial noncompliance." At

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[16] See RCRA penalty policy at 24.

[17] Id. at 23-24.

[18] Complainant's Memorandum at 15; George Affidavit at ¶ 82.

[19] George Affidavit at ¶ 86.

the time of inspection Respondent had no documentation which revealed the length of time the wood remained on the drip pad after treatment.[20] For this violation, the mid-point on the penalty matrix was chosen. Here, as with Counts I through IV, Complainant applied the RCRA penalty policy reasonably.

Adjustments to the Gravity Based Penalty

As previously stated, the RCRA penalty policy instructs EPA to make adjustments to the gravity based penalty to take into consideration good faith efforts to comply, degree of willfulness or negligence, history of noncompliance, ability to pay, and any other unique factors.[21] In the instant case, Complainant chose not to adjust the gravity-based penalty, on the ground that Respondent provided no documentation upon which Complainant could base an adjustment. On the issue of ability to pay the proposed penalty, for example, Respondent provided no evidence to support lack of ability to pay. Indeed, Respondent failed to comply with a specific Order which scheduled Respondent's production of materials to support of its penalty position.[22] Such failure leads to an inference that Respondent was unwilling or unable to supply information in support of its position. See also In re:

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[20] George Affidavit at 87.

[21] See RCRA penalty policy at 1-3.

[22] Order Scheduling Production of Materials, December 7, 1994.

New Waterbury, Ltd., TSCA Appeal No. 93-2, at 16-17 (EAB, October 20, 1994) (citing 40 C.F.R. § 22.19(f)(4)).[23] With regard to the other adjustment factors, Respondent similarly failed to provide credible evidence upon which any adjustment could be based.

Conclusion:

In sum, the RCRA penalty policy provides, in this instance, a reasonable framework for incorporating the factors set forth in the Act which must be taken into account in imposing a civil penalty. The policy was properly applied here, and the penalty sought in the complaint has been justified under the statute. Respondent failed to provide credible evidence upon which an adjustment of the penalty could be based, notwithstanding an Order that it do so. Under these circumstances, an oral evidentiary hearing is not required.[24] Accordingly,

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[23] Respondent replied to the Order of December 7, 1994, only by stating that it was preparing to file a petition under Chapter 7 of the Bankruptcy Code, and that it would notify the Presiding Judge upon the filing of the case. See also stipulations of the parties of August 9, 1994, to the effect that Respondent filed for reorganization under Chapter 11, Title 11 of the U. S. Code, case designated # 94-02069 (ESL). This filing, however, standing alone, is not sufficient to support a finding that Respondent cannot afford to pay the proposed penalty.

[24] See In re Jenny Rose, Inc., Docket No. IF&R-III-395-C (February 22, 1993)(assessing civil penalty without oral evidentiary hearing); In re Sam Emani, d\b\a Auto Stop of Godby Road, Docket No. CAA-IV-93-007 (August 31, 1994) (same); In re Rainbow Paint and Coatings, Inc., EPCRA Docket No. VII-89-T-609 (August 8, 1991)(same); In re Bestech, Inc., Docket No. IF&R-04-91-7073-C (March 12, 1992) (same).

Complainant's motion for "accelerated" decision as to the penalty will be granted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Complainant's calculation of the proposed penalty is reasonable, and is consistent with and complies with the RCRA penalty policy and with Section 3008(a)(3) of the Act, 42 U.S.C. § 6928(a)(3).

2. Respondent failed to respond to the motion or otherwise to provide sufficient credible evidence upon which an adjustment of the penalty could have been based. Respondent's failure in this regard leads to a conclusion that no useful purpose would be served by holding a hearing on the penalty issue.

3. Under the circumstances of this case, due process requirements are satisfied despite the lack of an oral evidentiary hearing as to the penalty issue.

4. No other issues remain to be decided herein.

ORDER[25]

Accordingly, it is ORDERED, pursuant to Section 3008 of the Act, 42 U.S.C. § 6928, that:

1. Respondent B & B Wood Treating and Processing Co. Inc. shall be, and is hereby, assessed a civil penalty of $220,825 for the violations previously found.

2. Payment shall become due and payable sixty (60) days after a final order is issued, and shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States of America, to:

Mellon Bank
EPA -- Region II,
Regional Hearing Clerk
P.O. Box 360188M,
Pittsburgh, PA 15251

3. Failure by Respondent to pay the penalty within the prescribed time frame after the final order shall result in the

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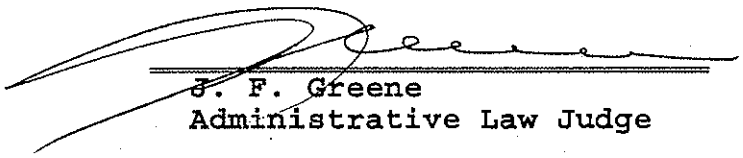
[25] Pursuant to Section 22.27(c) of the Consolidated Rules, 40 C.F.R. § 22.27(c), an Initial Decision "shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless: (1) an appeal to the Environmental Appeals Board is taken from it by a party to the proceedings, or (2) the Environmental Appeals Board elects, sua sponte, to review the initial decision." Under Section 22.30(a) of the Consolidated Rules, 40 C.F.R. § 22.30(a), the parties have twenty (20) days after service upon them of an Initial Decision to appeal it. The address for filing an appeal is as follows:

Environmental Appeals Board
U.S. EPA
Weststory Building (WSB)
607 14th Street, N.W., 5th Floor
Washington, DC 20005

assessment of interest and penalty charges on the debt pursuant to 4 C.F.R. § 102.13.



J. F. Greene
Administrative Law Judge

October 29, 1996
Washington, D. C.