UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
	)	
M.A. Bruder and Sons, Inc.	)	
d/b/a M.A.B. Paints,	)	**Docket No: RCRA 5-99-005**
	)	
Respondent	)	
	)	

INITIAL DECISION

This proceeding arose from the filing of a complaint by the United States Environmental Protection Agency ("EPA" or "Complainant") on August 17, 1999 against the Respondent, M.A. Bruder and Sons, Inc. ("Respondent"or "MAB"). The Complaint charges that Respondent violated the provisions of Section 3005(a) of the Resource Conservation and Recovery Act ("RCRA") and its implementing regulations set forth at 40 C.F.R. Section 270.1(c). These provisions prohibit the accumulation of hazardous waste by the owners and operators of hazardous waste facilities without a permit. Accelerated decision has been granted on the issue of Respondent's liability.[1] Therefore, the only remaining issue which must be resolved in this proceeding is the determination of an appropriate penalty. The Complainant has proposed that Respondent should be assessed a penalty of $64,900 for its RCRA violation. Respondent opposes the assessment of this proposed penalty and asserts that this amount is inappropriately large in view of the violation and the circumstances surrounding it.

Background

Respondent owns and operates M.A.B. Paints, Inc. a paint manufacturing facility located in Terre Haute, Indiana. This facility[2] has been owned and operated by the Respondent since 1969.

Respondent's facility was inspected by the Region 5 Office of EPA as well as by the

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[1]Respondent has conceded liability. *See infra* at p. 3 and hearing transcript at 5, (Tr.5).

[2] This facility has been in operation since 1909. Joint Exhibit 5 ("Jt. Ex. 5") at 1.

Indiana Department of Environmental Management ("IDEM") on June 3, 1998. John Gaitskill [3] was the EPA's representative during this inspection and Deborah French was the IDEM representative. Joseph Sladek, the manufacturing and distribution manager at the Terre Haute facility, accompanied the inspectors during their inspection. During the inspection Mr. Gaitskill and Ms. French examined Respondent's drum storage area and the waste storage tank. Mr. Gaitskill memorialized his observations in an inspection report.[4]

MAB's manufacturing process at its Terre Haute facility generates used solvents which include xylene, ethylbenzene, toulene, mineral spirits and naphtha. These solvents are hazardous wastes as defined by the regulations and were stored in an accumulation tank[5] on-site. Respondent's violations derive from an inverted J-shaped pipe located at the top of the accumulation tank, which pipe was allowed to vent directly into the air until October 23, 1998, when a valve was installed to control the emission of chemicals.

On October 22, 1998, EPA, via an information request, asked the Respondent to turn over information regarding the storage of hazardous waste at the facility. Complainant then requested additional information from the Respondent via a Supplemental Information Request, dated February 10, 1999.[6] Respondent responded to both of these requests for information on November 25, 1998, and on March 10, 1999, respectively.[7]

Complainant filed a Motion for Accelerated Decision, dated June 30, 2000, and argued that such motion should be granted because Respondent had not disputed its liability regarding the alleged RCRA violations. Respondent filed a reply to this Motion on July 18, 2000, and admitted liability but disputed the proposed penalty amount. Complainant's Motion was orally granted by this Court on August 2, 2000. An evidentiary hearing was held on August 25, 2000,

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[3] Mr. Gaitskill is now employed with the Waste Management Branch in Region 5 of EPA and is no longer assigned to this case.

[4] This inspection report is part of the record as Complainant's Exhibit 1 ("C's Ex. 1").

[5] The accumulation tank is cylindrical in shape, is vertical, has a fixed roof and a storage capacity of 10,000 gallons. Complaint at 7.

[6] Mr. Sladek testified that when Respondent received the EPA's first Information Request he called the Terre Haute facility to ask whether there was a valve on the accumulation tank. Tr. at 201-202. The response was that there was no valve on the tank but that there was valve onsite which was supposed to go on it. *Id.* at 202.

[7] Respondent's November 25, 1998, Information Request is part of the record as Joint Exhibit 5 ("Jt. Ex. 5 "). In the fourth numbered paragraph of this document Respondent states: "40 C.F.R. 265 Subpart CC applies to each of the containers discussed in Item 3." *Id.* The sixth numbered paragraph states that "[t]he 10,000 gallon tank is currently not in compliance with 40 C.F.R. § 265.1085 because there is no pressure relief valve on the tank[']s vent." *Id.*

in Chicago, Illinois on the issue of the appropriate penalty to be assessed against the Respondent. Complainant and Respondent have each filed a Post-Hearing Brief and a Reply Brief.

The statutory requirements and the implementing regulatory requirements which are at issue in this proceeding govern the management of hazardous wastes at facilities that produce, accumulate and store this kind of waste. Hazardous waste is defined by Section 261.20(a) of the regulations as "[a] solid waste, as defined in § 261.1 which is not excluded from regulation as a hazardous waste under § 261.4(b) [and which] exhibits any of the characteristics identified in this subpart." 40 C.F.R.§ 261.20. The major qualities characterizing hazardous waste are ignitability, corrosivity, reactivity and toxicity. 40 C.F.R. §§261.20-261.24.

Section 3005(a) of RCRA generally prohibits the accumulation of hazardous wastes by a storage, disposal or treatment facility onsite in the absence of a permit.[8] However, a generator of hazardous waste may accumulate hazardous waste onsite for up to 90 days without a permit or interim status if the provisions of 40 C.F.R. Part 265, Subpart CC are satisfied. Tr. 21.

As mentioned, pursuant to RCRA, owners or operators of a storage, treatment or disposal facility for hazardous waste must obtain a permit. RCRA §3005(a), 42 § 6925(a); 40 C.F.R. § 270.1(c). However, under Section 262.34(a) of the RCRA regulations, a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status as long as that generator complies with the provisions enumerated in the subsection. One of these requirements is that the generator must comply with the requirements of Subpart CC of Part 265. Section 265.1085 sets forth the standards applicable to tanks in which hazardous waste is accumulated. These standards include the directive to owners or operators of such tanks to "control air pollutant emissions from each tank subject to this section" in accordance with certain enumerated requirements. 40 C.F.R. 265.1085(b). Respondent's failure to install air emission controls on the accumulation tank, i.e. on the J-shaped valve, as required by Subpart CC of 40 C.F.R. Part 265, constituted a failure to comply with Section 262.34 and loss of its eligibility for the generator 90-day exemption.

Complainant asserts that the Respondent became subject to the requirements Subpart CC on December 6, 1996, the deadline under Section 265.1082(a)(1), when all owners and operators of facilities in existence on December 6, 1996, and subject to Subparts I, J and K were required to install the required emission control equipment. 40 C.F. R.§ 265.1082(a). Consequently, Complainant asserts that since December 6, 1996, Respondent's accumulation of hazardous waste in the accumulation tank without a permit was illegal under Section 3005(a) of RCRA.

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[8] 40 C.F.R. Part 270 sets forth requirements governing all aspects of the RCRA permitting process including the application process, changes to permits, permit conditions, the expiration and continuation of permits as well as interim status.

PENALTY DETERMINATION

Introduction

As Respondent has been found liable for its violation of Section 3005(a) of RCRA and its implementing regulations set forth at 40 C.F.R. Section 270.1(c), the remaining issue is the appropriate penalty amount to be assessed. Section 3008(g) of RCRA addresses the assessment of civil penalties for violations under Subchapter III of RCRA. This Section states that "[a]ny person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation." RCRA §3008, 42 § 6928. The assessment of penalties for RCRA violations is governed by Section 3008(a)(3) of RCRA. As alluded to, this section of the statute requires the EPA Administrator to take into account the seriousness of the violation and any good faith efforts by the violator to comply with the applicable requirements. RCRA § 3008(a)(3), 42 § 6928(a)(3).

Complainant has used the 1990 Revised RCRA Civil Penalty Policy ("Penalty Policy") in the calculation of its proposed penalty. This document, which serves as guidance in the assessment of penalties in cases involving RCRA violations, states that in civil judicial cases "EPA will use the narrative penalty assessment criteria set forth in the policy to argue for *as high a penalty* as the facts of a case justify should the case go to trial ...." Penalty Policy at 2 (emphasis added). The stated purposes of the Penalty Policy are to "ensure that RCRA civil penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained." *Id.* at 5.

The Penalty Policy delineates a methodology for calculating penalties for RCRA violations. This calculation method entails first determining a gravity-based penalty for the violation based on the penalty-assessment matrix, then, if applicable, the addition of a multi-day component, followed by the adjustment of the sum of the gravity-based and multi-day components on the basis of the circumstances surrounding the case and finally, the addition of the appropriate economic benefit, if applicable, which was derived from the noncompliance. *Id*. at 1.

The instant proceeding is governed by the Consolidated Rules of Practice ("Rules of Practice") set forth at 40 C.F.R. Part 22. Under the Rules of Practice a complainant in a civil administrative hearing has the burden of proof with respect to establishing the appropriateness of the proposed penalty amount. 40 C.F.R. §22.24(a). *See also New Waterbury, Ltd.*, 5 E.A.D. 529, 536-540 (EAB 1994). Specifically, Section 22.24(a) states that "[t]he complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. §22.24(a). Thus, EPA must demonstrate that the penalty amount it proposes is appropriate.

Section 22.27(b) of the Rules of Practice requires the Presiding Officer, (i.e. the Administrative Law Judge, "ALJ," or Court) in this matter, to consider the evidence and any penalty criteria delineated in the applicable statute in determining an appropriate penalty amount. 40 C.F.R. § 22.27(b). In addition, the ALJ must consider any civil penalty guidelines issued under the statute and give a detailed explanation in the initial decision explaining how the final penalty amount corresponds to the penalty criteria set forth in the Act. The Rules of Practice and existing case law grant ALJs the discretion to depart from the penalty amount proposed in the Complaint. This discretion also includes the latitude to determine whether the applicable penalty policy should be applied to calculate the penalty in a particular case. *Hall Signs, Inc*., 1998 EPA. App. LEXIS 113 (EAB, December 16, 1998); *Employers Insurance and Group Eight Technology, Inc.*, 6 E.A.D. 735 (EAB 1997). If the ALJ decides to assess a penalty in an amount which differs from the proposed penalty amount, the initial decision must articulate the reasons for the increase or decrease. *Id.*

Complainant has proposed that Respondent should be assessed a penalty in the amount of $64,900. Respondent seeks the reduction of the proposed penalty amount and asserts there is ample reason in the record for diverging from the Penalty Policy. For the reasons set forth below, the Court finds that the Complainant has failed to demonstrate that the penalty it proposes is appropriate for the violation in this matter. As a result, the Court departs from the policy and the penalty will be reduced to an amount which is appropriate to the violation and which better reflects the penalty criteria which apply to this proceeding.

EPA's perspective of the violation

The calculation EPA derived under its proposed penalty was based on the Respondent's failure to have a permit or to qualify for interim status to allow them to store hazardous waste in the accumulation tank. This failure, as admitted by the Respondent and found by the Court, resulted in the violation of Section 3005(a) of RCRA and 40 CFR § 270.1(c),(329 IAC 3.1-13-1). Although EPA acknowledges that a generator of hazardous waste may accumulate such waste for 90 days without a permit or interim status, as long as the provisions of 40 CFR § 262.34(a) are satisfied,[9] it maintains since the Respondent did not meet those provisions, this case is properly viewed as one involving the operation of a TSDF without a permit or interim status. EPA Br.
at 3-5. Complainant asserts that the $64,900[10] penalty amount it seeks was determined upon considering Respondent's violation in light of the RCRA penalty criteria, as well as in

[9]This section, entitled "accumulation time," includes the provision, among others, that the requirements of subpart CC of 40 CFR part 265 must be met.

[10] The penalty was calculated by John Gaitskill, the EPA inspector. However, Harry Duncan Campbell, an environmental protection specialist since 1993 with the Waste, Pesticide, Toxics Division in the Enforcement Compliance Assurance Branch of the Region 5 EPA, testified during the hearing regarding the proposed penalty calculation.

accordance with the Penalty Policy. EPA concluded that the potential for harm for the violation in this matter was "minor," however, it also concluded that the extent of the deviation was "major." Additionally, EPA factored in the multi-day component[11] of the violation and then

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[11]The parties have raised issues regarding when EPA first detected the violation (i.e. the absence of the valve), and the number of days of violation. However, for the reasons which follow, the Court has determined that these questions do not impact the penalty in this instance and therefore do not need to be resolved.

EPA maintains that it did not conclude that MAB's accumulation tank failed to meet the requirements of Subpart CC, and therefor needed the valve installed, until after it received the information request responses from the Respondent. MAB claims that approximately 165 of the 179 days of violation "represents a period during which EPA and IDEM had actual knowledge of the violation..." MAB Br. at 7. Respondent asserts EPA discovered the missing valve during the June 1998 inspection, but did not inform MAB of this until October 22, 1998. *Id.*

In support of its position, EPA contends that the inspection report and Sladek's testimony confirm that, while the accumulation tank was viewed on June 3rd, no one inspected the top of the tank where the escape vent is located. (EPA's Ex. 1 and Tr. 206) EPA points out that Sladek himself testified that the escape vent was not discussed nor was there discussion regarding the need for a valve. Tr. 187, 203, 206-207. Further, the inspectors did not get to view documentation during the inspection to determine whether Subpart CC applied.

On the other hand, the handwritten notes made by the EPA inspector, John Gaitskill, provide an element tending to support MAB's contention. Those notes reflect that EPA witness Campbell acknowledged that a sketch included with the notes seem to indicate the presence of an open pipe in the roof of the tank. In response, EPA, after first highlighting that the notes were not admitted into evidence, then turns to the same notes to point out the absence of any explicit notation in them of a missing valve. EPA Br. at 13. EPA notes that two requests for information followed in the wake of the inspection, the first on October 22, 1998 and the second on February 10, 1999. It also notes that in its April 15, 1999 letter to MAB, EPA declared in its notice and opportunity to show cause that the conclusion that RCRA provisions may have been violated was based, in part, on the information received from those requests. *Id*. at 13.

EPA maintains that under the provisions of 40 CFR § 265.1082(a)(1), the Respondent became subject to the requirements of Subpart CC on December 6, 1996 and that it was not eligible for the one year extension referred to in subsection (a)(2) of that provision. To be eligible for the extension, EPA asserts, without providing any supporting citation to authority, that one had to prepare an implementation schedule for the installation of the air emission control equipment, have the schedule on file at the facility by December 6, 1996, and actually have the control equipment installed by the end of the extension period (i.e. December 8, 1997). As Respondent met none of these requirements, EPA concludes it was not eligible for the extension.

Despite the lengthy arguments, the Court concludes that the matter can be resolved on more fundamental grounds. The Complaint charges that MAB failed to equip the valve on the tank from December 6, 1996 through November 18, 1998. Thus, the number of days of violation were approximately 685 days. As EPA elected to charge MAB with only 179 of the potential

adjusted the penalty amount to account for Respondent's "good-faith."

Thus, EPA sees the violation and the penalty analysis as a straightforward affair. MAB ran afoul of the provision governing storers of hazardous waste and the general rule provides that such storers must have either a permit or interim status. While MAB used to qualify under the 90 day exception to the general rule, it lost that status by failing to install the air emission control. *Id*. at 17. This failure initiated a cascade of consequences. Without the valve installed, Respondent was no longer in compliance with Subpart CC. That, in turn, meant that its facility, formerly viewed as a generator, had been transformed into a TSDF. *Id*. at 18-19. This transformation, however, was immediately reversed once the Respondent installed the valve. No longer considered a TSDF, it then resumed its satisfaction of Subpart CC, met the requirements of the 90 day exception and could go back to accumulating hazardous waste without any permit and without having interim status.

EPA's penalty calculation analysis.

EPA first points out that Section 3008 of RCRA provides that, in assessing a penalty, the seriousness of the violation and any good faith efforts to comply with the applicable requirements are to taken into account. It also reminds that under the statute the penalty can be up to $25,000 per day of violation and contends that the penalty it seeks conforms to these criteria. *Id*. at 22.

Curiously, after taking note of the stated purposes[12] of the penalty policy, EPA then promptly turns to a federal district court decision in which the policy itself is never mentioned. The case, *United States v. Ekco Housewares, Inc*., 853 F. Supp. 975 (N.D. Ohio 1994), stated that in determining the penalty under RCRA a court should "give effect to a major purpose of a civil penalty: deterrence." *Id*. at 989, EPA Br. at 24. EPA points out that the district court expressed that a substantial penalty is in order even if the violator is not likely to repeat the violation, as deterrence of others is also a penalty consideration.

While the district court did so opine, to be fair, this Court believes that a broader discussion of *Ekco* is in order. Ekco had discharged hazardous waste to a surface impoundment between 1980 and 1984. The district court in assessing a $4.6 million civil penalty determined that Ekco, as a TSD facility, was subject to the interim status requirements and failed in complying with several requirements related to that status. Although the district court noted, as EPA observed, that a civil penalty should give effect to the goal of deterrence, it also remarked that "[t]he assessment of a civil penalty is committed to the informed discretion of the Court"

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685 days, the date EPA actually became aware of the missing valve and the applicability of the one year extension are mooted. This is the case because the applicability of either issue in Respondent's favor would still leave days of violation far in excess of the 179 days charged.

[12]See *supra* at page 4.

and that substantial penalties are appropriate where one has "violated prior consensual agreements with environmental agencies." *Id*. at * 989. In contrast, MAB had no prior history of violations nor had it entered into any consent agreements.

In addition, EPA failed to note that, on appeal, the Sixth Circuit determined that the trial court gave too little weight to various mitigating considerations and remanded for such reassessment. In responding to Ekco's assertion that it had been levied with a disproportionate penalty, the appeals court agreed that "the reasonableness of a penalty ... is a fact-driven question, ... that turns on the circumstances and events peculiar to the case at hand," noting that Ekco's violation occurred in the context of "continued default ... under ... the regulations and the consent order." 62 F.3d 806 at * 816.

Returning to its discussion of the RCRA penalty policy, EPA describes the penalty determination as a four step process. This process begins by determining a gravity-based penalty, and the employment of a penalty matrix. After a multi-day component is considered, in the third step adjustments are made for case specific circumstances. Finally, any economic benefit from non-compliance is factored into the total.

For the first step, gravity itself is divided into two aspects. First, the potential for harm posed by the violation, that is, the risk to human health or the environment and, a separate consideration, the impact of the violation on the "statutory or regulatory purposes or procedures for implementing the RCRA program" are each assessed. Then, as a second step, the extent to which there was a deviation from the requirements is evaluated.

In examining this first gravity component, the danger to human health and environment, EPA concedes both were low. This evaluation considers the likelihood of exposure and the seriousness of any potential exposure. Low tank vapor pressure and quick dissipation of the small level of emissions combined to make the emissions undetectable more than a few feet from the vent. Toxicity, as reflected by vapors that EPA speculated may have contained a small amount of toluene, was also negligible as EPA conceded such vapors were undetectable a short distance from the vent. The same analysis applied to the issue of ignitability, which was also deemed to be low. EPA Br. at 27.

Even in its analysis of the harm to the RCRA regulatory program, which measures "the adverse affect (sic) noncompliance may have on statutory or regulatory purposes or procedures

for implementing the RCRA program," EPA ultimately[13] concluded that this too was "minor." *Id*. at 28, 30.

However, EPA did determine that one aspect of the gravity based penalty was major: the extent of deviation from a statutory or regulatory requirement. This aspect examines the "degree to which the violation renders inoperative the requirement violated." *Id*. at 30. It measures the "extent to which the violator's performance complied with or deviated from the applicable requirements." *Id*. In assessing this aspect here, EPA depicts MAB's deviation as "the illegal storage of hazardous waste without a permit or interim status [and thus as the] illegal operation of a TSDF." *Id*. In support of its analysis, EPA identifies *Everwood Treatment Company*, 6 E.A.D. 589 (September 27, 1996)("*Everwood")*, *Harmon Electronics, Inc*., 7 E.A.D. 1 (March 24,1997), ("*Harmon*") *Ashland Chemical Company*, RCRA (3008) Appeal No. 87-1, 3 E.A.D. 1 (October 25, 1989)("*Ashland*"), and *A.Y. McDonald*, 2 E.A.D. 402 (July 27, 1987)("*McDonald*") as cases in which the extent of deviation was "major." To these it adds *Bloomfield Foundry, Inc*., RCRA VII 88 H 0017 (July 14, 1989)(1989 WL 253207)("*Bloomfield*") and *Zalcon Inc*., RCRA V W-92- R-9 (June 30, 1998)(1998 WL 422233)("*Zalcon*"), as cases in which the potential for harm was described as less than major, while the extent of deviation was described as "major."[14]

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[13]Before reaching the conclusion that the harm to the program was in fact "minor," EPA revisited its view of the gravity in this situation: a respondent who stored hazardous waste without a permit and without interim status. This permit-less activity is not only illegal but poses a "very significant potential for harm" to the RCRA regulatory program, with its illegal operation of a TSDF. Operating a TSDF without a permit, EPA informs, is considered to be of the "highest importance" as the agency has "an urgent need to know who is treating, storing and disposing of hazardous waste." Citing *A.Y. McDonald Industries, Inc*., 2 E.A.D. 402 (July 1987) for the principal that permits are crucial to RCRA enforcement activity and go to the "very heart of the RCRA program," EPA points out that the failure to have a permit warranted increasing the potential for harm to "major." Having outlined the graveness of such a failure, EPA ultimately concedes that in this case such a situation does not apply, leaving its analysis with the determination that the potential for harm to the program by MAB's failure was, in the end, minor. EPA Br. at 28-30.

[14]EPA does call to attention a case in which hazardous waste was accumulated, without a permit or interim status and without meeting the 90 day exemption for generators, in which it determined the extent of deviation to be "moderate" instead of "major." In *Bil-Dry Corp*., RCRA-III-264 (October 8, 1998) (1998 WL 743914), EPA sought, in Count I, a gravity based penalty of $6,000 and a multi-day penalty of $250 per day, for a total penalty of $36,000 for respondent's failure to have a hazardous waste permit or interim status. The result was a decision where a $20,000 penalty was imposed for that Count. EPA relates that the court rejected the agency's claim for a multi-day penalty "on grounds not relevant here." EPA Br. at 32. While that characterization is accurate, with that court finding that the multi-day component was inapplicable to violations concerning waste drums, it also found the multi-day component to

While EPA cites *Everwood* as an example of a 'major' extent of deviation case, it should be noted that the Respondent did not challenge that conclusion. Further, the violation was in the context of a "total failure to adhere to the permitting requirements." The respondent had disposed of soil contaminated with arsenic and other chemicals into a pit without a permit and without complying with certain land disposal restrictions. Although EPA sought a total civil penalty of $497,500, the Board, observing that a judge must not only consider the risk of exposure to humans and the environmental harm, but must also consider the harm to the RCRA program (i.e. the permitting scheme) as well, still reduced the penalty to $273,750,. The Board also stated that while the judge must consider any civil penalty policy, "in any particular instance ... [the court] may depart from the policy as long as ... the reasons for departing from it ...[are adequately explained]."

Further, in the Court's view, *Bloomfield* and *Zalcon*, both cited by EPA as examples where the potential for harm was deemed 'less than major' but extent of deviation termed 'major,' are highly distinguishable from the facts present here. In *Bloomfield*, the court found that the respondent accumulated hazardous waste for more than 90 days and consequently was an operator of a storage facility and subject to the requirements of 40 C.F.R. Parts 265 and 270. Consequently, it was found that the respondent violated Section 3005 and the regulations at 40 CFR Part 265 and Section 262.34, among other provisions. Importantly, Bloomfield had a history of storing hazardous waste without a permit and had entered in a consent agreement only months before the action. The case is of no value to the analysis here because the respondent did not challenge EPA's view that the extent of deviation was major for that count. Further, while EPA had asserted that the potential for harm *was* major, the judge rejected that assessment.

In *Zalcon*, another case cited by EPA as a less than major harm coupled with a major deviation, the respondent had failed to submit a post-closure permit application and EPA sought a $81,100 penalty for that failure. Although EPA is correct that the judge placed the violation in the minor harm but major extent of deviation category, it should not be overlooked that the respondent's challenge was to the imposition of multi-day penalties and that the court found the "highly unusual" circumstances present to justify waiver of the multi-day penalty under the 1990 RCRA Civil Penalty Policy, reducing the penalty to $9,000. Moreover, that court found, in the alternative, that if the circumstances did not constitute the "highly unusual" standard to justify waiver of the multi-day penalty, then the penalty policy was to be disregarded entirely.

In the Court's view, none of these cases lend assistance to the evaluation of the appropriate penalty to be applied in the present matter. Rather, they serve to highlight the individuality of each circumstance and the propriety of departing from the penalty policy's formulation when the facts warrant it.

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be arbitrarily calculated in general and accordingly departed from the use of the penalty policy entirely. The decision to depart from the policy and to look to the statutory criteria alone, was not disturbed by the Board nor were the court's conclusions regarding Count I.

With EPA's view that the potential for harm should be designated as "minor" and the extent of deviation as "major," the policy mechanically leads to the matrix cell with a $1,500 to $2,999 range. From this range, EPA chose $2,250, the mid-point within the cell, as a starting point of "neutrality." *Id*. at 33. EPA, while acknowledging that the policy itself provides that the selection of the amount within a given cell should consider the "seriousness of the violation ... efforts at remediation or the degree of cooperation ... size and sophistication of the violator, the number of days of violation, and other relevant matters," suggests that it really had little choice but to pick the mid-point within a cell because if that is not the "starting point, the Complainant would not be able to make proper adjustments." *Id*. quoting from the penalty policy at page 10, JX-1.

EPA goes on to explain that it made no adjustments for the "seriousness of the violation" because it was "previously captured" in assigning the minor/major ranking. While MAB's cooperation was noted, the Respondent's size and sophistication and the number of days of violation wiped out any downward adjustment in the penalty. The end result of this analysis was for EPA to leave the penalty at the mid-point of the minor/major gravity based cell.

Since $2,250 was assigned to gravity but a $64,000 penalty was proposed, EPA acknowledges that most of the penalty comes from the duration of the violation and is reflected in the multi-day component. *Id*.at 34. Working from presumption under the policy that multi-day penalties are presumed to be appropriate for days 2 through 180 for minor/major violations and given that MAB's violation ran from December 6, 1996 through October 23, 1998, EPA notes that such penalties must be sought "unless case-specific facts overcom[e] the presumption..." *Id*. at 35. Applying this test, EPA relates it found no such factors to overcome the presumption in this case.[15]

Within this multi-day component the penalty range is from $100 to $600 and, as it did with the gravity matrix, EPA chose the mid-point amount of $350. Also, as with its gravity analysis, EPA determined that MAB's cooperation was negated by its size and sophistication and, in the end, it concluded that the mid-point of the matrix cell remained appropriate. On this basis, it multiplied 179 days times $350 and arrived at the $62,650 total for the multi-day component. *Id*. at 36. After adding in the 10% inflation adjustment to these components, EPA applied adjustment factors for good faith, the degree of willfulness and/or negligence, violation history, ability to pay and "other unique factors," and concluded that these erased the inflation adjustment. The effect of this was a final proposed penalty of $64,000. *Id*. 34-40.

[15]EPA notes that seeking more than 180 days for a minor/major violation is discretionary and that it elected to seek the multi-day component only for days 2-180, though 685 days of violation were alleged to be involved. EPA Br. at 35.

MAB's penalty analysis

MAB maintains that its failure had only an "infinitesimal impact upon the integrity of the EPA's RCRA permitting program," and consequently the penalty imposed should be reduced to reflect its minimal interference with the penalty policy's overarching objectives of deterrence, fair penalties and swift resolution of environmental problems. *Id*. at 8 -9.

Pointing out that only about 26% of the contents of the tank was solvent, with the balance being water, Respondent contends that there would be no significant emissions because the solvent produced no meaningful vapor pressure. By its calculations, only 10 pounds per year of emissions would be produced. Thus, MAB emphasizes that the environmental harm created by its omission was minimal. Further, since it had purchased the valve, there was no economic benefit derived from the failure to install it.[16]

Taking issue with the penalty policy assessment of gravity, MAB argues that EPA's analysis of the "extent of deviation" is flawed because the agency, in effect, double counts the impact of the violation's potential to undermine RCRA's environmental protections. It submits that once the agency determined that the environmental harm from the missing valve was minor, the analysis should have turned to the impact of the missing valve on the permitting scheme. This analysis would have revealed that the absence of the valve had only a minor impact on RCRA. Instead, EPA turned its attention away from the missing valve and analyzed the violation as one which focused on MAB's new status as an illegal TSDF.[17]

MAB asserts that EPA revisited the same issues it addressed in evaluating the gravity when it examined the "extent of deviation" but inconsistently concluded that a "major" designation applied for that factor. It asserts that the agency's "major" designation is fueled by the policy determination that all TSDFs must be so labeled. Respondent submits that EPA's analysis, in adopting this approach, ignores MAB's historical status as a generator. *Id*. at 10. This, it suggests, yields a result at odds with the policy itself because EPA's analysis focuses on the Respondent as a TSDF and ignores the policy's pronouncement that it will examine the violator's overall compliance with RCRA. Had MAB's overall RCRA compliance been the measure, the evaluation would have considered its long history of compliance as a generator. *Id*. at 11.

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[16]While these particular contentions of the Respondent may be in dispute, the important point is that the parties are in agreement that the environmental harm was minimal and that MAB gained no economic advantage from its failure to install the valve.

[17]Ultimately, MAB agrees with EPA's bottom line regarding gravity in which the Agency concluded that the gravity was "minor." Accordingly, while the parties would take different routes to reach the same conclusion that the gravity in this instance was "minor," in this instance the Court's focus remains on the conclusion. Accordingly, this aspect of the penalty analysis produces no recognizable dispute for resolution.

While MAB acknowledges, in principal, the proposition that a violation resulting in minor environmental harm could still constitute a major violation, in terms of harm to the RCRA program, it urges that such a conclusion cannot be reached in the absence of an evaluation of the context of the violation. *Everwood*, in its estimation, is an example of such a case because, although the violator's activity of burying waste in a pit presented only a minimal risk of human or environmental harm, the unpermitted and concealed disposal of waste was a direct assault on the very activity RCRA was intended to prevent. The decision in *Harmon*, MAB submits, presents another such example where the major deviation label is warranted, because the violator in that case had "comprehensive and serious failure[s]" with the RCRA requirements. *Id.* .

In support of its argument that there are instances when the deviation from the RCRA regulations are properly labeled as "minor," MAB points to the Board's decision *In the Matter of Sandoz, Inc.*, 2 E.A.D. 324, (E.A.B. 1987)("*Sandoz*"). Respondent relates that the Board considered that, although Sandoz failed to implement a groundwater monitoring system, it was not seeking to evade the entire permitting process and had met nearly all other RCRA requirements. Under those circumstances the Board determined that the harm to the RCRA program was not "major."

In light of *Sandoz*, MAB suggests that its deviation from the RCRA program was minor, as it met most of the regulatory requirements applicable to generators of hazardous waste, deviating "only somewhat" from them. *Id*. at 12. It support of this view, it points to its lawful storage of solvent waste, that such waste was timely removed by a recycling contractor on a regular basis, that it complied with manifesting and reporting requirements, that it engaged an outside contractor to evaluate its compliance under RCRA, and that it had purchased the air emission device and shipped it to the facility, failing only to see that had in fact been installed. Viewed in this light, MAB asserts that both axes on the penalty matrix should have been considered minor, a conclusion which would produce a penalty range between $100 and $499, as opposed to the $2250 derived by EPA from its minor/major designation. *Id.*

With regard to EPA's multi-day assessment, MAB concedes that the minor/major gravity designation operates to create a presumption for including the multi-day aspect. However, as with its gravity analysis, MAB contends that case-specific factors can overcome the presumption of its applicability. In support of this contention, MAB refers to *In the Matter of Cypress Aviation, Inc. and the City of Lakeland, Florida*, 1991 WL 209855 (E.P.A. 1991)("Cypress"), a case in which the judge, relying on an earlier version of the RCRA penalty policy, noted that multi-day penalties were intended for "continuing *egregious* violations." *Id*. at 13 (emphasis added). MAB also points to *Harmon* as a case in which, despite the gravity designation of the respondent's violations as a major/major gravity-based situation, the court looked to the respondent's good faith efforts to comply with RCRA and its swift resolution of the problems, in deciding that the low end of the multi-day range was most appropriate. Analogizing its attendant facts to *Harmon*, MAB believes that the multi-day component should not be applied in this instance either.

Respondent also takes issue with EPA's "good faith" analysis and its crediting only a 10%

reduction for that factor. Highlighting the penalty policy's recognition that prompt correction of problems is a key consideration in the evaluation of good faith and noting the ample credit that was afforded respondents for their good faith actions in *Fishel v. Westinghouse Electric Corp*., 17 Envtl. L. Rep. 20465 (M.D. Pa 1986), and *In re Rybond, Inc*., 6 E.A.D. 614 (EAB 1996) ("Rybond"), MAB asserts that its swift resolution of the problem was insufficiently recognized, particularly when violation itself was an inadvertent omission. Relying upon the 86% reduction afforded to the violator for its swift resolution of the violation in *Rybond,* MAB suggests that it too should have a reduction on that order.

Last, MAB, looking to the EAB's decision in *Chempace*, 2000 WL 696821, (EAB May 18, 2000), submits that the record provides ample justification for the Court to depart from the penalty policy entirely. Under either approach, MAB asserts that the appropriate penalty should be approximately $499. *Id*. at 15.

EPA's Reply Brief

In responding to MAB's argument that case-specific factors should rebut the presumption that a multi-day component should be applied, EPA distinguishes the cases Respondent relies upon. In *Cypress*, cited by MAB for the principal that multi-day penalties are appropriate for continuing "egregious" violations, EPA observes that *Cypress* relied upon an earlier version of the penalty policy. EPA's Reply Br. at 18-19. The earlier version, published in 1984, was supplanted by the 1990 penalty policy and under the new policy the Agency no longer refers to "continuing egregious violations" to trigger application of multi-day penalties. Instead, the minor/major designation operates to create a presumption for multi-day penalties. This presumption, EPA concedes, is rebuttable where warranted by case specific factors, which constitute "highly unusual"circumstances.

In addition, EPA views *Cypress* as a "highly unusual case" which rejected the claim that there was a continuing violation since there was only a single illegal land disposal involved.[18] The court rejected the Agency's attempt to cast the requirement to clean up such disposals into independent violations. In contrast, in MAB's case, with each day of failing to have the required permit, a separate violation occurred. *Id*. at 23.

EPA observes that the case specific factors raised by MAB rest upon the assertion that the employee responsible for RCRA compliance issues was suffering from Lou Gehrig's disease and that neither the employee, nor a consulting firm MAB hired to ensure RCRA compliance, detected that the valve had not been installed at Respondent's Terre Haute facility. However, EPA notes that, other than the Respondent's assertions, the record is devoid of evidence

[18]EPA also distinguishes *Harmon* because in that case the respondent discovered and reported the violation. *Harmon* involved a RCRA violation designated under gravity as "major/major" in which the judge, employing a 66% reduction, decreased the multi-day penalty to the low end of the range.

supporting these claims.[19] Further, noting that RCRA is a strict liability statute, EPA contends that MAB had a duty to ensure that its employee's health problems would not interfere with its compliance.

EPA also disputes the Respondent's claim that more credit should have been afforded for its good faith efforts to comply. Following the prescription of the penalty policy, EPA notes that downward adjustments to the penalty are not made where a respondent's efforts consist primarily of coming into compliance, as it is assumed that one will engage in such efforts after EPA has discovered a violation. In EPA's view, the Respondent "made no attempt to install the device until after U.S. EPA's inspection and information requests..." *Id.* at 26. Consistent with this view, EPA believes that Respondent's reliance on *Fishel v. Westinghouse Electric Corp*., 17 Envt. L. Report, 20465 (M.D. Pa. 1986) is not supportable because, as opposed to the governmental enforcement action involved here, that case was a citizens' enforcement action and encompassed CERCLA and CWA violations in addition to RCRA. EPA, while conceding that the Court reduced the proposed penalty from $100,000 to $10,000, asserts the court "apparently did not seriously consider multi-day penalties." *Id*. at 28.

Finally, EPA maintains that the Respondent misconstrues the opinion in *Rybond*. Although acknowledging that the Board "concluded under the totality of the circumstances, a $25,000 penalty was appropriate," and thereby reduced EPA's proposed penalty of $178,896, it distinguishes the case because, as a lessor, Rybond was only indirectly involved with the violation of its tenant, was unrepresented by counsel "at important times in the enforcement process" and because there was a "lack of a serious risk to public health or the environment associated with [the] violations." *Id*. at 29.

MAB's Reply Brief

In its Reply Brief, MAB continues its theme that the violation in issue here has been miscast[20] by EPA, unfairly painting it as a TSDF illegally operating without a permit, when the

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[19]EPA suggests that, even if the record had supported the employee's illness, Respondent's claim that the failure stemmed from this problem is unsupported. It notes that the employee did ship the valve to the facility and that he did not retire until six months after the compliance deadline had passed.

[20]The Respondent also has suggested that this case should have been brought as a failure to install the required air emission control valve, and therefore as a violation of Subpart CC's requirements. In response, EPA submits that this may not be an option because, arguably, one is not required to meet that Subpart's provisions until one becomes subject to the requirement for a permit. Taking that approach, EPA submits, could have subjected the complaint to dismissal, although it acknowledges that some decisions have concluded violations of 40 CFR § 262.34 can stand alone. *Id*. at 19, 20, ftnt.21. This issue, while interesting, need not be resolved because MAB has already conceded liability. Such concession encompasses the basis of liability set

more accurate depiction is that of a generator, with a history of compliance, that in this instance failed to install a minor pollution control device. R's Reply Br. at 1. In support of its assertion that its noncompliance was of a low order, MAB observes that, despite the dual EPA and Indiana DEM inspection team, they too did not detect the missing valve during their inspection.

MAB notes that EPA looks to the Board's decision in *McDonald* for the principal that permitting is central to the effectiveness of RCRA and agrees with that observation. However, MAB believes that *McDonald* highlights the inappropriateness of analogizing that case with EPA's assessment in this instance, because a missing valve cover is not comparable to McDonald's wholesale disregard of RCRA's requirements. Similarly, MAB concedes that it is critical for EPA to be aware of all genuine TSDFs but that such facilities must be distinguished from "momentary" TSDFs which acquire such status because of a relatively minor violation. *Id*. at 3.

Discussion

Several of the cases cited by the parties provide useful guideposts[21] for this RCRA penalty analysis. A brief discussion of these cases follows.

In *Cypress* the respondent had disposed of hazardous waste in an unpermitted landfill and never analyzed the waste to determine if it was restricted from land disposal. The deposits, F002 waste, were disposed on the land for more than two years and EPA rated the violations as major for their potential for harm and in the extent of deviation. In reducing the penalty from EPA's proposed $54,000 to $37,500, the judge found that it was not an "egregious" violation and therefore not eligible under the penalty policy for the "continuing violation" designation. Although EPA correctly observes that the case was decided in the context of an earlier penalty policy, *Cypress* points out that departure from a penalty policy may be appropriate in a given case and such departure will be upheld where the the judge's determination of the penalty is derived from the particular facts involved. *Sandoz* makes this point as well. There, while the court found that Sandoz violated 40 CFR Part 265 by failing to properly construct and operate a groundwater monitoring system, EPA took issue with the court's imposition of a $7,500 penalty, instead of the $36,928 it sought. Specifically, EPA took issue with the judge's determination that the gravity was moderate, instead of major, for the potential for harm and the extent of

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forth in the Complaint, and may not be reargued now.

[21]*Fishel v. Westinghouse et. al*., 640 F.Supp. 442 (M.D. Pa 1985), a case cited by MAB, is an exception to this observation. In that case the district court had before it a motion for summary judgment against defendant Shealer who was found to have violated RCRA permit and notification requirements. The case is of no discernable value, as the court, while noting that the amount of any civil penalty was a matter within its sound discretion, made no determination of the appropriate penalty or otherwise offered insight into the penalty computation process.

deviation. The Board, however, in rejecting the claim that the judge had erred, reminded EPA that the bounds of the authority to assess a civil penalty are defined by the statute and regulations and, accordingly, "[a]s a matter of law [the court] has properly assessed a penalty if it is not more than $25,000 per day, if he takes into account the seriousness of the violation and any good faith efforts to comply ...and if he considers any civil penalty guidelines ... ."[22]

A.Y. McDonald, involved disposing of hazardous waste without a permit or interim status and failure to comply with groundwater monitoring requirements. It provides another example of deference paid to the trial court's individual analysis of the facts, where the proposed penalty is duly considered and the basis for departure from it is explained. The Respondent, which had dumped more than a million pounds of waste at a site over a four year period, in a setting where access to the site was described as "virtually unlimited," had totally failed to adhere to the regulations. In addressing a judge's obligations with regard to the penalty policy, the Board reiterated that "The Region is *incorrect* in asserting that the Penalty Policy is binding on EPA administrative law judges ... [rather, the court is] obliged only to 'consider' it, which [it] indubitably did." (emphasis added).

Rybond points out that, even where the amount recommended under the penalty policy is upheld by a court, the Board will not hesitate to revisit the penalty where the result would be inappropriate. In that case, the Board had before it the respondent's appeal from a default order issued by the trial judge for its failure to comply with a prehearing exchange order and the attendant $178,896 civil penalty for the five count complaint. The violations stemmed from the permit-less storage of hazardous waste by one of the respondent's tenants. Although the default order was upheld, the Board, applying a "totality of the circumstances" test concluded that the appropriate penalty was $25,000. In reducing the proposed penalty by some 86%, the Board took account of the lack of serious risk to health or the environment, the likelihood that a substantially smaller penalty would still produce a significant deterrent effect on Rybond, and the indirect nature of its involvement. Pointedly, the Board noted that penalty policies are "in no sense binding"on it and, citing its holdings in *Pacific Refining* 5 E.A.D.607, (EAB 1994) and *James C. Lin and Lin Cubing* 5 E.A.D. 595, (EAB 1994), remarked that even where the penalty was properly calculated under the policy, it was free to apply additional reductions in the penalty in appropriate circumstances "based on a full consideration of the statutory penalty factors." Further, after agreeing that good faith efforts, made after a violation has been detected, do not afford a basis for reducing the penalty under the RCRA penalty policy, the Board proceeded to consider Rybond's efforts to work cooperatively with EPA to dispose of the hazardous waste as a basis to substantially reduce the penalty, and concluded that sufficient deterrence would also be achieved.

It is also worth noting that in assessing the penalty upon full consideration of the statutory

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[22]However, the Board, relying on the respondent's own figures, did reassess the judge's economic benefit analysis, finding that Sandoz saved $5898 instead of the $1,000 benefit found by the trial court.

factors, the Board necessarily jettisoned EPA's determination under the policy, and the judge's adoption of that determination, that the moderate potential for harm, the major extent of deviation and the imposition of 180 days of multi-day penalties for the counts should be applied. Thus, *Rybond* highlights that the Board will not allow an inappropriate penalty to stand even when, technically, the calculation is correct under the policy. In such circumstances the Board assesses the "totality of the circumstances" to arrive at an appropriate penalty.

Placing the violation in perspective

EPA acknowledges that prior to December 6, 1996 the Respondent was regulated by the State of Indiana as a generator of hazardous waste and was entitled to store its waste under the 90-day exception and accordingly, under this status, it did not need a permit or interim status. Things changed, however, after December 6, 1996, because additional requirements were added to the 90-day exception and the Respondent did not comply with one of these new provisions. EPA Reply Br. at 1-2. Once the Respondent fell out of compliance for the 90-day exception, it could then only store hazardous waste by having a permit or interim status.

When it inspected the Respondent on June 3, 1998, EPA maintains it did not know whether Respondent continued to qualify for the 90-day exception. This determination, not discernable at first, required figuring out whether MAB satisfied the Subpart CC requirements. To evaluate this, EPA issued an information request on October 22, 1998 and a supplemental request in February 1999. All of this information led EPA to conclude, some ten months after the June inspection, that MAB did not meet the Subpart CC requirements.

While acknowledging that the Respondent's violation produced only a minor potential for harm, EPA asserts that its designation of the violation as a "major deviation" from the requirements was proper. As previously discussed, under the penalty policy, gravity is measured by the potential for harm created and the extent of the deviation. The potential for harm analysis itself has two parts. First, it looks at the risk presented to human health and to the environment. For this part, EPA has conceded that, when one examines the risk of human or environmental harm posed by the violation, the harm was minor. EPA Reply Br. at 6. The second part of the harm analysis examines the harm to the RCRA regulatory program. Focusing on this aspect of harm, EPA asserts that the label "major" properly attaches if the violation has or may have a substantial adverse effect on the purposes or procedures implementing RCRA. In its view, storing hazardous waste without a permit or interim status usually amounts to major harm. However, given a host of ameliorating factors,[23] EPA concluded that the harm to the RCRA

[23]As described earlier, these include that MAB did not conceal its storage activity and that the State of Indiana was well aware of MAB's storage activity and regulated this activity as a "generator." So labeled by Indiana as a "generator," Respondent in fact complied with the requirements imposed on generators for years. In addition, the violative storage did not result in a land-based unit that would cause regulatory burdens for years. EPA Br. 29 - 30 and EPA Reply Br. at 9.

program was in fact minor in this case.

While finding the potential for harm to be minor,[24] EPA points out that the analysis of the harm is distinct from the extent of deviation. Its analysis of the extent of deviation, which measures the degree which the violator missed conforming to the requirements, led it to conclude that this factor was properly labeled as "major" because there was substantial noncompliance. It contends that the storage of hazardous waste without a permit resulted in a deviation from the requirements to the extent that most or at least important aspects of the requirements were not being met. This is the case, EPA contends, because permitting requirements go to the heart of RCRA: "[t]he requirement to have a permit for the storage, treatment or disposal of hazardous waste is arguably the central provision of the entire RCRA program." EPA Reply Br. at 9. By not having a permit, MAB completely deviated from this fundamental RCRA requirement.[25]

In distinguishing harm from the extent of deviation, EPA argues that a "small extent of deviation can lead to a grave harm" and, conversely, a "large extent of deviation can lead to small harm." *Id*. at 10. Thus, one can have major deviation with minor potential for harm. Restated, EPA summarizes its point by noting that the "deviation analysis measures the extent to which the Respondent had missed the mark; the harms analysis measures the harm caused by missing the mark." *Id.* at 13, footnote 8.

Applying its analysis here, EPA states that it evaluated the missing valve by measuring its impact on the RCRA permitting scheme. It maintains that important aspects of the RCRA regulatory scheme were not met because the requirement to have a permit is "central and fundamentally important in the RCRA program" and if one is presented with a failure to comply with a fundamental RCRA requirement, "case specific facts cannot erase [that] fact." *Id.* at 12. Given that the Respondent stored hazardous waste without getting a permit and that *no part* of the requirement to obtain a permit was completed, the extent of Respondent's deviation was necessarily "major."

Departure from the penalty policy is fully warranted in this case. The Court realizes that EPA's evaluation of the extent of deviation, deemed "major" in this instance, is technically accurate, because MAB had, in a formal sense, become a TSDF. Therefore, when viewed as a

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[24] EPA tries to turn MAB's acknowledgment that it had long known of the requirement to install the valve on the tank against the Respondent, suggesting that, but for EPA's benevolent restraint, it could have used this admission as evidence of negligence and therefore as a basis to increase the penalty. EPA Br. at 15. This is rejected. EPA's own penalty calculation implicitly rejected this construction and this late attempt to recast how it could have viewed the gravity, but did not, is without merit.

[25]In support of this view, EPA cites to *In the Matter of A. Y. McDonald Industries, Inc.* 2 E.A.D. 402 (EAB 1987), *In re: Everwood Treatment Company, Inc.*, 6 E.A.D. 589 (E.A.B. 1996); and *In re Ashland Chemical Co.*, Docket No. RCRA V-W-86-R-13 (ALJ June 22, 1987)

TSDF, Respondent was in total noncompliance with the statutory and regulatory permit requirements for such facilities. However, this analysis is myopic, as it loses sight of the fact that, but for the failure of the installation of the valve, MAB would have continued to be exempt from the permit requirements entirely. In short, had MAB timely installed the valve, it would not have ever been in TSDF status. Thus, although in the abstract Respondent's violation, storing hazardous waste without a permit or exception, and consequently operating a treatment, storage and disposal facility illegally, appears to be quite serious, the underlying reality is that MAB would have continued to be in compliance with Subpart CC had it done one thing: install the pressure relief valve on the tank.

As EPA expressed it:

> Respondent could have avoided the penalty *completely*
> had it installed the air emission control [valve]...

EPA Reply Br. at 3. (emphasis added).

EPA underscored this fact by admitting that:

> [the Respondent] came back into compliance because ...
> in October of 1998, [when the valve was installed]
> it resumed satisfaction of the requirements
> of the 90 - day exception to the requirement to have a permit and
> therefore, it was at that point entitled to the benefit of the exception
> to have a permit. And since it didn't any longer have to have a permit to
> operate, it wasn't a TSDF [any longer].

Tr. 214

Further, even assuming that MAB's minor/major gravity designation was correct, the true depiction of its status within that matrix was not reflected because EPA mechanically adopted the midpoint range within that cell. As its witness conceded, the selection of the mid-point range was made to allow the agency to move up or down within the figures of that cell and therefore was not selected because of the particular facts presented in the case. Tr. 88-89. Selecting the mid-point in order to give the Agency room to roam within the range of penalties for a given matrix cell is hardly a case specific rationale for the selection. Thus, the mid-point selection was initially chosen to permit adjustments, and not because of the particular facts involved.

Second, EPA erred in its multi-day assessment. This resulted from its earlier error in designating the gravity with a minor/major designation. That designation also impacts the multi-day assessment because once the minor/major designation is selected, the multi-day component is presumed to be appropriate. However, EPA's incorrect evaluation of the case specific facts led it to reach the minor/major designation and the presumption that it was appropriate for the multi-day component to be applied. Further, as it did in its gravity analysis, EPA again mechanically picked the mid-point within the multi-day matrix cell, not because of the particular

facts, but rather to allow it room to amble within that matrix cell. Tr. 100.

Having determined that the policy's application was wanting in this instance, the Court turns to the statutory criteria of seriousness and good faith. The seriousness, as outlined above, was manifestly minimal. As EPA has conceded, but for the failure to install the valve, this action would not have been brought. Respondent had a longstanding history of being designated as a generator and only lost that designation during the interval beginning when the regulations were changed and the valve became a requirement and ending when the valve was belatedly installed.
There was certainly no misunderstanding as to what the Respondent was about. Indiana and EPA had always known that the Respondent was a paint manufacturer and had long designated the facility as a generator of waste.

Also to be measured in assessing the seriousness is that the Respondent had in fact purchased the valve and had it delivered to the facility long before the inspection which resulted in the filing of this complaint. While the Court cannot consider MAB's allegation that the failure to install, as opposed to acquire, the valve was attributable in part to the failing health of the employee charged with the installation oversight[26], EPA concedes that the Respondent had the

valve, uninstalled though it was, at the facility. Thus, it is more accurate to describe MAB as a longstanding genuine generator that for a period of time, technically, slipped into TSDF status for want of a valve, rather than a TSDF that had on occasion temporarily qualified as a generator.

A few words need to be said about the valve itself, a subject which EPA studiously avoids mentioning. While the valve served a containment function, EPA has conceded that the waste

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[26]The Court is somewhat sympathetic to the Respondent's situation. Early on it claimed that it hired Sadat Associates "[i]n part, because Mr. Deutsch's health was rapidly degenerating because of Lou Gehrig's disease." MAB Reply Br. at 7. EPA never questioned the veracity of MAB's assertion that its gravely ill employee failed to follow up with the installation. For that reason, it is possible that the Respondent felt lulled by EPA's apparent acceptance of that contention. EPA's seeming acceptance of this claim continued throughout the hearing and ended only when it filed its reply brief. Consequently, on this record, the Agency's reservations about the ill employee contention apparently were not made known to the Respondent until it was too late to respond. However, this is litigation and the Court must rely only on the transcript record, admitted exhibits and stipulations. None of those record sources provide a basis to make a finding regarding the health of MAB's employee. As a result the Court can not make any finding regarding the employee's health or the impact of such health on MAB's compliance. Such consequences should serve as a sobering reminder to all litigants of the hazards when a party starts assuming that certain facts are not in dispute.

released before it was installed was minimal and that the harm was minimal as well. In EPA's words, without the valve any hazard would dissipate within a few feet of the vent. EPA Br. at 27. Further the valve itself served no recycling, filtering or rerouting function for the waste. Rather its purpose was simply to open, burping the waste directly into the atmosphere when the pressure in the tank reached a certain level.

Respondent's overall good faith also points in the direction of a lower penalty than proposed by EPA. As the Board showed in *Rybond*, while efforts made after a violation has been detected are not credited under the RCRA penalty policy, in certain circumstances it may be appropriate to consider a respondent's efforts to work cooperatively. Certainly the description of cooperation applies to MAB in this instance. MAB provided the information requested by EPA's two supplemental requests and the information was reliable to the point that EPA used it in arriving at its proposed penalty assessment. Further, the valve had been purchased and was at the facility before the June 1998 inspection occurred and it was installed immediately after MAB was informed of the oversight.

Conclusion

After considering the statutory factors of the seriousness of the violation and Respondent's good faith efforts, as viewed through the totality of the circumstances, it is concluded that a penalty of $50 per day for each of the 179 days of violation alleged in the complaint, for a total penalty of $8,950, is appropriate in this case.[27] Respondent will, therefore, be assessed a penalty in that amount for its violation of Section 3005(a) of RCRA and its implementing regulations set forth at 40 C.F.R. Section 270.1 (c).

ORDER

A civil penalty in the amount of $8,950 is assessed against the Respondent, M.A. Bruder and Sons, Inc. Payment of the full amount of the civil penalty assessed shall be made within thirty(30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c). Payment shall be submitted by a certified check or cashier's check payable to the Treasurer, United States of America and mailed to:

[27]Although not expressly a statutory penalty consideration, the Court has determined that this penalty will also serve a sufficient deterrence function. MAB has no prior violation history, and it is uncontested that it had the valve at the facility prior to the inspection.

The First National Bank of Chicago
EPA Region V
Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

A transmittal letter identifying the subject case and the EPA docket number and address must accompany the check. Failure of the Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalties.

Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: (1) party moves to reopen the hearing within twenty (20) days after service of the Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the EAB is taken from it by a party to this proceeding, pursuant to 40 C.F.R. § 22.30, within thirty(30) days after the Initial Decision is served upon the parties; or (3) the EAB elects, upon its own initiative, under 40 C.F.R. § 22.30(b) to review the Initial Decision.

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William B. Moran
United States Administrative Law Judge

Dated: October 25, 2001

In the Matter of M.A. Bruder & Sons, Inc., Respondent
Docket No. RCRA-5-99-0005

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated October 25, 2001, was sent this day in the following manner to the addressees listed below:

Original + 1 copy by Pouch Mail to:

Sonja R. Brooks-Woodard
Regional Hearing Clerk
U.S. EPA - Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Copy by Regular Mail:

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_____
Rachele D. Jackson
Legal Staff Assistant

Dated: October 25, 2001