7/21/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
STANDARD TANK CLEANING CORP.,	)	**Docket No. II-RCRA-88-0110**
	)	
Respondent	)	

Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq. Proceeding brought pursuant to 42 U.S.C. § 3008, authorizing Administrator of U. S. Environmental Protection Agency to enforce provisions of an authorized State program. Respondent found in violation of pertinent provisions of the State of New Jersey's Solid Waste Management Act and appropriate regulations promulgated thereunder.

INITIAL DECISION

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: March 21, 1991

Appearances:

For Complainant: Carl Howard, William Sawyer, Gary Nurkin and Joseph Segal, Esquires
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region II
26 Federal Plaza
New York, NY 10278

For Respondent: Jared Stamell, Esquire
555 Madison Avenue
New York, NY 10022

INTRODUCTION

This civil administrative proceeding is the result of a complaint served by the U.S. Environmental Protection Agency (sometimes complainant or EPA) pursuant to section 3008 of the Resource Conservation and Recovery Act (RCRA) 42 U.S.C. § 6928. Section 3006(b) of RCRA, 42 U.S.C. § 3006(b), provides that EPA may, if certain standards are met, authorize a state to operate a hazardous waste program in place of the federal program. In 1985, the State of New Jersey (sometimes State) received authorization to administer its own hazardous waste program. Section 3008 of RCRA also gives EPA authority to enforce provisions of an authorized state program or regulations.

Complainant charges that Standard Tank Cleaning Corp. (respondent) violated certain provisions of the State's Solid Waste Management Act (SWMA). Title 7 of the State's Administrative Code sets out standards, in the form of regulations, for hazardous waste treatment, storage and disposal (TSD) facilities. The complaint alleges that respondent violated section 7.26-19.13(a) of the regulations. These regulations require, in part, that an owner or operator of a hazardous waste facility establish financial responsibility for bodily injury and property damages to third parties caused by sudden accidental occurrences arising from the operation of the facility. Complainant contends that on

February 9, 1988 the State's Department of Environmental Protection (DEP) conducted a review of respondent's financial responsibility. It found that it did not have the required liability coverage for bodily injury and property damage to third parties for bodily injury and property damage caused by sudden accidental occurrences arising from the operation of the facility, and that it was in violation of the aforementioned section of the regulations. In light of their significance, and in the interest of clarity and understanding to the reader, the pertinent sections of the regulations (Appendix A, subsection (j) of section 7:26-9.13, also found in Exhibit C18) are set out verbatim in the Attachment to this Initial Decision.

The complaint seeks a penalty in the amount of $60,850. For the reasons mentioned in its brief, discussed more fully below, complainant is of a mind that the penalty should be increased to $135,312.50. Complainant states that a penalty against respondent is not sought for the period prior to 1985 when respondent's Exhibit 1 was in effect. (Comp. Op. Br. at 15). In addition to the monetary penalty sought, complainant seeks a compliance order requiring respondent to conform to section 7:26-9.13(a) of the regulations within a prescribed period of time.

All issues have been considered by the Administrative Law Judge (ALJ). Those questions not addressed specifically are either rejected or viewed as not being of sufficient import for the resolution of the principal issues presented.

FINDINGS OF FACT

Respondent's operation is located at One Ingham Avenue, Bayonne, New Jersey, and is one of 33 affiliates of Standard Marine Services, Inc. It is a tank cleaning facility located on the waterfront of New Jersey, where it services primarily vessels. Such service includes the cleaning of a vessel when same is going from one cargo to another, or when it is entering drydock for repair. The process involves oily waste generated by the tank cleaning, which waste consists mostly of water, oil and oil additives. (Jt. Ex. 1, Ex. C3 at 5, TR 406-07). At issue is respondent's "landbased RCRA facility." (TR 181).

If an entity is a generator of hazardous waste, a transporter of such, or a TSD facility of such waste, it is required to submit a notification of such activity to EPA. Such written notification is characterized as a Part A application. Thereafter, the facility is required to submit a Part B application which is a more detailed description of the operation. The Part B application embraces such activities as disclosure, contingency and waste analysis plans, plus financial responsibility submissions. Respondent submitted its notification of hazardous waste activity on August 15, 1980. In that document, respondent stated that its types of hazardous waste activity consisted of being a generator, transporter and that it engaged in TSD. Respondent's Part A application followed on November 18, 1980, in which respondent listed the types, and

estimated annual quantity of wastes. On April 11, 1986, respondent submitted a revised Part A application. Again, the types and amounts of hazardous wastes were listed and respondent described the nature of its business as a "gas freeing, tank cleaning, and machine-tank washing facility. Ballasts and oily wastes are separated and recycled within the [respondent's operation]." (Exs. C23, 24, 25; TR 363-66, 378-79.) The record indicates that respondent also filed a Part B application. (Ex. C14, TR 407).

Representatives of DEP visited respondent's facility regularly to examine its conditions. It is unclear, however, whether any of respondent's insurance policies were examined during such visits. (TR 52, 414).

Gordon Beaver (Beaver) is an Administrative Analyst for DEP. His duties consist, in part, of reviewing documents to determine if they are in compliance with the regulations, with particular reference to financial assurance for liability coverage. Compliance, in short, may be demonstrated in three ways. First, by meeting certain financial standards; second, by submission of a liability insurance policy with appropriate endorsement; third, by presenting a certificate of hazardous waste liability coverage. The regulations require, in pertinent part, that for sudden accidental occurrences the owner or operator of the facility must maintain liability coverage in the amount of at least $1 million per occurrence, with an annual aggregate of $2 million, exclusive of legal defense costs. Also, "[T]he wording of an endorsement and the wording of the certificate of insurance must be <u>identical</u> to

the wording specified in N.J.A.C. 7:26-9 (Appendix A)." (Emphasis added). Most facilities show financial responsibility by providing a certificate of liability insurance (CLI). (TR 22, 24-26).

By letter dated November 3, 1982, DEP advised respondent that it had performed a preliminary review of its Part B application. Among the deficiencies noted was that respondent had not furnished a copy of an insurance policy required by the regulations. Another communication was sent by DEP to respondent on or about August 6, 1984, in which deficiencies were mentioned. Among others, respondent was informed again that evidence of required insurance had not been produced. A similar letter was sent to respondent on October 2, 1984. (Exs. C14 at 5; 15 at 5, 9; 16 at 2; TR 42-47). There was a lacuna in communications between DEP and respondent until November 30, 1987. Susan Frank (Frank) is President of respondent. She stated that DEP investigators visited the facility weekly. She also claimed that she did not receive notices from DEP previous to 1987 stating respondent did not satisfy the requirements of the regulations. Considering the totality of the evidence, and the demeanor of the witness, the ALJ does not find Frank's testimony credible on this point. On November 30, 1987, DEP sent a letter to respondent in which the latter was advised that it had furnished DEP with a copy of the required insurance information. This was an error. A review of DEP files was made by Beaver and failed to produce the insurance information. In a conversation with Jane Kresch (Kresch), an official of respondent, in February 1988, Beaver advised her of the error. Kresch stated

that respondent had the required insurance coverage and that she would request its insurance representative to provide the necessary documentation to DEP. (Ex. C17 at 6; TR 48-49).

Prior to 1984, DEP did not have evidence of respondent's financial responsibility. Respondent submitted insurance for the period of March 31, 1984 to March 31, 1985. (The certificate was not discovered by DEP until on or about February 9, 1988.) The certificate stated the general liability limits were $500,000 for each occurrence and in the aggregate. It also provided for excess liability limits in the amount of $10 million for each occurrence and in the aggregate, "other than umbrella form." The certificate does not show $1 million per occurrence nor does it contain the identical wording required by the regulations. (Ex. C11; TR 28, 30, 36). At this juncture, it is appropriate to observe that the "certificates" or "certificates of insurance" submitted as exhibits are, speaking broadly, one page documents purporting to state coverage in general terms and that "[T]his certificate is issued as a matter of information only and confers no rights upon the certificate holder." It is not to be confused with the CLI mentioned in the regulations. Another document entitled, "Marine General Liability Insurance," is an insurance policy issued by American Home Assurance Company for the policy period March 31, 1984 to March 31, 1985, in which respondent is one of 33 specified companies insured. The requirement for a 60 day notice for cancellation of the policy appears to be absent from the policy, and it contains a $5,000 deductible provision. (Ex. C3 at 15, 19;

TR 147-48, 150). For a like period of time, March 31, 1984 to March 31, 1985, respondent produced its only documentary evidence. It provided for $10 million limit of liability for each occurrence and in the aggregate. The policy took the form of excess insurance to the primary insurance evidence by complainant's Exhibit C3. Though this policy did not satisfy all of the demand of the regulations, it met most of the monetary requirements. There was no evidence of this excess policy ever being renewed. However, after March 31, 1985, a review of respondent's policies failed to disclose that the monetary liability limits were met by respondent. (Ex. R1 at 15; TR 354-57).

No policies or other convincing evidence was introduced for the years 1985/1986 or 1986/1987 to show required coverage, having reference to respondent's land-based hazardous waste activities. (Ex. C21; TR 36-37, 164-65). Concerning the policy periods of 1987-1988, on or about February 9, 1988, Beaver telephoned Kresch and requested that respondent submit proof of required coverage. The response of Kresch was that respondent would get in touch with its insurance representative and have the required documents sent. In a one sentence memorandum, dated February 10, 1988, with a notation showing the received date of May 26, 1988, a certificate was received by DEP. It showed that the insurance carrier was Lloyds of London; that the policy effective date was March 21, 1987, and the expiration date was March 31, 1988; that the general liability limits were $1 million for each occurrence and in the aggregate; that coverage also included "Wharfingers Legal

Liability," and that the excess liability limits were $10 million for each occurrence and in the aggregate. (Ex. C12; TR 33-36). However, the certificate did not contain the specific language by the regulations.

Beaver did not know what the term "excess liability" meant on complainant's Exhibits C11, 12 and 13. (TR 54). He conceded that respondent could have requested from DEP a variation for the language required by the regulations; that he did not discuss this with Kresch; that he does not necessarily request policies from respondents; that because of the existence of a variety of policies it is physically impossible for DEP to review same; that the purpose of certificates is to simplify DEP tasks by demanding that the required language appear on these documents; that he was uncertain concerning the interpretation of paragraph "(b)" of Appendix A of complainant's Exhibit 18; but that the deductible provision mentioned therein does not have to be complied with if a respondent meets the financial requirements set out in section 7:26-9.13(f) of the regulations. (TR 65-66, 68-70, 73-77). Concerning the required wording on a certificate, much of the cross examination by respondent was somewhat less than relevant. The salient factual question being whether or not the certificates contained the required wording of paragraph (j) of Appendix A. It is found that the certificates did not contain such required wording. Findings concerning "excess liability" mentioned on the certificates will be addressed below.

Complainant's Exhibit 4 is similar to its Exhibit 2. They both cover the same period 1987 to 1988. The difference is that the former policy covers 82.64 percent of the risk, and the latter 17.36 percent. Both have $1 million coverage and contain the wharfingers liability provision. Aside from the deficiency in not having $2 million coverage in the aggregate, neither the required Hazardous Waste Facility Liability Endorsement (HWFLE) or CLI is present. For example, the required 60 days notice for cancellation, and the lack of first dollar coverage is absent. Liability "arising out of tank cleaning" is mentioned. However, the wharfingers liability provision states that the insurance covers "only the liability of the assured, . . . as bailee or custodian of steel barges and/or vessels . . . ." (Ex. C2 at 9, 10; C4 at 5, 6). Thus, a question exists concerning whether or not coverage would extend to any land-based activities conducted by respondent, such as on site waste handling.

For the period 1987-1988, there is a document which does not purport to be a HWFLE or CLI. It is more in the form of a letter discussing, in pertinent part, respondent's limit of liability of $1 million for a single occurrence or a series of occurrences arising from one event. No mention is made of $2 million in the aggregate. This document is neither a HWFLE or a CLI. (Ex. C2; TR 141-43). The document has the same deficiencies as those in complainant's Exhibit C1, including inadequate language concerning cancellation, plus vagueness regarding whether or not legal defense costs are within or without the limits of coverage. Another

document pertaining to coverage for the 1987-1988 period has a wharfingers comprehensive general liability coverage for a combined single limit of $1 million. The policy provides for "Excess Liabilities-Umbrella Basic," with a $10 million limit for "covered events." However, there is an endorsement which excludes coverage on any site handling, processing, treating, storing, disposing or dumping any waste material or substances. (Ex. C8[1] at 4, 6, 9; TR 175-77, 199, 200). Both complainant's Exhibits C8 and C9 at 6 contain an "Except Pollution Liability" in the amount of $300 million. The "right kind of pollution insurance" or the comprehensive general liability coverage could satisfy respondent's statutory requirements. However, the insurance would have to be linked to its RCRA operations involving waste disposal, handling, storage and treatment. (TR 194-96). These exhibits also contain an "Umbrella Policy (London 1971) LPO 354B." (Ex. C8, 9 at 4). This would provide coverage for personal injury and property damage, but one would have to consider this in connection with other provisions, such as exclusions, and it would be necessary to read and interpret the policy in its entirety. It is found that it is unclear from Exhibit C8 whether land-based RCRA activities are covered.

Respondent's alleged compliance for the period March 31, 1988 to March 31, 1989 is reflected first in a document consisting of

---

[1] Complainant's Exhibit C8 provides for 47.36 percent of coverage. Complainant's Exhibit C9 is an identical policy providing for 52.64 percent of respondent's coverage. (TR 178).

a one page certificate not meeting the requirements of a CLI. (Ex. C13 at 2). The second document is a "cover note" having a 14 page attachment. The limits of liability are $1 million, and it contains the same wharfingers liability wording as in complainant's Exhibit 4. Among its deficiencies, the document contained a $5,000 deductible and it fails to have the required language. (Ex. C6 at 1, 2; TR 157-58). The wharfingers liability provision is complainant's Exhibit 4 at 6, for example states, in substance, that the insurance covers defense costs. (TR 201). However, this is different from the language of the regulations which states that a certificate shall contain the limits of liability "exclusive of legal defense costs." The wharfingers liability provision provides coverage only as "bailee or custodian of steel barges and/or vessels . . . ." Wharfingers liability would also include responsibility arising out of tank cleaning. (Ex. C4 at 5; TR 217). Complainant conceded that it seemed to cover both certain shoreside, wharf and property risks as well as those associated with vessels. (TR 205). Complainant's Exhibit C6 like C4 is neither a HWFLE nor a CLI.

If a respondent can meet the financial test for liability coverage as set forth in section 7:26-9.13(f), it would satisfy the regulations. (TR 209). However, respondent's net worth is less than $10 million, as demanded by the aforementioned section. (TR 424).

In relevant part, Frank testified that the respondent expends over $1 million annually for various types of insurance for itself

and its numerous affiliate companies. Solely for general liability insurance, on an annual basis, respondent spends $94,500. Respondent has purchased general liability insurance, with umbrella provisions for over 10 years; that such insurance covered sudden accidental occurrences; that the limits of such insurance were for $10 million for the years 1983 to 1989. Respondent "believe[d]" it had $10 million in excess liability insurance; that respondent ["knew"] it had such coverage for the years 1983 through 1989. (TR 408, 420, 429). The ALJ does not find Frank's testimony in this regard credible, a finding which an objective review of the record will sustain.

Notwithstanding respondent's efforts, it has been unable to obtain what it considers to be a reliable and sound insurance carrier that will provide a policy without the $5,000 deductible clause. (TR. 421-24). However, there are insurance carriers which provide coverage to meet liability requirements associated with RCRA, but obtaining the identity of such carrier and the necessary insurance is not without some effort and difficulty. (Ex. C21; TR 181-83, 220-31).

Respondent for many years used the services of Keith Bell (Bell), an insurance broker located in New York, New York. He is employed for Lloyd's Broker, in London, England, and was a witness for respondent. An examination of respondent's insurance policies by Bell disclosed, in his opinion, that respondent's policies provided for sudden accidental insurance coverage for claims of third parties for personal injury and property damage; that the

limits on the primary policy are for $1 million for each occurrence with no aggregate limit; that if there were four $1 million claims for each occurrence, or a combination of occurrences, the coverage would be $4 million. Thus, in Bell's view, there is at least $1 million for each occurrence and at least $2 million in the aggregate, but the policies provide for a deductible. (Exs. C1, 4; TR 436-38, 342). The record does not support Bell's views, however. The evidence on liability limits is unsteady and uncertain. On cross examination, Bell conceded that the policy limit was $1 million. (Exs. C4 at 5; TR 453). Legal defense costs are included in the coverage of the policies, in addition to the policy limits. This is qualified to the extent that the "excess" policy provides, in pertinent part, that the underwriter will not be called upon to assume the settlement or defense of any claim, but should have the right and be given an opportunity to associate with the insured in defense of the claims and the excess insurers have the right to make legal appeals at their own costs. (Ex. C8 at 18, Para. H, I; TR 457-59). Bell admitted that the language in the policy does not state specifically that defense costs are either within or without the limits of the policy, but by "market practice" the latter interpretation would prevail. (TR 458-59).

The first policy written by Lloyd's for respondent with the above coverage commenced on March 31, 1987 and ended on March 31, 1988. Since that time, up to the date of the hearing, successive,

like policies have been issued. (Ex. C1; TR 441-42).[2] The policies provide for a 30-day cancellation notice. In Bell's view, the 60-day cancellation notice required by the regulations is a departure from insurance custom and practice; that the policies provide for a deductible and it is unlikely that an underwriter would agree to reduce or eliminate the deductible entirely; but respondent's broker is prepared to see if the deductible could be eliminated. (TR 443).

Bell could not recall if respondent ever asked him to secure a HWFLE or CLI required by the regulations; and that he would need to check his records for certainty. Though Bell worked on respondent's behalf since 1986, he was not familiar with requirements of the regulations concerning liability coverage. He also opined that the comprehensive general liability (CGL) coverage on the primary policy covers pollution liability if the loss were sudden and accidental. (TR 444). Concerning the exclusionary language found in complainant's Exhibit C8 at 9 stating that coverage would not apply to "[a]ny site or location used in whole or in part for the handling, processing, treatment, storage, disposal or dumping of any waste material or substance," it was Bell's view that in the London insurance market oil storage is not regarded as waste or toxic waste. For example, if oil spilled and caused pollution it would not be excluded from coverage by the above quoted language. However, the exclusion would apply if

---

[2] The "binder" or "cover letter" for the period is C1; the policy is C4.

respondent handled a substance which the insured considered to be waste. (TR 448-50). To be observed at this juncture is that in its Part A and Revised Part A applications, respondent listed numerous hazardous waste substances that were involved with the facility. (Exs. C24, 25).

Peter Newell (Newell) is also an insurance broker. He is employed by CMPA, an insurance agency located in Paramus, New Jersey, and negotiated with various insurance companies on behalf of respondent. Certificates of insurance were issued by him from time to time on behalf of respondent. These were for the period March 21 1987 to March 31, 1988 and March 31, 1988 to March 31, 1989. This certificate shows Lloyd's as the insurer with $1 million, $10 million coverage. (Exs. C12, 13). Earlier, a certificate was issued by an insurance agency, Adams Porter. The insurers in that certificate were three companies other than Lloyd's with the expiration date of coverage reflected in the certificate as March 31, 1985. The limits shown therein are $500,000 and $10 million. (Ex. C11; TR 461-63, 468). The tortured question that remained unmet and unanswered by Newell's testimony is whether the purported liability limits pertained to the land-based hazardous waste facility activities.

It is unclear from Newell's testimony whether he received requests from respondent to get a CLI required by regulations. A direct answer was not forthcoming. Newell did make inquiries concerning the insurance companies proposed by Bailey, but most would only offer coverage with a $50,000 deductible. (TR 464-66).

Newell was not aware of the specific language that the regulations required to be on a CLI or HWFLE. Nor was he aware that the regulations required a certificate or endorsement to be submitted along with the policy. Nor did Newell get in touch with DEP to determine if other hazardous waste facilities were complying with liability coverage. (TR 467-69, 472). Newell had some difficulties preparing certificates of insurance for the respondent. The certificate for March 21, 1987 to March 31, 1988 reflected a $1 million aggregate for general liability. This was in error. A like mistake appears in the certificate for the subsequent year's insurance. (Exs. C12, 13 at 2; TR 472-74). The result of this was that two inaccurate certificates were submitted by Newell to DEP on behalf of respondent. (TR 479). Newell stated that in October 1988 respondent requested that he obtain a certificate or endorsement that contained the precise language required by the regulations. (TR 480-481). Stemming from Newell's overall somewhat confusing testimony, his stated lack of knowledge of the State's regulations and his observed demeanor, the ALJ finds Newell's testimony that he attempted to obtain a CLI or HWFLE conforming with the regulations utterly unconvincing.

Findings Concerning Calculation of Proposed Penalty

The penalty sought in the complaint was arrived at by the criteria set forth in RCRA plus the Civil Penalty Policy (Penalty Policy), issued by EPA on May 8, 1984, of which official notice is taken by the ALJ. Section 3008(a) of RCRA, 42 U.S.C. § 6928(a),

provides that in assessing a penalty the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. The Penalty Policy used two factors as a matrix to arrive at what EPA considers an appropriate penalty. On the vertical plane of the matrix is the "potential for harm" and on the horizontal plane is the "extent of deviation" from the statutory requirements. Each plane has three categories: major, moderate and minor. By combining the two factors a penalty range is obtained. To illustrate, a potential for harm in the moderate category with an extent of deviation in the major classification shows a penalty range of $8,000 to $10,999. Usually, complainant selects a midpoint range between these two figures, but it could be lower or higher. (Penalty Policy at 4; TR 382-85). Based on the information from DEP, it was determined that respondent did not have liability insurance and complainant was of the opinion that this violation posed a major potential for harm and was a major deviation from the regulations. The reason for this conclusion is that in the absence of liability insurance there would be no ready financial source to compensate third parties for injuries incurred or property damaged as a result of sudden accidental occurrences. On the facts available to complainant at the time, it was determined that there was a major deviation from the regulations because of no liability coverage as compared to a moderate deviation where there may be some liability insurance for sudden accidental insurance. Following the matrix, complainant selected the upper range penalty of $25,000, not to

midpoint between $20,000 and $25,000. The Penalty Policy provides that a penalty may be adjusted upwards or downwards to reflect particular circumstances surrounding the violation. These factors that should be considered are: (1) A respondent's good faith efforts to comply, or its lack of good faith. (2) The degree of willfulness and/or negligence exhibited by a respondent. (3) Any history of noncompliance by respondent. (4) Respondent's ability to pay the proposed penalty. (5) Any unique factors. (Penalty Policy at 4; TR 386-88). The Penalty Policy also provides that an "economic benefit component" should be calculated and added to the gravity-based penalty when a violation results in significant economic benefit to a violator. Accordingly, in addition to the $25,000, complainant calculated an amount of $35,850 for the economic benefit which accrued to the benefit of respondent for noncompliance to comprise the total amount of $60,850 sought in the complaint. The penalty computation work sheets for the two amounts are attached to the complaint, which the parties requested to be marked as Joint Exhibit 2. The formula for calculating the economic benefit is comprised essentially of three factors. First, there are avoided costs, which are expenses a respondent never incurs because of its noncompliance. Next, are delayed costs which are expenditures which have been deferred by respondent's failure to comply with the regulations but will be incurred eventually. Respondent's avoided costs were the premiums for appropriate amount and type of liability insurance. In the instant matter the delayed costs were the same as the avoided costs, since it is alleged

respondent never had the insurance required by the regulations. The interest component is the interest benefit obtained on the money not used to purchase the required insurance. Avoided costs were calculated to be $10,000. This figure originated at the EPA headquarters based upon what it estimated the average annual premium to be. It arrived at the premiums for specific facilities in the State, and when the premiums were averaged the annual costs came to $20,000. Complainant reduced that figure because a number of the facilities had both sudden and nonsudden coverage and this respondent's insurance situation concerned only sudden accidental occurrences. There are approximately 17 commercial facilities in the State that are regulated federally, two of which had failed to obtain the insurance required by the regulations. (Penalty Policy at 12, 14; TR 389-94).

Joel Golumbek (Golumbek) is a supervisory environmental engineer with EPA. He is Chief of the State's Caribbean Hazardous Waste Compliance Section. One of his duties is to review enforcement documents, including penalty assessments. (TR 360-61, 389). At the time that the penalty calculation was made, Golumbek based the penalty calculation upon respondent's lack of any insurance coverage. (TR 400-03). Respondent was not asked to submit any insurance policy prior to the penalty calculation, and no effort was made by Golumbek to determine if the facility had insurance; he relied upon information provided to him by DEP. (TR 396-98). Certificates submitted by respondent to DEP were deficient in many areas. (TR 169-73).

The evidence offered through Golumbek shows how the penalty of $60,850 sought in the complaint was determined. For the reasons stated in its brief, complainant seeks a penalty of $135,313.[3] (Comp. Op. Br. at 15.) Notwithstanding respondent's annual premiums for general liability insurance of $90,000 or $94,500 (TR 400, 420), it is not found that this insurance would be applicable to its land-based hazardous waste activities. Such insurance concerned itself largely with respondent's marine activities. It is found that with sufficient effort and perseverance, the required insurance could be obtained by respondent for an annual premium of $25,000. It found that the economic benefit obtained by respondent from 1985 to the time of hearing was $110,313. (TR 187-88). It is further found that the $25,000 gravity-based penalty of $25,000 plus the economic benefit amount would amount to a total penalty of $135,313.

DISCUSSION AND CONCLUSIONS OF LAW

Liability Issue

At the threshold, this matter must be placed in proper procedural perspective. The pertinent section of the Consolidated Rules of Practice (Rules), 40 C.F.R. § 22.24, provides that:

> The complainant has the burden of going forward with and proving that the violation occurred as set forth in the complaint and that the proposed civil penalty . . . is appropriate. Following the establishment of a prima facie case, the respondent shall have

[3] Figure rounded to nearest dollar.

> the burden of presenting and of going forward with any defense to the allegations in the complaint. Each matter of controversy shall be determined by the Presiding Officer [ALJ] upon the preponderance of the evidence.

To be determined initially is whether or not the alleged violations are supported by the preponderance of the evidence. "Preponderance of the evidence" is that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely true than not true.

A "prima facie" case means, among others, where the evidence in favor of a proposition is sufficient to support a finding of conclusion in its favor if all the evidence to the contrary be disregarded. Words and Phrases, Prima Facie Case. Complainant established a prima facie case when its evidence showed that respondent did not have adequate liability coverage except for the period March 31, 1984 to March 31, 1985. To be observed parenthetically here, however, was that respondent met the monetary limits only, following an examination of the insurance policies. Respondent remained in violation of the regulations in that applicable policy, (Exhibit C3), did not have a HWFLE attached or a CLI for the period with the exact wording required by the regulations. The burden of proof then rested upon respondent to "demonstrate," as the regulations state, that it had the required coverage for the years in contention. Respondent provided copies of insurance documents to complainant before the hearing, and the latter introduced same through its witnesses, who showed coverage

did not exist. Respondent attempted to carry its burden, mainly by cross examining complainant's witnesses. One of the major purposes of the regulations is to establish by clear, concise and conclusive language whether or not a member of the regulated community has the required liability coverage. Respondent attempted to establish appropriate liability coverage by the awkward and agonizing route of policy interpretation in an evidentiary hearing--a procedure at war with the regulations.

Whether or not respondent had the required liability insurance must be measured against section 7:26-9.13 of the regulations with the wording of any endorsement or certificate conforming identically with the language of Appendix A. Looking at the elements set out in subsection (a)1, it is observed first that it applies to the owner or operator of a TSD facility. It has been found that respondent filed with EPA a Notification of Hazardous Waste activity concerning its facility; and that by Notification of August 15, 1980, it informed EPA that its activities involved "hazardous waste." Respondent is therefore subject to the regulations. The next requirement of the subsection is that such "owner or operator" of the TSD facility "must demonstrate financial responsibility." This will be addressed more fully below concerning burden of proof in this matter. The requirement of financial responsibility applies to sudden occurrences arising "from operation of the facility." This requirement also to be addressed below pertains, in part, to whether or not the insurance coverage of respondent embraces the operation of the facility in

addition to its other activities. The liability coverage for the required "sudden" accidental occurrences must be in the amount of at least $1 million per occurrence with an "annual" aggregate of at least $2 million, "exclusive" of legal defense costs.

"Liability coverage" may be demonstrated in one of three ways. First, by insurance liability coverage. Each policy must be amended by attachment of the HWFLE or the CLI. However, the wording of the HWFLE and the wording of the CLI must be identical with that set forth in section 7:26-9 of the regulations, Appendix A, attached hereto. The facility must submit a signed duplicate original of the HWFLE or the CLI to DEP. (A variation of the aforementioned is required for a new facility.) The insurer on each policy must be licensed to transact the business of insurance. An insurer is not required specifically by the regulations to be licensed to do business in the State of New Jersey. The regulations only require that an insurer be licensed to "transact the business of insurance . . . in one or more states."

The second way an owner or operator may meet the demands of the subsection is by passing a financial test for liability coverage, as specified in subsection (f). This subsection is set out verbatim in the attachment. In pertinent part, this test requires that the owner or operator must have "net working capital and tangible net worth each at least six times the amount of liability coverage . . .; and [t]angible net worth of at least $10 million." It has already been found that respondent did not meet the financial criterion.

As a third alternative, an owner or operator may demonstrate the required liability coverage through the use of both the financial tests and insurance. The amount of coverage demonstrated must be at least $1/$2 million as set forth in subsection(a)(1).

With the above statutory backdrop, the core conundrum on the facts found is whether or not respondent is in violation of the regulations.

Respondent was the owner or operator of a hazardous waste TSD facility and came within the purview of the regulations. It was its obligation to demonstrate it met the financial responsibility requirement. The route it chose was that set forth in subsection (a)(1)(i), showing the required insurance coverage of $1/$2 million. Respondent, however, fell far short of the regulatory requirements. For example, complainant's Exhibit C11 purports to be a certificate for the period March 31, 1984 to March 31, 1985. However, much of the information required by section 7:29-9 (Appendix A) is not included, and what is included does not contain the required "identical" language. The same deficiency appears with the other certificates. (Complainant's Exhibits 12, 13). These documents or purported certificates are of a broad nature as a handy reference to liability coverage in general, and clearly not what is required by Appendix. It is plain as a plate, and so concluded, that the policies and certificates in evidence do not comply with the regulations.

However, liability coverage can be shown alternatively to a proper certificate by an insurance policy with HWFLE, with the

owner or operator being required to submit a signed duplicate original HWFLE to DEP. Respondent also failed in this regard. Nor were there submissions to DEP of CLIs. The record discloses that DEP could not locate evidence of insurance before March 31, 1984. Exhibit R1, concerning coverage from March 31, 1984 to March 31, 1985, was the sole exhibit offered for introduction by respondent. It was not sent previously to DEP, and there was no evidence to show that it was ever renewed.

Though coverage by policy interpretation has been shown for the March 31, 1984 to March 31, 1985 period, respondent remains in violation of the regulations for its failure to file a HWFLE or certificate for the period. The regulations do not envision the regulatory authorities searching out alleged violators, followed by ensuing evidentiary hearings to establish whether or not coverage exists. This is antithetical to the regulations and contrary to the public interest. It would bring effective enforcement to its knees.

It is also concluded that respondent was unable to show by insurance policies, HWFLEs or CLIs, that it met the requirements of the regulations for the period from March 31, 1985 to the date of the hearing. More specifically, for the period April 1, 1985 through March 31, 1986, respondent was unable to demonstrate that complainant's Exhibit C3 was renewed and, if renewed, it met the regulatory requirements. Among others, it does not contain first dollar coverage, but contains a deductible amount of $5,000, and it can be canceled upon 30 days written notice. It is concluded

that respondent did not have the required coverage. Nor did it have a HWFLE attached to the policy or was there a CLI submitted to DEP.

For the coverage in the period April 1, 1986 through March 1987, respondent failed completely to demonstrate the compliance with the regulations. For the period, respondent did not come forward with one document to show compliance with the regulations. It is concluded that respondent did not comply with the regulations for this period.

Turning to the period of March 31, 1987 to March 31, 1988, the "cover note" as binder does not set forth the information demanded by the regulations. The insurance policies for the term show a $1 million limit in the aggregate; the regulations require $2 million. Additionally, the policies do not show first dollar coverage and they permit the insured to cancel in 30 days written notice. Further, it is unclear from the policies whether legal defense costs are within or without the policy limits. The limitation of liability to respondent's activity as bailee or custodian of steel barges or vessels clouds a determination concerning whether coverage would extend to releases of hazardous waste from tanks on land. The certificate for the period states excess liability of $10 million. However, another certificate in evidence contains language which, in pertinent part, read: "Notwithstanding any requirement, term, or condition of any contract or other document with respect to which this certificate may be issued or may pertain, the insurance afforded by the policies described herein

is subject to all terms and conditions of such policies." This language makes it clear that the conditions set forth on the cover sheet to a policy, which is part of the latter, prevails over that in the certificate. Significantly, for the period, respondent did not have the required HWFLE or CLI. It is concluded that respondent was not in compliance with the regulations for this period.

For the period of March 31, 1988 to March 31, 1989, the liability insurance coverage is also deficient for essentially the same reasons as that set forth above for the previous year or years. Respondent did not amend the policy with a HWFLE or submit a CLI. It concluded that respondent was in violation of the regulations for the period.

PENALTY ISSUE

The pertinent section of the Rules, 40 C.F.R. § 22.27(b), provide, in pertinent part,:

> (b) Amount of such penalty. If the Presiding Officer determines that a violation has occurred, [he] shall determine the dollar amount of the recommended civil penalty to be assessed in accordance with any criteria set forth in the Act relating to the proper amount of civil penalty, and must consider any civil penalty guidelines issued under the Act. 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 his initial decision the specific reason for the increase or decrease . . . .

The classification by complainant that the violations had major potential harm was not inappropriate for the reason that there was no RCRA insurance coverage for certain years and lack of adequate coverage for other periods. This would leave third parties injured from release of hazardous waste without immediate compensation resulting from payment by an insurance carrier. Injured third parties should not be limited solely to tort action against the respondent which could be lengthy, expensive, and be contrary to the intent of the regulations. For the same reasons complainant acted properly in determining that the violations amounted to a major deviation from the regulations.

The economic benefits enjoyed by respondent from its noncompliance were $135,313 (figure rounded). The record confirms that respondent spent a large sum of money on liability insurance. However, respondent did not demonstrate, or carry its burden, that the premiums provided the required insurance for its land-based hazardous waste activities. Respondent was unable to rebut complainant's contention concerning the economic benefit it derived for its failure to comply with the regulations.

Under section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), the two factors specified to be weighed in assessing a penalty are the "seriousness of the violation" and "any good faith efforts" to comply with applicable requirements. None of the insurance policies was amended with a HWFLE or evidenced by a CLI as required by the regulations. Responding to the complaint, respondent engaged in the wondrous farce of delivering insurance policies to

complainant, alleging the required coverage, and attempting to place the burden on complainant to show that it did not have the required coverage. Intentionally or otherwise, it created a farrago. When one considers an insurance contract with all its treacherous ambiguity of language, this is certainly not what the drafters of the regulations had in mind. It would be an administrative nightmare and guarantee chaos for any member of the regulated community to think it legally sufficient to submit insurance policies to DEP to interpret same, challenging that agency to show appropriate coverage or lack of it. This is not only bizarre but smacks of contempt for the regulations. The expense, effort and time spent litigating this matter ill serves the public interest. It could have been obviated by respondent showing compliance with the regulations by amending the policies, where it has them, with the HWFLE or submitting the CLI. The production of policies alone, with their interpretation problems, simply will not do.

Respondent's contention concerning the unavailability of the required insurance is unpersuasive. It is respondent's obligation to show that the required insurance was unobtainable in the market, not for complainant to demonstrate that such insurance was available. Significantly, the evidence shows that the required coverage was available to 15 of 17 facilities. Respondent is the architect of its own legal misfortune. Assuming, without concluding, that respondent had made good faith efforts to obtain the required insurance, it would not be a defense to the liability

after November 8, 1985. Further, even if respondent were able to demonstrate the purported "impossibility" of obtaining insurance, which it did not, it would not constitute a defense to respondent's liability. United States v. T & S Brass and Bronze Works, Inc. 681 F. Supp. 314, 321 (D.S.C. 1988), aff'd 28 ERC 1649, (4th Cir. 1988). Respondent misreads grossly T & S Brass when it makes such sweeping statements with regard to the case that "impossibility is a defense to the violation of the regulations alleged by EPA," and "the defense [of impossibility] was required in those cases in which insurance is not available in the market place." (Res. Reply Br. at 19). "Impossibility," if established, which is not the situation here, may only have some bearing on the penalty issue.

At this juncture, another argument of respondent should be met. It observes that DEP investigators were at the facility weekly and implies that DEP responsibility was to advise respondent that its coverage was inadequate. It is not the duty of DEP investigators, and would be a questionable practice for them, to examine a niagara of documents consisting in part of insurance policies with their arcane language and then voice an opinion concerning coverage. The regulations place the duty to demonstrate financial responsibility squarely upon respondent.

Respondent's conduct over a protracted period of time concerning its statutory obligation displayed deliberate neglect, indifference, or both. It is a luminous example of lack of good faith. Up to and including the time of the hearing in this matter, respondent failed to come into compliance. Instead, it maintained

an ironhard insistence that its patchwork of policies and other documents met the regulations. The Penalty Policy provides that after an appropriate penalty based on gravity, and where appropriate, economic benefit, is determined an adjustment upwards or downwards may be made to reflect "the particular circumstances surrounding the violation." Among the elements to be considered are the lack of good faith, degree of negligence and other unique factors. With particular reference to good faith, the Penalty Policy (at 17) provides that lack of good faith can result in an increase in the gravity-based penalty up to 40 percent in unusual circumstances. In the informed discretion of the ALJ, the gravity-based penalty is increased by 40 percent, from $25,000 to $35,000, and that a total condign penalty in this matter is $145,313.

ORDER [4]

Pursuant to section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928, it is concluded that respondent is in violation of Title 7 of the New Jersey Solid Waste Management Act, more specifically section 7.26-19.13(a) of the regulations promulgated thereunder. The following order is entered against respondent Standard Tank Cleaning Corporation.

I. A civil penalty in the amount of $145,313 is assessed against the respondent Standard Tank Cleaning Corporation.

---

[4] Unless an appeal is taken pursuant to 40 C.F.R. § 22.30, or the Administrator elects to review this decision sua sponte, this Initial Decision shall become the final order of the Administrator. See 40 C.F.R. § 22.27(c).

II. Payment of the full amount of the civil penalty assessed shall be made within sixty days of the service of the final order by submitting a certified or cashier's check payable to Treasurer, United States of America and mailed to:

EPA - Region II
(Regional Hearing Clerk)
P.O. Box 360188
Pittsburgh, PA 15251

Failure upon part of 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 penalty. 31 U.S.C. § 3717; 4 C.F.R §§ 102.13(b)(c)(e).

III. The following compliance order is also entered against respondent:

A. Respondent shall, within sixty (60) days of the effective date of this Compliance Order, submit to EPA, documents sufficient to establish financial responsibility for bodily injury and property damage to third parties caused by accidental occurrences arising from the operation of the facility, as required by N.J.A.C. 7:26-9.13(a).

B. If, within sixty (60) days of the effective date of this Compliance Order, respondent cannot establish liability coverage for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from the operation of the facility, as required by N.J.A.C. 7:26-9.13(a), it shall cease conducting treatment, storage, and disposal activities and submit a closure plan no later than the sixtieth (60th) day of the effective date of this Compliance Order.

Notwithstanding any other provision of this order, an enforcement action may be brought pursuant to section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973, or other statutory authority, where the handling, storage, treatment, transportation or disposal of solid waste at respondent's facility may present an imminent and substantial endangerment to human health or the environment.

Frank W. Vanderheyden
Administrative Law Judge

Dated: March 21, 1991

APPENDIX A

I hereby certify that the wording of this endorsement is identical to the wording specified in N.J.A.C. 7:26-9 (Appendix A), as such regulation was constituted on the date first above written, and that the Insurer is licensed to transact the business of insurance or is eligible to provide insurance as an excess or surplus lines insurer, in one or more states.

(Signature of Authorized Representative of Insurer)
(Type name)
(Title), Authorized Representative of (name of Insurer)
(Address of Representative)

(j) A certificate of liability insurance, as required in N.J.A.C. 7:26-9.13, must be worded as follows, except that the instructions in brackets are to be replaced with the relevant information and the brackets deleted:

Hazardous Waste Facility Certificate of Liability Insurance

1. (Name of Insurer), (the "Insurer"), of (address of Insurer) hereby certifies that it has issued liability insurance covering bodily injury and property damage to (name of insured), (The "insured"), of (address of insured) in connection with the insured's obligation to demonstrate financial responsibility under N.J.A.C. 7:26-9.13. The coverage applies at (list EPA Identification Number, name and address for each facility) for (insert "sudden accidental occurrences," "nonsudden accidental occurrences," or "sudden and nonsudden accidental occurrences;" if coverage is for multiple facilities and the coverage is different for different facilities, indicate which facilities are insured for sudden accidental occurrences, which are insured for nonsudden accidental occurrences, and which are insured for both). The limits of liability are (insert the dollar amount of the "each occurrence" and "annual aggregate" limits of the Insurer's liability), exclusive of legal defense costs. The coverage is provided under policy number _____, issued on (date). The effective date of said policy is (date).

2. The Insurer further certifies the following with respect to the insurance, described in Paragraph 1.

(a) Bankruptcy or insolvency of the insured shall not relieve the Insurer of its obligations under the policy.

(b) The Insurer is liable for the payment of amounts within any deductible applicable to the policy, with a right of reimbursement by the insured for any such payment made by the Insurer. This provision does not apply with respect to that amount of any deductible for which coverage is demonstrated, as specified in N.J.A.C. 7:26-9.13.

(c) The Insurer agrees to furnish to the New Jersey Department of Environmental Protection (hereinafter, the "NJDEP") a signed duplicate original of the policy and all endorsements.

(d) Cancellation of the insurance, whether by the Insurer or the insured, will be effective only upon written notice and only after the expiration of sixty (60) days after a copy of such written notice is received by the NJDEP.

(e) Any other termination of the insurance will be effective only upon written notice and only after the expiration of thirty (30) days after a copy of such written notice is received by the NJDEP.

I hereby certify that the wording of this instrument is identical to the wording specified in N.J.A.C. 7:26-9 (Appendix A) as such regulation was constituted on the date first above written, and that the Insurer is licensed to transact the business of insurance or is eligible to provide insurance as an excess or surplus lines insurer in one or more States.

(Signature of Authorized Representative of Insurer)
(Type name)
(title), Authorized Representative of (name of Insurer)
(Address of Representative)

ATTACHMENT

7:26-9.13 Liability requirements

(a) Coverage for sudden accidental occurrences shall meet the following requirements:

1. An owner or operator of a hazardous waste treatment, storage or disposal facility, or a group of such facilities, must demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility or group of facilities. The owner or operator must have and maintain liability coverage for sudden accidental occurrences in the amount of at least $1 million per occurrence with an annual aggregate of at least $2 million, exclusive of legal defense costs. This liability coverage may be demonstrated in one of three ways, as specified in (a)1i, ii and iii below:

i. An owner or operator may demonstrate the required liability coverage by having liability insurance, as specified in (a)1.

(1) Each insurance policy must be amended by attachment of the Hazardous Waste Facility Liability Endorsement or evidenced by a Certificate of Liability Insurance. The wording of the endorsement and the wording of the certificate of insurance must be identical to the wording specified in N.J.A.C. 7:26-9 (Appendix A).

(A) The owner or operator of a new facility must submit a signed duplicate original of the endorsement or certificate of insurance and assigned duplicate original of the insurance policy to the Department.

(B) An owner or operator of a new facility must submit the signed duplicate original of the endorsement or the certificate and a signed duplicate original of the insurance policy to the Department at least 60 days before the date on which hazardous waste is first received for treatment, storage or disposal. The insurance must be effective before this initial receipt of hazardous waste.

(2) Each insurance policy must be issued by an insurer which, at a minimum, is licensed to transact the business of insurance, or is eligible to provide insurance as an excess or surplus lines insurer in one or more states.

ii. An owner or operator may meet the requirements of this section by passing a financial test for liability coverage, as specified in (f) below.

iii. An owner or operator may demonstrate the required liability coverage through use of both the financial test and insurance, as these mechanisms are specified in this section. The amounts of coverage demonstrated must total at least the minimum amounts required by (a)1 above.

. . . .

(f) Requirements for the use of the financial test for liability coverage are as follows:

1. An owner or operator may satisfy the requirements of this section by demonstrating that he passes a financial test, as specified in (f) of this section. To pass this test the owner or operator must meet the criteria of (f)1i or (f)1ii below:

i. The owner or operator must have:

(1) Net working capital and tangible net worth each at least six times the amount of liability coverage to be demonstrated by this test; and

(2) Tangible net worth of at least $10 million; and

. . . .