UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
COUNTRY ROADS, INC.,	)	Docket No. RCRA-V-W-86-R-09
	)	
Respondent	)	

Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq. (Act). Respondent found in violation of Sections 3002 and 3004 of Act, 42 U.S.C. §§ 6922 and 6924 and implementing regulations 40 C.F.R. §§ 262.34, 262.42, 265.16, 265.50 through 265.56 and 265.176.

INITIAL DECISION

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: August 11, 1987

Appearances:

For Complainant:

Roger M. Grimes, Esquire
Lynn Yerges, Esquire
U. S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

For Respondent:

Steven C. Berry, Esquire
Franklin, Bigler, Berry, Johnston, P.C.
900 Tower Drive
14th Floor
Troy, Michigan 48098

Introduction

This civil administrative proceeding is the result of a complaint brought by the U.S. Environmental Protection Agency (sometimes EPA or complainant) on January 16, 1986, pursuant to Section 3008, 42 U.S.C. § 6928, of the Resource Conservation and Recovery Act (Act), 42 U.S.C. § 6901, et. seq. and its implementing regulations.[1/] The complaint proposed total civil penalties of $15,262 for the alleged violations. Country Roads, Inc. (respondent), served an answer to the complaint on February 10, 1986 in which it did not deny any of the violations cited in the complaint; instead respondent explained its efforts to come into compliance since the November 6, 1984 inspection. The respondent requested a hearing.

Despite settlement negotiations extending over a period of approximately one year, the parties were unable to reach an agreement on the appropriate penalty amount in this case. A

1/ Pertinent provisions of Section 3008 are:

Section 3008(a)(1): "Compliance orders. - . . . whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period or both . . . ."

Section 3008(g): "Civil penalty - Any person who violates any requirement of this subchapter shall be liable to the United States for 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."

hearing in this matter was held on February 3, 1987 in Grand Rapids, Michigan.

The complaint, based upon information available to complainant, including a November 6, 1984 compliance inspection conducted by the Michigan Department of Natural Resources (MDNR),[2/] charged respondent with violating Sections 3002 and 3004 of the Act, 42 U.S.C. §§ 6922 and 6924, and the following regulations: 40 C.F.R. §§ 262.34, 262.42, 265.16, 265.50 through 265.56 and 265.176 applicable to generators of hazardous waste. By the time the complaint was issued, respondent had corrected three of the violations but had not complied with the provisions dealing with personnel training records, a contingency plan and the 90-day storage limit.

To be determined here is whether or not the alleged violations are supported by the preponderance of the evidence[3/] and if so whether the proposed penalty is condign. "Preponderance of the evidence" is that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient

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2/ At the time, Michigan was not an EPA authorized state, therefore, the violations are based exclusively on the federal law of the time.

3/ The applicable section of the Consolidated Rules of Practice, 40 C.F.R. § 22.24, provides in pertinent part that: ". . . Each matter in controversy shall be determined by the Presiding Officer upon a preponderance of evidence."

to support a conclusion that the matter asserted is more likely to be true than not true. All issues have been considered by the Administrative Law Judge (ALJ). Those questions not discussed specifically are either rejected or viewed as not being of sufficient import for the resolution of the principal issues presented.

FINDINGS OF FACT

Respondent is in the business of refurbishing the seating of theaters, operating since 1981 from a facility located at 1122 South Bridge Street, Belding, Michigan 48809. Its refinishing operations generate hazardous waste, including iron phosphate sludge, chromic acid, paint sludge and mask wash sludge.

EPA promulgated regulations concerning the generation, transportation, treatment, storage or disposal of hazardous waste on May 19, 1980, with an effective date of November 19, 1980, which regulations will be discussed more fully under the Conclusions, infra. On June 26, 1984, respondent submitted to the EPA a notification of Hazardous Waste Activity indicating that it generates, treats, stores or disposes of EPA Hazardous Waste Nos. F002, F003 and F005.[4/]

On November 6, 1984, Elizabeth Bols (sometimes Bols or inspector) an environmental sanitarian and later an environmental quality analyst with MDNR, conducted a compliance inspection of

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[4/] These hazardous waste are defined in 40 C.F.R. § 261.31.

respondent's facility. A substantial part of complainant's evidence concerned the report prepared by Bols following the inspection of respondent's facility.

During the inspection Bols, a highly credible witness, observed at least six drums which were identified as containing hazardous waste by Mike Griffin (Griffin), who stated that he was respondent's general manager.5/ The drums were located on the side of the building but Bols neither opened them up to see how much waste was inside, nor did she perform a chemical analysis of their contents. There was another building 12 feet away which Griffin told Bols did not belong to respondent. Griffin told Bols that the drums contained waste paint and waste solvent (toluene and xylene) but made no reference to the amount contained inside each drum. Based on the size of the drums (55 gallons each), Bols determined that respondent generated over 1,000 kilograms of hazardous waste a month. (Ex. C-7; Tr. 33-34, 40-41, 84-86).

In the normal course of an inspection, Bols also reviewed respondent's manifests.6/ She discovered that for one manifest, dated June 11, 1984, respondent had not received a copy back from

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5/ At the time of the hearing, Griffin was no longer in the employ of respondent and he did not appear as a witness.

6/ A manifest is a shipping record which must be prepared whenever waste is shipped out of the facility.

the treatment storage facility and had also not filed a timely exception report. (Tr. 34-35).

During the inspection, Bols also observed containers of hazardous waste which had not been labeled with the words "Hazardous Waste" or dated with the date the period of accumulation began. (Tr. 37-39). The inspector was able to determine that some of the unmarked containers had been storing hazardous waste for over 90 days. In reviewing the manifests, it was determined that, as of November 19, 1984, the inspection date, the last shipment of hazardous waste to leave respondents facility was on June 11, 1984, five months earlier. Bols determined, and it is found, because of the nature of respondent's business, it would have generated waste every few days, which according to the manifests, had not been shipped out since June of 1984, thus exceeding the 90-day limit. (Tr. 37-38).

While at the facility, the inspector requested to see respondent's personnel training records but was told by Griffin that they did not have any. (Tr. 92-93).

The last alleged violation cited in the inspection report concerned respondent's failure to develop and implement a satisfactory Contingency Plan and Emergency Procedures. The inspector asked Griffin for a copy of respondent's contingency plan but it did not have one that met the regulatory requirements. Griffin provided her items dealing with the policies of the

company, especially in the case of fire. However, nothing went into the details required by the regulations, more of which will be said under the Conclusions. Respondent only had portions of a plan and it needed modification. (Tr. 48-53).

It is the practice of Bols when conducting an inspection, to give a facility a copy of the regulatory provisions dealing with the personnel training and contingency plan. It is found that she gave a copy of those regulations to respondent after explaining the provisions and suggesting various ways to develop its plan. On the copy left with respondent, the inspector underlined key words and items, and she also made pertinent notes thereon. (Tr. 44-46, 93-94). Bols' telephone log shows that on January 16, 1985, respondent requested a copy of the regulations pertaining to personnel training and contingency plans. (Ex. C-9; Tr. 95-97).

Respondent argued that MDNR did not send them a copy of the regulations until after the complaint was filed in January of 1986. (Tr. 248-49). It has already been found that the inspector left a copy of the regulations with respondent. However, assuming, without conceding, that this were not the case, respondent misses the point of the regulations and what is expected of generators of hazardous waste. It is not the EPA's or MDNR's responsibility to supply generators with a copy of the regulations before generators are expected to obey the law. Respondents are charged with knowledge of the regulations. Additionally, respondent was put

on notice by a letter from MDNR dated November 9, 1984 listing all of the observed violations. The onus shifted to respondent to take any steps necessary to come into compliance with the regulations as soon as possible.

In its letter of warning on November 9, 1984, listing the violations, MDNR set December 14, 1984 as the date of expected compliance. (Ex. C-8; Tr. 53-55). Between January 15, 1985 and May 29, 1985, there were a series of six phone calls between MDNR and respondent. The telephone log kept by the inspector indicates that on more than one occasion she discussed with a representative of respondent the nature of the violations and requested written confirmation of the efforts made to bring respondent into compliance with the regulations. (Ex. C-9).

On June 3, 1985, respondent wrote to Bols describing the corrective actions taken, particularly the disposal of stored hazardous waste, the labeling of hazardous waste containers, the placement of stored ignitable waste to areas more than 15 meters from the facility's property line and the formulation of personnel training records and a contingency plan. (Ex. R-1; Tr. 107). Around this same time, respondent also sent MDNR a copy of the missing manifest with all the required signatures thereby bringing them in compliance concerning that particular violation. (Tr. 106).

On June 17, 1985, MDNR responded to respondent's letter outlining the deficiencies in respondent's submittal. At the hearing Bols could not remember whether the letter precipitated any results on the part of respondent. (Ex. C-11; Tr. 61-62).

MDNR sent a second letter of warning on July 18, 1985, informing respondent that it had still not received a schedule with the projected dates for correction of all the violations or confirmation that all the violations have been rectified. The letter went on to set August 12, 1985 as the last date when all the violations had to be completely addressed or the matter would be referred to EPA for enforcement action. (Ex. C-12; Tr. 62-66).

On July 29, 1985, respondent sent MDNR copies of letters it had sent to the local hospital, police and fire departments, the state police and respondent's hauler setting up a meeting whereby department representatives could use the facility and coordinate emergency services. (Ex. R-2). MDNR responded on August 6, 1985 with a letter informing respondent that its steps to coordinate emergency services with local agencies remedied one part of the deficiencies in the contingency plan. The communication also stated that respondent was still in violation of the personnel training requirements and had not confirmed removal from the facility of all waste within the 90-day accumulation time frame. (Ex. C-14; Tr. 70-71).

The final correspondence between MDNR and respondent, before issuance of the complaint, was a letter dated August 9, 1985 from Dennis Millis (Millis) of respondent to Bols at MDNR. Millis enclosed a copy of the minutes of the August 6, 1985 meeting between respondent and the representatives from the local agencies. (Ex. R-4). Millis first got involved with the matter in August of 1985 when he replaced Dave Miller (Miller) as safety director of the facility. Millis purportedly followed Miller's directions as to what needed to be sent to MDNR, but he did not personally review the file until after the complaint. (Tr. 194, 211-12). Millis testified that also included with the letter were several documents used at and prepared for that meeting. These included a list of the facility's emergency equipment and their location, a diagram locating the fire extinguishers and a list of people to be called in case of fire with their job description. After sending the letter with the enclosed documents respondent thought that it was in compliance, especially since no one from MDNR got in touch with it or told them otherwise. (Tr. 197-202). Bols testifed that the only document included in the letter was a copy of the minutes of the meeting. (Tr. 112-113). It is found that Bols is a more credible witness than Millis on this issue. Additionally, even if the additional documents were included in the letter they were relevant only to the contingency plan violation and did not effect either the 90-day storage or personnel

training report violations which were still outstanding. MDNR had set August 12, 1985 as the final date for compliance before the case was referred to the EPA. Once the case was so referred, MDNR no longer had authority over the matter and it could only get in touch with the facility with EPA authorization. (Tr. 121-22).

In June of 1986, respondent hired Chris Putt to develop a contingency plan. His first submittal was rejected by EPA and with a few changes his second one was accepted. In September 1986, EPA officials notified respondent that they were finally in full compliance with the regulations. (Tr. 227-31).

CONCLUSIONS OF LAW

Section 3010 of the Act, 42 U.S.C. § 6930, requires any person who generates or transports hazardous waste or owns or operates a facility for the treatment, storage or disposal of hazardous waste to notify EPA of such activity within 90 days of the promulgation of regulations under Section 3001. This Section also provides that no hazardous waste subject to regulation may be transported, treated, stored or disposed of unless the required notification has been given.

The complaint charged respondent with six violations of the regulations applicable to generators of hazardous waste. Respondent, however, claims that because it is a "small quantity

generator" the regulations are not applicable to it. A "small quantity generator" is defined in 40 C.F.R. § 261.5(a) as:

> A generator is a conditionally exempt small quantity generator in a calendar month if he generates less than 1,000 kilograms of hazardous waste in that month.

Complainant established a prima facie case that respondent generated over 1,000 kilograms of hazardous waste per month. The MDNR inspector was not obliged to examine every drum found at respondent's facility. She may indulge in the assumption that a drum is filled to capacity with hazardous waste unless and until a respondent shows otherwise, which it did not do so here. Respondent's reliance upon a notation on Exhibit C-7 is insufficient to rebut the prima facie case established by complainant. Respondent is therefore subject to the regulatory provisions cited in the complaint which are found at 40 C.F.R. §§ 262 through 265.

The first allegation charges respondent with the failure to maintain the proper personnel training records. The pertinent regulation, 40 C.F.R. § 265.16, requires a generator of hazardous waste to maintain written job titles and job descriptions for each position at the facility related to hazardous waste management, the name of the employee filling each job, a written description of introductory and continuing hazardous waste training for each employee, and records of such training. At the time of the

inspection, it was found that respondent did not maintain or have any of the records required by the regulations. Respondent violated the aforementioned regulation.

The provisions of 40 C.F.R. §§ 265.50 through 265.56 require a generator of hazardous waste to develop and maintain a contingency plan and emergency procedures designed to minimize hazards to human health or the environment from fire, explosives, or any release of hazardous waste to air, soil or surface water. Broadly stated, in content the plan must describe the action facility personnel would take in response to fires, explosions, releases or spills and the like. The plan must also provide for evacuation and alternative evacuation routes and identify and give the name, address and telephone number of people qualified to be emergency coordinators. At the time of the inspection, respondent's plan was deficient in that it had not developed a complete or updated contingency plan which complied with the regulatory requirements. It was thus in violation of the aforementioned cited regulation.

Generators may accumulate hazardous waste on-site for 90 days or less without a permit, provided that the date upon which each period of accumulation begins is clearly marked on each container and each container is labeled or clearly marked with the words "Hazardous Waste." 40 C.F.R. § 262.34(a)(2)(3). On the date of inspection respondent was accumulating waste in containers that did not bear the required date and "Hazardous

Waste." Additionally, the inspection disclosed that respondent had accumulated waste beyond 90 days.7/ As a result of these failures, respondent is in violation of 40 C.F.R. § 262.34.

Also, the pertinent regulation requires a generator of hazardous waste must locate containers of ignitable waste no less than 15 meters from the facility property line. The inspection revealed that respondent had ignitable waste located less than the required distance from the facility property line. It was in violation of 40 C.F.R. § 265.176.

Finally, 40 C.F.R. § 262.42(a)(b) require a generator who does not receive a copy of a manifest, with the handwritten signature of the owner or operator of the designated treatment, storage or disposal facility within 35 days of the date the waste was accepted by the initial transporter, to contact the transporter and/or the owner or operator of the designated facility to determine the status of the hazardous waste. If the copy with the handwritten signature from the treatment storage or disposal facility is not received within 45 days, an Exception Report must be filed with the Regional Administrator of EPA. On the date of the inspection, it was found that respondent had not received a signed copy of manifest #MI 0413405 from the designated facility

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7/ The 90-day storage rule begins when material is first put in the containers not when the containers are full. 47 Fed. Reg. 1250 (January 11, 1982).

within 35 days of the shipment date and had not submitted an Exception Report. Respondent's conduct was a violation of 40 C.F.R. § 262.42(a)(b).

It is concluded that respondent was in violation of Sections 3002 and 3004 of the Act, 42 U.S.C. §§ 6922 and 6924, and the regulations at 40 C.F.R. §§ 262.34, 262.42, 265.16, 265.50 through 265.56 and 265.176.

Appropriateness of the Penalty

More specifically, the proposed penalty of $15,262 sought by complainant is as follows:

Alleged Violations	Penalty Sought
1. Failure to maintain personnel training records.	$2,587
2. Failure to develop and maintain contingency plan and emergency procedure.	$7,475
3. Failure to submit manifest exception.	$ 300
4. Failure to locate containers of ignitable waste no less than 15 meters from facility's property line.	$ 300
5. Failure to date and label hazardous waste containers and storage of accumulated hazardous waste beyond 90-day limit.	$4,600
Total	$15,262

The penalty computation sheet used to develop the proposed penalty was part of EPA's civil penalty policy under the Act. Use of the penalty policy in formulating proposed penalties insures consistency through EPA's regions. (Ex. C-17, 20; Tr. 145-47). The proposed penalty is derived by calculating the potential for harm and extent of deviation for each violation which is reflected on a matrix that shows a penalty range from which to choose. The policy of Region V is to use the mid-point of the ranges as the penalty amount unless there are extenuating circumstances, which were found lacking here. (Tr. 52-53). The penalty does not require a finding of actual harm before a penalty may be assessed, only a potential for harm. (Tr. 152-55). If the ALJ decides to assess a penalty different in amount from the penalty recommended in the complaint, he shall set forth his reasons for any increase or decrease. 40 C.F.R. § 22.27(b).

Respondent corrected certain violations by the time the complaint was issued. However, penalties were calculated for the three violations that had been corrected by the time the complaint was issued. This was done because EPA policy is for facilities to be in compliance at all times. When MDNR inspected respondent's facility it was not in compliance. Other allegations could have been made in the complaint as a result of respondent's storing hazardous waste over the 90-day period, but complainant, in its

discretion, did not do this because the facility, while not a small quantity generator, did not generate large amounts of waste. (Tr. 140-43).

The penalty was calculated in such a manner so it was lower than that usually arrived at in like cases. For example, the storage and labeling violations were combined, and those dealing with the contingency plan grouped together which caused the final penalty calculations to be lower than if they were calculated separately. (Tr. 148-49, 161-62).

Once an initial penalty is arrived at for each violation, they may be subject to any of five adjustment factors: good faith efforts to comply, willfulness or negligence, history of noncompliance, ability to pay and other unique efforts. (Ex. C-20 at 4, 16-21; Tr. 156-57). The willfulness/negligence adjustment factor was properly applied to violations not corrected by the time complaint was issued due to the extended period of noncompliance by respondent after the initial discovery of the violations. An enforcement agency is not required to exercise the patience of unanswered prayer. Delayed compliance is no compliance. Respondent could have had a 25 percent increase in its penalty. Complainant reduced this to 15 percent. There are no convincing reasons to reduce it further.

Regarding good faith efforts, no downward adjustment was made by complainant. This was proper concerning the violations

not remedied by the time the complaint was issued. The penalty policy provides that no downward adjustment should be made if purported good faith efforts consist primarily of a respondent ultimately coming into compliance. (Ex. C-20 at 17, Tr. 159). However, good faith is a consideration regarding correction of violations before issuance of a complaint. Section 6928(a)(3) of the Act, 42 U.S.C. § 6928(a)(3) provides that in issuing a complaint and assessing a penalty, "The Administrator shall take into account . . . any good faith efforts to comply with applicable requirements."[8/] By the time the complaint was issued in this case, respondent had come into compliance concerning three of six violations: failure to submit manifest exception, failure to locate containers of ignitable waste no less than 15 meters from facility's property line and failure to date and label hazardous waste containers. To eliminate the total penalty for each of these provisions would erode the deterrent effect of a penalty. The Act requires compliance at all times, not by the time the complaint is issued. However, in consideration of respondent's good faith efforts to remedy the violations once discovered, the penalty as to those three violations will be reduced 75 percent. The penalty to be assessed is as follows:

8/ In the Matter of A. Y. McDonald Industries, RCRA (3008) Appeal No. 86-2, n. 31 at 29 (July 23, 1987). Good faith efforts warrant reduction.

Violation	Penalty Assessed
1. Failure to maintain personnel training records.	$2,587
2. Failure to develop and maintain contingency plan and emergency procedures.	$7,475
3. Failure to submit manifest exception.	$ 100
4. Failure to locate containers of ignitable waste no less than 15 meters from facility's property line.	$ 100
5. Failure to label and date hazardous waste containers and storage of accumulated hazardous waste beyond 90-day limit.	$2,300 9/
Total	$12,562

The burden of showing inability to pay rests with respondent. However, respondent did not raise the issue of inability to pay and it was proper for complainant not to consider this factor.

The last two adjustment factors are inapplicable to this case. There is an absence of other unique factors and respondent's history of compliance was not an issue. Based upon the totality

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9/ In calculating the original penalty, complainant combined the labeling and dating violations with the 90-day storage violation to get a total penalty of $4,600. Respondent remedied only the labeling and dating violations by the time of the complaint and is therefore only entitled to a reduction of 75% for good faith as to those two violations. This was achieved by dividing the total $4,600 penalty into three which sets the penalty for each violation at $1,533. The $1,533 was then reduced by 75% for both the labeling and dating violations bringing the penalty as to each of them down to $383 (or $766 for both). Then, $1,533 for the 90-day storage violation was added to get a total penalty of $2,300 for the three violations. (All figures are rounded.)

of evidence and adjustment factors, the appropriate penalty in this matter is $12,562.

ORDER [10/]

Pursuant to Section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928, the following order is entered against respondent Country Roads, Inc.:

I. A civil penalty in the amount of $12,562 is assessed against the respondent.

II. Payment of the full amount of the civil penalty shall be made within sixty (60) days after a receipt of the final order, 40 C.F.R. § 22.31(b), by submitting a certified or cashier's check payable to the Treasurer, United States of America, and mailed to:

EPA - Region V
Regional Hearing Clerk
P. O. Box 70753
Chicago, Illinois 60673

Frank W. Vanderheyden
Administrative Law Judge

Dated: August 11, 1987

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION V

IN THE MATTER OF:)
)
)
COUNTRY ROADS, INC.) DOCKET NO. RCRA-V-W-86-R-09
)
)

CERTIFICATE OF SERVICE

I hereby certify that the Initial Decision in the above referenced case, and this certificate have been served as shown below:

Initial Decision and Certificate mailed Certified mail on August 19, 1987 to:

Steven C. Berry, Esquire
Franklin, Bigler, Berry,
Johnston, P.C.
900 Tower Drive
14th Floor
Troy, Michigan 48098

Certificate and original file mailed Certified mail on August 19, 1987 to:

Bessie Hammiel
Regional Hearing Clerk
U.S. Environmental Protection Agency
401 M. Street S.W., A-110
Washington, D.C. 60204

Certificate and Initial Decision hand delivered August 19, 1987 to:

Roger Grimes, Esquire
Lynn Yerges, Esquire
Assistant Regional Counsel
U.S. Environmental Protection
230 South Dearborn Street
Chicago, Illinois 60604

August 19, 1987

BEVERLY SHORTY

Reverely Shorty
Regional Hearing Clerk

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