UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	**)**	
	)	
Federal Cartridge Company,	**)**	**Docket No. RCRA-05-2002-0003**
	)	
Respondent	**)**	

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: September 3, 2004
Washington, D.C.

Appearances

For Complainant: Richard R. Wagner, Esq.
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U.S. Environmental Protection Agency
Region 5
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For Respondent: Eric J. Rucker, Esq.
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I. Statement of the Case

This enforcement proceeding arises under Section 3008(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act of 1976 ("RCRA"). 42 U.S.C. § 6928(a). The United States Environmental Protection Agency ("EPA") charges that Federal Cartridge Company ("Federal") committed nine violations of RCRA. EPA seeks civil penalties totaling $258,592.50. 42 U.S.C. § 6928(a).

On December 6, 2002, an order was issued granting in part, and denying in part, EPA's motion for accelerated decision, and denying Federal's cross-motion for accelerated decision. 40 CFR 22.20. EPA was awarded judgment on liability as to portions of Counts II, III, and V, and as to Counts VII, VIII, and IX in their entirety. EPA's motion was denied as to the remaining charges of violation and insofar as it sought a pre-hearing penalty assessment for the

violations found.[1]

Thereafter, a hearing was held on January 28, 2003, in Minneapolis, Minnesota, to address the issues remaining in this case. For the reasons set forth below, it is held that EPA has established RCRA violations as to all the remaining counts charged in the complaint. These counts are Count I, Count II ¶¶ 30(b) and (c), Count III ¶¶ 35(a) and (b), 36(a) and (b), 37(b), 38(a), (e), and (f), Count IV ¶ 42(a), (b), (c), and (d), Count V ¶ 46, Items 2 and 3, and Count VI. For these violations a civil penalty of $225,000 is assessed against Federal. 42 U.S.C. § 6928(a).

II. Facts

Federal operates a 175-acre facility in Anoka, Minnesota, where it manufactures "small arms ammunition, including shotshell, centerfire and rimfire ammunition and components." Stips. 3, 4, & 5. Federal is organized along three primary business lines. One line is "rim fire" where 22-caliber rim fire cases are manufactured. Another line is known as "center fire," where small arms ammunition is manufactured. The final line involves the manufacturing of shotgun shells, also referred to as "shotshell." Tr. 91.

In manufacturing these products, Federal generates a number of hazardous waste streams. Tr. 94. These waste streams include "spent plating chemicals, propellants, initiating compounds, various lead-contaminated materials, and certain sludge from Federal's wastewater treatment system." Stip. 6.

Some time prior to February 25, 1999, Federal applied to the State of Minnesota to obtain a Hazardous Waste Storage, Treatment, and Disposal Facility Permit ("Permit"). Respondent sought this permit for the purpose of storing, treating, and disposing of the hazardous waste that it generated at its Anoka, Minnesota, facility. Stip. 7. A permit was issued to Federal by the Minnesota Pollution Control Agency. CX 7.

On July 12 and 13, 2000, EPA Inspector Patrick Kuefler conducted an unannounced RCRA inspection of the Federal facility. Tr. 22-23. As a result of this inspection, EPA brought the present enforcement action against respondent.

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[1] Specifically, EPA's motion for accelerated decision was granted only with respect to Count II ¶ 30(a), Count III ¶¶ 35(c), 36(c), 36(d), 37(a), and 38(b) through 38(d), Count V ¶ 46, Item 1, and Counts VII, VIII, and IX.

III. Analysis

A. Liability

Count I

This count alleges that Federal violated RCRA by "unpermitted treatment of hazardous waste." EPA charges that "at the time of, and prior to July 12, 2000, in the course of operating its business, specifically: firing ammunition at its gunnery range for testing purposes, Respondent generated wads of waste paper which Respondent has characterized as 'shotshell wad waste.'" Compl. ¶ 21. EPA further alleges that the shotshell wad waste is a hazardous waste because it contains lead. *Id.* ¶¶ 22-23.

EPA asserts that from at least 1998, to July 12, 2000, Federal shredded this shotshell wad waste for the purpose of reducing its volume. It charges in the complaint that this shredding of shotshell wad waste by respondent constituted "treatment" of a hazardous waste within the meaning of RCRA Section 1004(34), 42 U.S.C. § 6903(34), and Minnesota Rule 7045.0020, Subp. 97. Compl. ¶¶ 24-25.[2] EPA maintains that because respondent's Permit does not authorize it to treat shotshell wad waste, it violated RCRA Section 3005(a) by shredding this material. 42 U.S.C. § 6925(a).

The parties have stipulated "[t]hat, at the time of, and prior to July 12, 2000, in the course of operating its business, specifically: firing ammunition at its gunnery range for testing purposes, Respondent generated plastic wads that contained a small amount of waste paper, which Respondent has characterized as 'shotshell wad waste.'" Stip. 11. These shotshell wads are an interior material of a spent shotgun shell and they encapsulate the shot pellets. The shotshell wads

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[2] Section 1004(34) of RCRA provides:

> The term "treatment", when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such hazardous waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or *reduced in volume*. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous.

42 U.S.C. § 6903(34) (emphasis added). Minnesota Rule 7045, Subd. 97, similarly defines the term "treatment."

at issue were recovered from Federal's ballistic testing tank. Tr. 189-190, 193.[3]

In addition, the parties further stipulated that this shotshell wad waste "contained lead above the 5.0 mg/L, the TCLP [Toxicity Characteristic Leaching Procedure] regulated threshold set by the Administrator, at 40 CFR 261.24." Stip. 12.

Federal disagrees that the shredding of the plastic shotshell wads constitutes "treatment" of hazardous waste. Respondent maintains that its "act of shredding plastic shotshell wads recovered from its ballistic tank did not constitute treating hazardous waste in violation of RCRA because Federal did not shred the plastic for the purpose of discarding it or making it easier to dispose of the plastic." Resp. Br. at 19. Instead, Federal states that the plastic shotshell wads were shredded because it "intended to reuse the plastic as a useful product." *Id.* This is Federal's "useful product" defense. In that regard, Federal argues that during the time that it processed and stored the plastic shotshell wads, it "considered the plastic shotshell wads a reusable product." Resp. Br. at 5.

EPA does not challenge Federal's ability to raise a useful product defense in this RCRA proceeding. In fact, complainant does not even address the useful product defense case law cited by respondent. Instead, complainant agues that Federal did not establish any such defense on the facts of this case. As discussed below, EPA is correct.

The facts show that prior to 1997, the plastic shotshell wads were removed from Federal's ballistic tank, along with scrap lead shot and other materials, and taken to a smelter where the plastic was consumed in the smelting process. Tr. 193-194. Respondent has characterized this process as part of its lead recycling program. *Id.* EPA apparently had no problem with this activity.

In 1997, however, Federal stopped sending these plastic shotshell wads to the smelter. Instead, it began to recover the shotshell wads from the ballistic tank. Tr. 197. Respondent processed these shotshell wads in a rotating auger waste separation unit called a "trommel." The trommel separated non-burnable and potentially dangerous materials from the waste stream. Also, the trommel was equipped with a metal detector to insure that no metal remained in the shotshell wads. Metal remaining in the shotshell wads could cause damage to the shredder. Tr. 68, 180-181; *see* CX 4.

After the shotshell wads were processed in the trommel unit, they then went to the shredder. Tr. 150-151. It is this shredding, or grinding, activity which EPA charges constitutes unauthorized "treatment" of hazardous waste and hence a violation of the Resource Conservation

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[3] Shots are fired into the ballistic testing tank for the purpose of measuring their pressure and velocity. An instrument known as a "chronograph" is used to take these measurements. The chronograph readings allow Federal to make production adjustments, if necessary, to both the powder and shotshell. Tr. 189-190, 193.

and Recovery Act. Tr. 83.

The shotshell wads processed in the trommel still contained small amounts of paper. If the plastic shotshell wads were ultimately to be reclaimed, this paper had to be removed. Accordingly, after going through the trommel unit and after being shredded, the shotshell wads were sent to an "automatic screen changer" where Federal sought to remove the remaining paper.[4]

As noted, Federal denies violating RCRA. Respondent argues that there is no violation here because it "did not shred the plastic for the purpose of discarding it or making it easier to dispose of the plastic." Resp. Br. at 19. Rather, respondent maintains that there can be no finding of a RCRA violation because it shredded this material for reuse of the plastic. *Id.* This "useful product" defense, however, must fail.

We begin the analysis of Federal's useful product defense with a review of the testimony of EPA Inspector Patrick Kuefler. It was Kuefler's July 12 and 13, 2000, inspection of Federal Cartridge's facility which led to the present enforcement proceeding.

With respect to Count I, the alleged unpermitted treatment of hazardous waste, Kuefler testified that he was informed by Luke Davich, an environmental services manager with respondent, that Federal could not recycle the shotshell wads because they were contaminated with lead. Tr. 67-68. Inspector Kuefler explained:

> I questioned them because they removed the large parts of lead and asked why they couldn't recycle the plastic. And he indicated that there was still lead, fine lead dust on the spent wads making them hazardous. And then in follow up to the inspection they provided an analysis to me that supported that position.

Tr. 68.

Federal employee Davich corroborated the inspector's testimony. Davich testified that while Federal made a decision to try to reuse the plastic from the shotshell wads, there was nothing that could be reused by respondent after the shotshell wads exited the trommel unit process. In fact, according to Davich, all the material that went through the trommel unit eventually was disposed of as "hazardous waste." Tr. 202.

Brian Dudgeon, a safety manager at Federal, provided a similar assessment. The following exchange between Dudgeon and counsel for EPA illustrates why respondent's useful product defense has not been established here.

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[4] It appears that respondent was unsuccessful in removing the paper. Presently, Federal has gone back to shipping the plastic shotshell wads from the ballistic tank, off-site to the lead smelter. Tr. 195, 197.

Q. ... Federal never reclaimed anything at all from the shotshell wad material; is that not correct?

A. Correct. To the best of my knowledge nothing was reclaimed.

Q. And nothing was reused from the shotshell wad material?

A. Correct.

Q. And the shotshell wad material that Federal Cartridge Company had shredded was eventually disposed of by Federal Cartridge Company as hazardous waste; is that not correct?

A. Yes. That is correct.

Q. And Federal Cartridge Company never made any attempt to amend or have their permit modified to secure authorizations so that it would be able to shred that shotshell wad material; is that also not correct?

A. That is correct.

Tr. 152.

In sum, EPA has established by a preponderance of the evidence that Federal treated the plastic shotshell wads within the meaning of Section 1004(34) of RCRA, 42 U.S.C. § 6903(34), and Minnesota Rule 7045, Subd. 97. Because Federal was not authorized under the terms of its Permit to treat the shotshell wads in this manner, Federal thereby violated Section 3005(a) of RCRA. 42 U.S.C. § 6925(a).

Count II

In this count, EPA charges that Federal engaged in unpermitted accumulation of hazardous waste. Specifically, complainant charges that Federal accumulated a hazardous waste material at its facility for more than 90 days in violation of its Permit and Minnesota Rule 7045.0292, Subp. (1)(A). Non-compliance with its Permit and the Minnesota Rules under these circumstances constitute a violation of Section 3005(a) of RCRA. 42 U.S.C. § 6925(a).

Minnesota Rule 7045.0292, in part provides:

> Subpart 1. **Large quantity generator**. A large quantity generator may accumulate hazardous waste on site without a permit or without having interim status if:
>
> A. All accumulated hazardous waste is, within 90 days of the accumulation start date, treated on site in compliance with part 7045.0211 or shipped off site in compliance with part 7045.0208;

Minn. R. 7045.0292, Sub. (1)(A) (emphasis in original).

EPA cites three instances in which it claims respondent violated this Minnesota Rule. The first instance involves two 55-gallon drums of scrap ammunition, located in the solid waste area of Building 127. *See* Compl. ¶ 30(a). This waste was initially accumulated on August 24, 1992. This is one of the violations as to which EPA previously has been awarded summary judgment. The remaining two instances of hazardous waste storage violation, however, are still in issue.

One of these alleged storage violations involves "two 55-gallon drums of lead contaminated soil and shotshell wad waste, located in the solid waste area of Building 127, the waste being initially accumulated on September 15, 1989." Compl. ¶ 30(b). The other alleged instance of violation involves "one 55-gallon drum of lead contaminated soil, located in the solid waste area of Building 127, the waste being initially accumulated on November 13, 1987." Compl. ¶ 30(c).

In response, Federal states that the three drums identified in Paragraphs 30(b) and 30(c) of the complaint did not contain lead contaminated soil and shotshell wad waste. Instead, according to respondent, the three drums "actually contained scrap lead shot and plastic shotshell wads from [its] ballistic tank." Resp. Br. at 25-26. Federal submits that because the scrap lead shot contained in these drums was being recycled, it was excluded from the definition of "solid waste" pursuant to the RCRA regulation 40 CFR 261.3(a). Resp. Br. at 27.

The facts involving Count II are not in dispute. Indeed, the parties have stipulated to the following:

> (13) That as of July 12, 2000, Respondent had been accumulating the following material at the Facility for more than 90 days:
>
> (a) two 55-gallon drums of lead shot and plastic shotshell wads covered by wad paper, located in the solid waste area of Building 127, the material being initially accumulated on September 15, 1989;
>
> (b) one 55-gallon drum of lead shot and plastic shotshell wads

covered by [wad] paper, located in the solid waste area of Building 127, the material being initially accumulated on November 13, 1987.

(14) That during the time periods in which Respondent accumulated the three drums, as described in (13), Respondent did not have a permit, or interim status, authorizing it to accumulate hazardous waste for more than 90 days.

(15) That the wad paper in the drums, identified at (13), degrades when wet and takes on a soil-like appearance after a period of time. The scrap lead shot and shotshell wads were generated on site during ballistic testing. The scrap lead shot, shotshell wads and wet wad paper were removed from Federal's ballistic test tank. The scrap lead shot is taken from the bottom of the tank while the plastic shotshell wads are skimmed off of the top of the water. The plastic shotshell wads generated during testing are contaminated with lead. Some plastic shotshell wads sink because lead shot is imbedded in the plastic and some of the paper sinks when it gets wet.

(16) That on discovering that the drums, identified at (13), contained scrap lead shot and shotshell wad waste, Federal had Gopher Resource Corporation ("Gopher") recycle scrap lead shot, and Federal disposed of the shotshell wad waste as hazardous waste.

Stips. 13-16.

Despite these stipulations, respondent argues that it did not commit the two alleged violations still at issue in Count II. Citing to its answer, Federal denies that the three drums referenced in Paragraphs 30(b) and (c) of the complaint contained hazardous waste. Resp. Br. at 8. Instead, it maintains that the drums contained scrap lead shot from the ballistic tank tests. Moreover, respondent further maintains that it has been recycling this lead shot since 1968. *Id.*

The record supports Federal's contention that its standard practice was to recycle the lead shot. The testimony of Del Schmidt, the facility's environmental coordinator, certainly establishes this point. For instance, Schmidt testified that respondent has a current business relationship with a company by the name of "Gopher," and that Federal recycles approximately one million pounds of lead each year. Tr. 208-209.

Nonetheless, in its brief, Federal glosses over the fact that it stipulated that the contents of the three drums referenced in Paragraphs 30(b) and (c) of the complaint consisted of "lead shot

and plastic shotshell wads covered by wad paper." Stip. 13.[5] Moreover, Federal further stipulated that it had "disposed of the shotshell wad material as hazardous waste." Stip. 15. These stipulations alone are sufficient to support a finding that, as alleged by EPA, Federal stored hazardous waste for more than 90 days in violation of the terms of its Permit and Minnesota Rule 7045.0292, Subp. (1)(A). By doing so, Federal violated Section 3005(a) of RCRA. 42 U.S.C. § 6925(a).[6]

Count III

This count involves 15 separate instances of alleged violation of the Resource Conservation and Recovery Act, each involving in some manner the "Storage of Hazardous Waste in Violation of the Permit." In the complaint, EPA states "[t]hat the Permit, specifically Part V (A)(2)(b)(1), required: that Respondent attach to all containers holding hazardous waste a label identifying the contents of the container as 'Hazardous Waste' and identifying the date on which Respondent initially accumulated the waste in the container; and that respondent keep all such containers closed during storage, except when it is necessary to add or remove waste." Compl. ¶ 34. EPA has been awarded judgment as to seven of these instances.[7] The issue of liability must be resolved as to the remaining eight alleged violations.

i. Paragraphs 35(a) and (b)

Here EPA alleges that in two instances, on or about July 12, 2000, Federal had "containers of hazardous waste which did not have labels attached identifying the contents of the containers as 'Hazardous Waste' and identifying the date on which Respondent initially accumulated the waste in the container." Compl. ¶35. Those two instances are "(a) eight 55-gallon drums of lead contaminated shotshell wads, at Building 75" and "(b) one 55-gallon drum of lead contaminated shotshell wads, at Building 30a." Compl. ¶¶ 35 (a) & (b).

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[5] This stipulation is consistent with the testimony of Schmidt, who opened the drums one or two weeks after the EPA inspection. Schmidt stated:

> Well, when I opened them up I found that it wasn't soil, they contained plastic wads, shotshell wads. The brown material that was originally thought to be soil was paper and lead shot.

Tr. 213. Schmidt added that the contents of these drums came from the ballistic tank. Tr. 214.

[6] There is no evidence that Federal ever recycled the plastic shotshell wads. Indeed, in the discussion under Count I, *supra*, it was found that the spent shotshell wads constituted hazardous waste which could not be reused or recycled by respondent.

[7] Specifically, EPA has been awarded judgment as to Paragraphs 35(c), 36(c) and (d), 37(a), and 38(b), (c), and (d) of the complaint.

Federal does not dispute the facts as asserted in Paragraphs 35(a) and (b). Rather, it once again argues that the nine drums of shotshell wads "were being managed as a product for reuse." Resp. Br. at 29. Thus, respondent concludes that these containers "were not waste and were not subject to RCRA regulation." *Id.*

Inasmuch as Federal's argument that the plastic shotshell wads did not constitute hazardous waste already has been rejected (*see* discussion under Count I, *supra*), it need not be revisited here. Accordingly, it is held that respondent violated Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), as alleged by EPA.

ii. Paragraphs 36(a) and (b)

Of the four violations alleged under Paragraph 36 of the complaint, two remain unresolved. In that regard, EPA charges that on or about July 12, 2000, Federal had two containers of hazardous waste at its facility that did not have labels attached identifying their contents as "Hazardous Waste." These containers were "one ash bucket at Building 160," and "one satellite accumulation drum of hazardous waste sludge under the filter press at Building 133." Compl. ¶¶ 36(a) & (b).

Inspector Kuefler testified that he observed the ash bucket during his visit to respondent's Building 160. There, Federal produces a dry primer mix which is a compound used as an ignition source in the cartridges. Tr. 34. Kuefler further testified that "[i]n the building itself there was a small bucket of gray material that was identified by Federal Cartridge personnel as being barium material." Tr. 35. The inspector described the container as an "ash bucket" similar to a container that might be used to carry ashes from a fireplace. *Id.* When Kuefler asked Federal personnel what was in the bucket, he was informed that "it was from cleaning up from the production and they indicated that it was waste." Tr. 35-36. In addition, Inspector Kuefler testified that the barium nitrate in this bucket was "shock sensitive" and "explosive." Tr. 38. Indeed, because of the explosive nature of this material, he chose not to photograph it. *Id.*

Federal takes issue with the conclusions drawn by Inspector Kuefler, arguing that the barium nitrate observed by the inspector was a "raw material" and not a "hazardous waste." It also states that the ash bucket was "not a waste container." Resp. Br. at 29-30. In support of its position, respondent cites to the contrary testimony of Brian Dudgeon, a safety manager at the facility. Dudgeon testified that the material observed by Inspector Kuefler was ground barium nitrate, a raw material that is blended with other materials to make components of the priming mix. Tr. 106-107, 130. Dudgeon reached the conclusion that the material was ground barium nitrate from speaking to the building operator. Tr. 158. However, like Kuefler, Dudgeon's testimony was based upon a statement made by an individual who did not testify in this proceeding.

Thus, it appears that neither the testimony of Inspector Kuefler, nor Federal employee Dudgeon, is by itself sufficient to resolve the ash bucket matter. This is a circumstance that, if unchanged, would be fatal to EPA, as it is the complainant who bears the burden of proof.

40 CFR 22.24. Here, however, EPA is able to direct this tribunal's attention to additional evidence. Compl. Br. at 20. That evidence is the pre-hearing affidavit filed by Inspector Kuefler.

On July 25, 2002, Inspector Kuefler executed an affidavit which was submitted by EPA as Exhibit 8, attached to its motion for accelerated decision. Insofar as the ash bucket violation is concerned, the Keufler affidavit reads as follows:

> (6) While I was at Building 160, I observed a small 1-2 gallon pail of floor sweepings. Facility employees informed me that the floors are swept and mopped frequently, *and are managed as hazardous waste* and treated at Building 133. The pail had no label anywhere on it, identifying it as hazardous waste.
>
> (7) While at Building 160, I also observed, and was informed by facility staff, that barium nitrite powder is collected in a collection system that uses a bag-type filter, and that *barium powder collected is managed as hazardous waste....*

Aff. of Kuefler (emphasis added).

Thus, Inspector Kuefler's pre-hearing affidavit and his testimony are consistent in showing that the barium nitrate mixture in the ash bucket was a hazardous waste.[8] It also essentially went unchallenged by Federal, other than the fact that respondent offered an alternative explanation. Accordingly, the testimony of Kuefler is credited. EPA, therefore, has established that the material in the ash bucket was a hazardous waste and that the bucket did not contain a label identifying its hazardous waste contents.[9] Thus, respondent is in violation of Part V (A)(2)(b)(1) of its Permit, as well as RCRA Section 3005(a). 42 U.S.C. § 6925(a).

A similar result obtains for the labeling violation charged in Paragraph 36(b) of the complaint. There, EPA alleges that "one satellite accumulation drum of hazardous waste sludge under the filter press at Building 133" did not have a label identifying its contents as "Hazardous Waste."

In its answer, Federal denied that the satellite accumulation drum did not have a label. Ans. ¶ 36. It cites to Photograph 21 of Inspector Kuefler's inspection report (CX 11) and to the

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[8] In addition, EPA points out that Federal's Permit identifies "waste priming mix" as a hazardous waste stream. *See* Compl. Br. at 18, n.13, citing CX 11.

[9] Respondent stipulated that the ash bucket did not have a hazardous waste label. Stip. 18.

testimony of Federal employee Dudgeon as support for its position. Respondent's reliance upon this evidence is greatly misplaced.

First, Photograph 21 shows only a portion of a hazardous waste label. Neither the label, nor any markings on the drum, are legible. Moreover, the caption to this photograph prepared by Inspector Kuefler reads, "Photo 21, Building 133, Satellite drum of waste stored open and was not marked with words 'hazardous waste' *until inspectors identified it.*" (Emphasis added.) Also, the testimony of Dudgeon on which respondent relies is not at all helpful to its case. All that Dudgeon said was that he could see a label in Photograph 21 and that it was company practice to purchase pre-printed hazardous waste labels and to print the waste stream information onto the label when a new container was started under the filter press. Tr. 108. Dudgeon did not specifically testify that he observed the label on the drum *before* the EPA inspection.

Moreover, the testimony of Inspector Kuefler quite clearly establishes that Federal did not label the drum as hazardous waste prior to the EPA inspection. Kuefler testified:

> Q. From the standpoint of an RCRA inspector when you first observed this drum was there anything remarkable about it?
>
> A. When I first observed this particular drum there wasn't a label on it. This was an accumulated satellite regulation, so the requirement is that there be the words 'hazardous waste' on the satellite drum. When I first came in the building that wasn't marked.
>
> Q. I notice on this photograph it appears there is some type of label on that drum. Do you know what that label is?
>
> A. That is the hazardous waste label that they placed on it after I pointed out to them that it needed a label. *I wasn't able to take the photograph faster than they put on the label.* I was taking a lot of photographs throughout the inspection, and so when I went into the room I generally would try to conserve film to look to see what other significant issues were that may be a higher priority for photographing. *When I came back to get this photograph, they had already put the label on it.*

Tr. 40 (emphasis added).

On the basis of Inspector Kuefler's eyewitness account of the violation, Federal is again found to have been non-compliant with the provisions of Section 3005(a) of RCRA. 42 U.S.C. § 6925(a).

iii. <u>Paragraph 37(b)</u>

This paragraph of the complaint also involves events at Building 133 of respondent's facility. It charges that "two 55-gallon drums of treated primer at Building 133" did not have

labels which identified the date on which the waste initially was accumulated. EPA asserts that this is another violation of RCRA.

In support of the charges made in Paragraph 37(b), EPA relies on the testimony of Inspector Kuefler. The inspector testified that these two drums "had been filled and were off to the side" and that while "[t]hey had hazardous waste labels on them, ... they didn't have the date of accumulation marked ... on the containers." Tr. 41. Respondent does not address this charge of violation in its post-hearing brief.

Based upon the unrefuted testimony of Kuefler, it is found that Federal did not have labels on two 55-gallon drums in Building 133 identifying the initial date of the hazardous waste accumulation. Accordingly, Federal is held to have violated Section 3005(a) of RCRA. 42 U.S.C. § 6925(a).

iv. <u>Paragraphs 38(a), (e), and (f)</u>

Paragraph 38 of the complaint identifies three instances in which respondent allegedly had containers of hazardous waste which were not kept closed during storage. Paragraph (a) identifies "one ash bucket at Building 160;" Paragraph (e) identifies "one container of K046 waste at the Waste Water Treatment Plant;" and Paragraph (f) identifies "eight 55-gallon drums of lead contaminated shotshell wads at Building 75." Compl. ¶¶ 38(a), (e), & (f).

The parties stipulated that as charged in these three paragraphs, "on or about July 12, 2000, Federal had at the Facility containers of material which it had not kept closed during storage." Stip. 19. Despite this stipulation, Federal denies that it violated the Resource Conservation and Recovery Act.

With respect to the ash bucket at Building 160, respondent contends that there was no requirement to keep the container covered because it held ground barium nitrate, "a raw material used in the production of priming mix." Resp. Br. at 13. This argument, however, already has been rejected. Previously it has been held that the barium nitrate in the ash bucket was a hazardous waste. Thus, the requirement applies here that the hazardous waste container be covered during storage.

As for Paragraph 37(e), Federal described the container of K046 waste at its Waste Water Treatment Plant as a semi-trailer sized 25-cubic yard roll-off tote. It explained that this container was not covered "because it was impractical to do so, the container could not be overturned, the container did not emit organic vapors, the container was stored in a building with a roof, it had a single operator, and the container was covered when removed from the building." Resp. Br. at 13, 30-31.

Federal safety manager Brian Dudgeon testified that Federal made a decision not to cover the K046 waste container because "it was impractical and difficult to do." Tr. 109. His testimony shows that the respondent understood the applicable RCRA requirement that the hazardous waste

container be covered, but chose not to comply. In that regard, Dudgeon candidly stated:

> In reviewing the RCRA rules on container requirements, *Federal understood there to be a requirement to keep the container closed*. And understanding the purpose of the RCRA rules, it was to prevent a waste release in case the container was overturned, to prevent vapor release from the container, to prevent rain infiltration into the container. None of those conditions could be present or applicable to that type of a container....

Tr. 109 (emphasis added). While Dudgeon continued with his testimony explaining why, in Federal's view, it was safe, and even more practical, to keep the K046 container uncovered, the issue to be resolved here is whether respondent complied with the specific requirement to keep hazardous waste containers closed while being stored. Tr. 109-110.

Of critical importance at this liability stage is Federal's acknowledging a RCRA requirement that hazardous waste containers be covered during storage, and its admission that it did not comply with this RCRA requirement. Clearly, respondent's admission is sufficient to support a finding that it violated Section 3005(a) of RCRA under these circumstances. 42 U.S.C. § 6925(a). The fact that the building where the container was stored was covered is no defense to this violation, as Federal submits is the case. *See* Resp. Br. at 31.

v. <u>Paragraph 38(f)</u>

This paragraph of the complaint alleges that respondent, in violation of RCRA, left uncovered eight 55-gallon drums of lead contaminated shotshell wads at Building 75. Federal admits that these drums were uncovered, but argues that there was no violation because the drums did not contain hazardous waste. As noted earlier, Federal states that "[t]he plastic shotshell wads were being managed as a product and, as such, are not subject RCRA regulation because the shotshell wads were not waste and were a useful product." Resp. Br. at 31. Also, as noted earlier, this argument has been rejected. It has been held that the shotshell wads referenced by Federal, and stored in the eight drums at Building 75, were hazardous waste and not useful products. Thus, Federal's failure to keep these drums covered while being stored constitutes a violation of Section 3005(a) of RCRA. 42 U.S.C. § 6925(a).

<u>Count IV</u>

Count IV of the complaint is based upon Part V (A)(1)(c) of Federal's Permit. The complaint charges that this Permit provision required that respondent "maintain and operate its Anoka, Minnesota facility so as to minimize the possibility of a fire, explosion, or other event that might allow hazardous wastes to escape into the air, land, or water." Compl. ¶ 41. The complaint further charges that Federal failed to do so in four instances involving accumulations of copper plating salts and nickel plating solids, as well as build-ups of burn residues and barium dust. Compl. ¶ 42.

The basic facts are not in dispute. The parties have stipulated that EPA's inspection revealed the following:

> (a) copper plating salts accumulated or built-up around the edges of the floor, throughout the work and containment areas of the copper plating line;
>
> (b) nickel plating solids accumulated or built-up in the nickel plating line area, where the floor met the wall, and where the equipment rested on the floor;
>
> (c) burn residues built up on the outer edge of the floors in the Propellant Burn Pad Building, at which Respondent burns waste propellant;
>
> (d) dust accumulated or built-up around the edges of the building and on the soil outside Building 160, next to the waste barium nitrate baghouse.

Stip. 20. These areas will be addressed separately.

The Copper Plating Area

Federal uses copper plating vats to plate metal ammunition components. The copper plating area has a poured concrete floor, containment curbing, and it is enclosed by four walls and a roof. A number of rectangular vats are located here which contain a plating solution. In these plating baths there is a copper cyanide solution that is used to deposit a thin layer of copper on the outside of metal components. These metal components are primarily "22" rim fire bullets and shotshell. Tr. 111.

Federal employee Dudgeon explained that liquids that might splash onto the floor are cleaned several times a day by the operator. The operator would clean the floors by spraying them with rinse water. The rinse water would be collected by the floor trench system and it would be reused in the platting process if the solution were determined not to be contaminated. Tr. 114, 116.

During his inspection, EPA Inspector Kuefler observed "poor housekeeping" in the copper plating area. Tr. 47. (Dudgeon agrees with this poor housekeeping assessment. Tr. 116.) In particular, Kuefler observed "a lot of plating material on the floor" and that "part of the concrete secondary containment structures appeared to be deteriorating." Tr. 47. Photographs 25 and 26 were taken by Inspector Kuefler and were attached to his inspection report (CX 11) show "the plating solutions on the floor" and the "rounded" concrete berm. Tr. 47-48.

The EPA inspector was concerned with these conditions in the copper plating area. He

explained:

> [M]y concerns were that they were not keeping the plating solutions in the plating tanks and being left standing on the floor, such that it looked like it was comprising the integrity of the flooring and the secondary containment structures. I was concerned that those hazardous wastes or hazardous waste constituents in the materials could migrate through cracks in the floor and be released to the soils or groundwater below.

Tr. 48-49. The inspector added that the accumulation of the copper plating solution residue "makes it difficult to inspect for cracks or deterioration." Tr. 49.[10] Finally, Kuefler concluded that "there was considerable accumulations there that would indicate to me that there had been a lot of solution evaporated over time leaving residues." Tr. 52.

EPA submits that Inspector Kuefler's testimony supports a finding that Federal violated its Permit because it "failed to minimize the possibility" of the copper plating solution escaping into the environment. Compl. Br. at 29. In response, Federal states that the copper plating deposits seen outside the plating vats during the EPA inspection were "routine." Resp. Br. at 14. In support of this description, respondent cites to the testimony of its safety manager, Dudgeon, who testified that "there is always some splashing that occurs and there is always some residue that lands outside of the containers." Tr. 116. However, as noted, Dudgeon did agree with Kuefler that the facility's "housekeeping was not as good as it could have been or perhaps maybe should have been." *Id.*

Given this record, it is held that Federal did not comply with the provisions of Part V (A)(1)(c) of its Permit, thereby violating Section 3005(a) of RCRA. 42 U.S.C. § 6925(a). Kuefler's testimony is credited over the testimony of Dudgeon because it is more specific and it is supported not only by Photographs 25 and 26 of his report, but also by respondent's admission that its housekeeping in this area was not up-to-par. Moreover, Dudgeon did not actually contradict the observations of the inspector. Dudgeon basically only testified that there are going to be some spills in the plating area and that the area was being periodically sprayed down. *See* Tr. 116. He did not, however, contradict the inspector's observations.

The Nickel Plating Area

The nickel plating area is similar to the copper plating area. The flooring is concrete and there is a concrete spill containment system. Tr. 117. The difference here is that cartridge components are plated with nickel instead of copper. Tr. 49, 117. As set forth above, Federal has stipulated to an accumulation of nickel plating solids in this area.

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[10] On August 8, 2000, Federal sent a letter to EPA stating in part that "[p]lating areas in general, residue on floors seems to be a constant problem and we agree." Tr. 115; CX 8.

As in the copper plating area, Inspector Kuefler found the housekeeping conditions in the nickel plating area to be "poor." Tr. 50. To illustrate this point, Kuefler took Photograph 28, which is a view of the walkway and the nickel plating line. *See* CX 11. Directing attention to the lower left portion of this photograph, the inspector stated, "[t]here is a green staining down the side of the tank and you will see some accumulation on the floor, and that is to the wooden walkway, which is also stained or wet when I got there from some of the plating solution." Tr. 50. The inspector also identified nickel plating spillage in both the center and to the right portions of the photograph. *Id.* In addition, the inspector identified damage from nickel plating spillage in Photograph 29. Again, he described in this photograph "greenish and whitish material, as well as the whitish solids that are kind of encrusted on the floor directly below and to the left of the tank." Tr. 51.

Inspector Kuefler was concerned that the nickel plating accumulations on the floor and walkway of the plating area could be released into the environment through cracks in the floor or tracked from this area by employees. Tr. 51-52.[11] Finally, when asked how long this nickel plating solution had been building up, the inspector replied:

> I couldn't tell the exact time, but long enough for the solution to evaporate and leave the solid portion of the solution behind. It looked like it had been there a long time.

Tr. 52.

Federal offers little by way of defense to this alleged violation. Essentially, it relies upon the following testimony of its safety manager Dudgeon:

> ... [I]n my general knowledge of the operation, the methods used to clean the area, concrete floor, raised curb, lead me to conclude that there wasn't a significant risk of release of hazardous waste.

Tr. 119. *See* Resp. Br. at 33.

It is significant that Federal does not challenge the testimony of Inspector Kuefler that considerable spillage of nickel plating solution had occurred in this area over a long period of time. Instead, respondent relies solely upon the testimony of Dudgeon that there was no Permit violation here simply because the nickel plating area had a concrete floor and a containment curb. Essentially, Federal argues that as long as there is a concrete floor and a containment curb there can be no Permit violation regardless of the amount of nickel plating solution spillage, the frequency of such spillage, and the amount of time that the spillage remains. This is a defense

[11] Like the copper plating area, the inspector also stated that the accumulation of residue in the nickel plating area makes it more difficult to inspect the integrity of the floor and equipment. Tr. 52.

that cannot prevail in light of the evidence submitted by EPA to prove the charged violation.

Accordingly, it is held that EPA has established Federal has violated Part V (A)(1)(c) of its Permit, thereby violating Section 3005 of RCRA.

The Propellant Burn Pad Building

The Propellant Burn Pad is respondent's permitted treatment and disposal unit for waste propellant and gun powder. It is a long, rectangular building with a concrete floor and a raised curb. Also, this building has a steel frame with support walls that extend halfway up the wall, approximately four to five feet. A chain extends from the upper portion of the walls to the ceiling and there are removable doors on each end of the building. Down the center of the Propellant Burn Pad Building there is an elevated metal burn trough. Waste propellant is placed in this burn trough where it is ignited in a disposal process. Tr. 42, 119; *see* RXs 3, 4 & 5 (photographs). Respondent has stipulated to the build-up of burn residue on the outer edges of the floor. Stip. 20.[12]

Upon reviewing respondent's Permit, and after talking with its employees, Inspector Kuefler learned that the combustion process on the burn pad was not a "complete combustion." After the burn, propellant residue or incompletely burned propellant would remain, as well as combustion products from the burn. Tr. 44. He stated that this is part of the normal burn process and that the Permit anticipates this situation and requires debris cleanup. Tr. 44-45.

The condition observed by Kuefler on his inspection, however, caused him concern. *See* CX 11, Photograph 16. He explained:

> Well, my concern with the residue is that it still has possibly incompletely combusted propellant in it, as well as lead, which apparently is in the material itself, so there could be releases to the environment outside of the building or through cracks over time in the floor. As we see in the photograph 17, there is a crack in the swept portion of the floor, and then it appears to go underneath the residue, but you really can't see.
>
> So it would be a concern to me that they wouldn't be able to inspect the integrity of the flooring and they would increase the likelihood of releases of hazardous waste constituents to the environment or workers that might be in the area.

Tr. 45. EPA asserts that the condition of respondent's burn pad, recited above, violates the

[12] Inspector Kuefler testified that the center aisle of the burn pad was "swept clean." Tr. 43.

provisions of its Permit.

In defending against this alleged violation, Federal submits that it has a standard operating procedure, a "Burn Pad SOP," which contains specific provisions for cleaning the Propellant Burn Pad Building. Resp. Br. at 34, citing Tr. 124-126 & RX 6.

In addition, Federal cites to the testimony of its safety manager, Dudgeon, who had accompanied Kuefler on the burn pad inspection. According to Dudgeon, the condition of the burn pad was "[f]airly normal" that day. Tr. 126. Also, during the inspection, Dudgeon informed Inspector Kuefler that the burn pad had been cleaned since the previous burn. Tr. 127. Dudgeon testified, "I remember ensuring that it had been swept and cleaned prior to allowing the parties who participated in the inspection going into the burn pad area." *Id.* Dudgeon also believed that Kuefler's concern over the accumulations on the edges of the burn pad to be unfounded. He attempted to dislodge the residue there, he found that "[t]hey were pretty well adhered to the concrete." Tr. 129.

Whether or not the condition of the Propellant Burn Pad was "fairly normal" to Dudgeon is not the issue here. Rather, the issue is whether the condition of this burn pad was in compliance with the provisions of respondent's Permit. Therefore, based upon the testimony of Inspector Kuefler, including Photograph 17, attached to his inspection report ("Hazardous Waste Scrap Propellant Burn Pad Building close-up view of residue on the sides of the floor"), it is held that the residue accumulation on the sides of respondent's Propellant Burn Pad constitutes a violation of its Permit as charged. Thus, respondent is found to have violated Section 3005(a) of RCRA. 42 U.S.C. § 6925(a).[13]

Building 160

Building 160 was used to prepare dry lead components of respondent's priming mix. This included barium nitrate, antimony, and ground glass. Ventilation systems had been installed in Building 162 to protect the workers by removing airborne concentrations of these components. Those ventilation systems were connected to the bag house filter, also referred to as the dust collector, on the exterior of Building 160. Tr. 130. *See* CX 11, Photograph 32.

EPA alleges that Federal violated the terms of its Permit by allowing barium dust to accumulate around the edges of Building 160 and in the soil, next to waste barium nitrate baghouse. Compl. ¶ 42(d). As noted, the parties have stipulated to barium dust accumulations around the edges of the building and on the soil outside Building 160, next to the waste barium nitrate baghouse. Stip. 20. Barium is a toxicity characteristic constituent that, in enough concentration, could be a hazardous waste. Tr. 81-82.

[13] Respondent notes that soil sampling around the burn pad unit showed no sign of soil contamination. Resp. Br. at 34. This assertion will be addressed in the penalty discussion, *infra*.

It bears repeating that Part V (A)(1)(c) of Federal's Permit requires that respondent "maintain and operate its ... facility so as to minimize the possibility of a fire, explosion, or other event that might allow hazardous waste to escape into the air, land, or water." Keeping this provision in mind, Federal defends against this particular charge by asserting that "[s]oil testing in the area occupied by former Building 160 confirmed no impermissible release of barium nitrate powder." Resp. Br. at 35.[14] Federal also argues that it took appropriate measures to minimize the release of barium nitrate dust and that, in any event, "[t]he evidence suggests that the discoloration was caused by antimony sulfide which is not a hazardous waste." *Id.*

In pursuing this enforcement action against Federal, however, EPA underscores that the respondent has stipulated that barium dust accumulated on the side of Building 160, next to the waste barium nitrate bag house, as well as on the soil. Compl. Br. at 35. This stipulation is a significant admission by Federal.[15]

In describing this accumulation, Inspector Kuefler stated: "What I observed was kind of gray, grayish brown stain on the ground and on the side of the building with what looked like there had been releases of the primer mix material to the environment outside of the bag house." Tr. 37. Testifying as to Photograph 32 (CX 11), the inspector further stated that "you can see the foundation on the building is darkened, consistent with the color on the bag itself, the gray color on the bag, which is inside the locker." *Id.*

Kuefler similarly described the condition of the soil where the foundation is exposed as "darker brownish looking material." Tr. 37. Also, while the soil test in this area showed non-hazardous for barium, "[t]he result of the total Barium taken from along side the baghouse on the north side of building #160 was 1700 mg/l (ppm)." CX 3 at 3.[16] Even tough the barium level in the soil was at a non-hazardous level, safety manager Dudgeon nonetheless acknowledged that this was a "fairly high level." Tr. 133. Also, while acknowledging that the soil did not exhibit the characteristic of toxicity for barium, Inspector Kuefler testified that "they were high enough to where they should be identified as a solid waste management unit under their corrective action program." Tr. 82.

In sum, this evidence supports the claim of Permit violation asserted here by EPA.

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[14] Subsequent to the inspection Federal removed Building 160 and replaced it with a new building at a different area of the facility. Tr. 135.

[15] EPA also notes that, in addressing a different violation, the inspector testified that barium primer material is "shock sensitive and explosive." Compl. Br. at 35.

[16] Complainant's Exhibit 3 is a Federal interoffice correspondence which contains sample results sent to Midwest Analytical. While the soil sample results were 1700 mg/l (ppm), this interoffice correspondence went on to state, "[t]he Barium test indicated non-hazardous as the total Barium would have to be 2000 ppm to achieve 100 ppm in the TCLP test."

Respondent failed in this instance to minimize the escape into the environment of barium nitrate. To the extent that Federal argues that the stains were caused by antimony sulfide, its argument is rejected as being contrary to the weight of the evidence. In fact, Federal cites to no evidence proving that the stain was something other than barium nitrate. Accordingly, EPA has established that respondent violated Section 3005(a) here by failing to satisfy the requirements of its Permit. 42 U.S.C. § 6925(a).

Count V

This count involves an alleged failure to comply with waste analysis requirements. EPA charges that Minnesota Rule 7045.0214, Subpart 1, requires that the generator of a waste must evaluate the waste within 60 days of its generation to determine whether it is hazardous. Three items are specified in the complaint -- i.e., "Scrap Ammunition, Lead Contaminated Solid and Wad Waste," and "Lead Contaminated Soil." EPA previously has been awarded summary judgment as to the portion of this count involving Scrap Ammunition. Accordingly, the only issues that remain here involve respondent's compliance with the waste analysis requirements for Lead Contaminated Solid and Wad Waste, and Lead Contaminated Soil.

At the outset there is some dispute as to the contents of the drums at issue. In the complaint, EPA identifies that two drums of Lead Contaminated Soil and Wad Waste and one drum of Lead Contaminated Soil are involved. Compl. ¶ 46. Federal contends, however, that these three drums "actually contained scrap lead shot and plastic shotshell wads from the ballistic tank." Resp. Br. at 36. Citing to Complainant's Exhibits 5, 6, and 8, Federal submits that it had informed EPA of this fact after the inspection. *Id.* Accordingly, in respondent's view, it is entitled to judgment because EPA did not properly identify the contents of the drums in the complaint.

Complainant agrees with respondent that each of the three drums at issue contained shotshell wad material. Compl. Br. at 38. In fact, in its reply brief, EPA asserts that the drums that are issue in Count V are the same drums there were at issue in Count II. Compl. R.Br. at 24. To prove that point, EPA cites to Stipulation 13. That stipulation refers to "(a) two 55-gallon drums of lead shot and plastic shotshell wads covered by wad paper, located in the solid waste area of Building 127, the material being initially accumulated on September 15, 1989"; it also refers to "(b) one 55-gallon drum of lead shot and plastic shotshell wads covered by [wad] paper, located in the solid waste Building of 127, the material being initially accumulated on November 13, 1987."

EPA appears to be correct in its assertion that the drums referenced in Count V are the same drums referenced in Count II. There has been no subsequent submission by Federal arguing otherwise.[17] Moreover, inasmuch as Federal has stipulated that it disposed of the shotshell wad

[17] It is noteworthy that the dates of accumulation of the contents of the drums stipulated as to Count II are the same dates of accumulation listed in the complaint under Count V.

waste in these drums as hazardous waste (Stip. 16), its claim that it is entitled to judgment here because the particular hazardous waste in the drums may have been misidentified is frivolous.

As far as the merits of Count V are concerned, it already has been held with respect to Count II that these drums contained hazardous waste. Furthermore, at no time, either in its answer to the complaint or at the hearing, did respondent state that it did in fact conduct the waste analysis required by Minnesota Rule 7045.0214, Subpart 1. Accordingly, Federal is held to have violated section 3005(a) of RCRA, as alleged in Count V. 42 U.S.C. § 6925(a).

Count VI

This count involves alleged training violations. EPA charges that Federal violated Minnesota Rule 7045.0454, Subparts 4 and 5, in failing to provide required training to Emergency Coordinators James Rodgers and Orrin Nyhus, and to trommel unit operators Diane Pedersen and Dave Ahner.[18] The training requirements for each of these individuals is discussed below.

James Rodgers

In the complaint, EPA alleges that "Respondent has no records that James Rodgers, an Emergency Coordinator listed in Respondent's contingency plan, had ever received any of the required training." Compl. ¶ 51(a).

Federal has stipulated that it has no hazardous waste training records for James Rodgers. Stip. 21. It maintains, however, that no such training was required because he did not qualify as "personnel" or "facility personnel" under Minnesota Rule 7045.0020. Federal asserts that, pursuant to Rule 7045.0020, "'[p]ersonnel' or 'facility personnel' means all people who work at or oversee the operation of a hazardous waste facility, and whose actions or failure to act may result in noncompliance with the requirements of this chapter." Respondent states that the training regulations did not apply to Rodgers because he was a Human Resource Vice President, "who did not handle or provide direction for the handling of hazardous waste materials." Resp. Br. at 37.

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[18] Minnesota Rule 7045.0454, Subpart 4, in part states that "[f]acility personnel shall successfully complete the program required in subpart 3 within six months after the date of their employment or assignment to a facility or assignment to a new position at a facility." Subpart 3 of this Rule addresses the minimum program requirements. It states in part that "[t]he training program must include instruction which teaches facility personnel hazardous waste management procedures relevant to the positions in which they are employed, including contingency plan implementation procedures."

Minnesota Rule 7045.0454, Subpart 5, is titled, "Training review." It provides: "Facility personnel shall take part at least once per calendar year in a review of the initial training required in subparts 1 to 3."

In stipulating that it had no hazardous waste training records for Rodgers, respondent also stipulates that this individual was an "Emergency Coordinator listed in Federal's contingency plan." Stip. 20. This is a significant stipulation inasmuch as the training provisions of Minnesota Rule 7045.0454, Subpart 3 specifically refer to "contingency plan implementation procedures." Moreover, this subpart goes on to state that "[t]he training program must be designed to ensure that facility personnel are able to respond effectively to emergencies by familiarizing them with emergency procedures, emergency equipment, and emergency systems ...."

Because James Rodgers was listed by respondent in its contingency plan as the "Emergency Coordinator," he was subject to the training requirements of Minnesota Rule 7045.0454. Federal's failure to provide this training constitutes a violation of the cited Minnesota regulation and Section 3005(a) of RCRA. 42 U.S.C. § 6925(a).

Orrin Nyhus

The complaint charges "that Respondent has no records that Orrin Nyhus, an Emergency Coordinator listed in Respondent's contingency plan, received any required training until 16 months after being appointed to his position." Compl. ¶ 51(b). The record evidence supports EPA's claim that Federal did not provide Nyhus with the requisite training within the time provided by State regulation.

In its Proposed Finding of Fact No. 86, Federal provides the evidence sufficient to support EPA's charge of violation. There, respondent submits:

> Orrin Nyhus was the Safety, Security and Environmental Manager for Federal at the time of the Inspection. Nyhus was assigned environmental responsibilities in March of 1999. ([CX] 4, p. 6). Nyhus attended training in December of 1999 but was called out of the training session to handle a security matter. ([CX] 4, p. 6). Nyhus attended training again on August 16, 2000. ([CX] 4, p. 6).

Resp. Br. at 18.[19]

EPA correctly argues that the 6-month training requirement of Minnesota Rule 7045.0454, Subpart 4, requires that such training be completed within this time frame. The fact that Nyhus may have started his training, but not finished it, within this 6-month period does not constitute compliance with this State training regulation. Accordingly, Federal is found to have violated RCRA Section 3005(a). 42 U.S.C. § 6925(a).

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[19] This Proposed Finding of Fact is consistent with the affidavit of Orrin Nyhus (¶ 10), which was submitted by respondent in support of its pre-hearing motion for accelerated decision.

Diane Pedersen and David Ahner

As noted, both Pedersen and Ahner were trommel unit operators. In the complaint, EPA charges that Federal violated the applicable State training regulations as to each of these individuals. Compl. ¶¶ 51(c) & (d).

Respondent argues that the Minnesota training regulations do not apply here because the trommel unit sorts solid waste, not hazardous waste. Resp. Br. at 18, 38. Complainant argues that these regulations do apply because the work performed at the trommel unit, under its view, falls under heading "hazardous waste management." Compl. R.Br. at 29. EPA continues that in the Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*:

> Congress has defined 'hazardous waste management' to include 'the systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous waste.

42 U.S.C. § 6903(7).

Complaint submits that given this definition, and given the particular facts of this case, the trommel unit operators are the type of individuals intended to be covered by the State training regulations. In particular, EPA notes that the shotshell wad waste was ground after being processed in the trommel unit and was treated by Federal as hazardous waste. Complaint further notes that "Respondent's own testing and analysis revealed that the shotshell wads remaining, after going through the trommel unit, contained 13.3 mg/l (ppm) lead – above the regulated threshold level of 5 mg/l, 40 CFR 261.24." Compl. Br. at 44.

On balance, it appears that the regulatory interpretation offered by EPA is more consistent with the applicable State of Minnesota training regulations referencing hazardous waste management procedures, as well as the overall remedial purpose of the Resource Conservation and Recovery Act. Thus, it is held that respondent's failure to provide the training to Pedersen and Ahner required by Minnesota Rule 7045.0454 constitutes a violation of Section 3005(a) of RCRA.

B. Civil Penalty

Section 3008(a)(3) of the Resource Conservation and Recovery Act provides for the assessment of a civil penalty for violations of this Act. 42 U.S.C. § 6928(a)(3). It allows for a civil penalty up to $25,000, per day, for each violation.[20] It states, in part, that "[i]n assessing such

[20] Pursuant to the Debt Collection Improvement Act of 1996, this penalty amount has been increased to $27,500, per violation, for violations occurring between January 30, 1997, and March 15, 2004. 40 CFR 19.4 (2003).

a penalty, the Administrator shall take into account the *seriousness of the violation* and *any good faith efforts to comply with the applicable requirements.*" *Id.* (Emphasis added). Applying these criteria to the violations found in this case, as set forth in Counts I through IX of the complaint, a civil penalty of $225,000 is assessed against respondent.

i. Seriousness of the Violations

It is fair to say that each of the violations at issue in this case are serious inasmuch as they involve hazardous waste in one way or another. By grouping the violations for review purposes, their seriousness is self-evident. For instance the first group includes Count 1, the unpermitted treatment of hazardous waste, Count II, the unpermitted accumulation of hazardous waste, Count III, the storage of hazardous waste, Count IV the failure to minimize the possibility of a release of hazardous waste, and Count V, the failure to comply with waste analysis requirements. Each of these counts involves an important safety and environmental concern without which the proper storage, treatment, and disposal of hazardous waste can take place.

The second grouping in this case involves the training violations listed in Count VI. The need to provide adequate training to individuals who store, treat, and dispose of hazardous waste, or who otherwise are involved in hazardous waste management, cannot be understated. The failure to comply with hazardous waste training requirements is quite serious as it not only endangers the individual working with the hazardous waste, but it also jeopardizes the environment.

The final group consists of Count VII, failure to provide soil sample analysis, Count VIII, failure to meet groundwater requirements, and Count IX, failure to report solid waste management units. Respondent's violation of these monitoring and reporting requirements is serious because a failure to do so deprives both the regulated community and EPA of important environmental information.

ii. Good Faith Efforts to Comply

For the most part, it cannot be said that Federal made a good faith effort to comply either with the provisions of its Permit or with the cited regulatory requirements. What comes across from the violations discussed, *supra*, is the moderate to high degree of negligence exhibited by respondent in its non-compliance with its Permit, the Minnesota Rules, and RCRA. For example, respondent offered no sound explanation for failing to properly store or treat its hazardous waste, nor did it adequately explain its failure to clean up this waste that had spilled in the various work areas. Possibly nothing is more telling of respondent's negligence than its failure to properly train those employees who work with hazardous waste.[21]

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[21] Insofar as the penalty criteria is concerned, it is noteworthy that respondent did not substantially address the civil penalty issue in its opening brief. Further, respondent chose not to file a reply brief addressing EPA's penalty argument. While the burden of proof as to both

IV. Order

As set forth above, it is held that Federal Cartridge Company has violated the Resource Conservation and Recovery Act as alleged in the United States Environmental Protection Agency's complaint. 42 U.S.C. § 6928(a). For these violations, respondent is assessed a civil penalty of $225,000. 42 U.S.C. § 6928(a)(3). Further, respondent is directed to pay this penalty within 60 days of receipt of this order.[22]

Unless an appeal is taken to the Environmental Appeals Board pursuant to 40 CFR 22.30, or unless a party acts pursuant to 40 CFR 22.27(c), this decision shall become a Final Order as provided in 40 CFR 22.27(c).

Carl C. Charneski
Administrative Law Judge

liability and penalty remains with the complainant, Federal simply did not avail itself of the opportunity to effectively state its case as to the appropriate penalty.

[22] Payment of the civil penalty may be in the form of either a cashier's check or a certified check, made payable to the Treasurer of the United States, and addressed to The First National bank of Chicago, EPA Region 5 (Regional Hearing Clerk), P.O. Box 70753, Chicago, Illinois, 60673.