

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)	
Omark Industries, Inc.,)	Docket No. RCRA-85-10-09-3008P
Respondent)	

Resource Conservation and Recovery Act - Rules of Practice - Evidence - Burden of Proof - Complainant held to have sustained the burden of showing that a barrel of hazardous waste delivered to a landfill, which was not authorized to receive such waste, belonged to Respondent.

Resource Conservation and Recovery Act - Rules of Practice - Penalty - RCRA Civil Penalty Policy - Good faith efforts to comply with applicable requirements held to warrant 25% reduction in gravity based penalty.

Appearance for Complainant: D. Henry Elsen, Esq.
Assistant Regional Counsel
U.S. EPA, Reg. X
Seattle, Washington

Appearance for Respondent: Mark L. Cushing, Esq.
Tonkon, Torp, Galen, Marmaduke & Booth
Portland, Oregon

INITIAL DECISION

This proceeding under § 3008 of the Resource Conservation and Recovery Act, as amended (42 U.S.C. 6928),^{1/} was commenced by the issuance on November 19, 1985, of a complaint, compliance order and notice of opportunity for hearing charging Respondent, Omark Industries, Inc., with the transportation and disposal of a 55-gallon drum of hazardous waste in violation of applicable regulations, 40 CFR Parts 262 and 263. Specifically, Omark was charged with transporting to, and disposing of, the mentioned drum containing

^{1/} Section 3008 of the Act entitled "Federal Enforcement" provides in pertinent part:

(a) Compliance Orders.

(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subtitle, the Administrator may issue an order requiring compliance immediately or within a specified time period or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

* * * *

(3) Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subtitle and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed \$25,000 per day of noncompliance for each violation of a requirement of this subtitle. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

* * * *

(g) Civil Penalty -- Any person who violates any requirement of this subtitle shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

solid waste having a pH of 13.0, thus making it hazardous by reason of corrosivity, in the Asotin County Landfill, a facility not authorized to receive hazardous waste. It was further alleged that the mentioned shipment had been made without complying with manifest requirements for generators and transporters of hazardous waste and with failure to comply with pretransport requirements including packaging, labeling, marking and placarding. For these alleged violations, it was proposed to assess Omark a penalty totaling \$22,500.

Omark answered, denying ownership or responsibility for transport of the drum in question, contesting the amount of the penalty and requesting a hearing.

A hearing on this matter was held in Asotin, Washington on August 20, and 21, 1986.

Based on the entire record, including the briefs and proposed findings of the parties, I make the following:

Findings of Fact

1. Omark Industries, Inc. operates a facility in Lewiston, Idaho which manufactures ammunition (Tr. 196). The facility consists of a main plant, referred to as CCI, and a second plant, called Speer, located approximately one and one-tenth miles apart (Tr. 86).
2. Omark makes frequent deliveries of trash and refuse to the Asotin County Sanitary Landfill. The landfill is not authorized to receive or dispose of hazardous waste.

3. Although other firms and individuals occasionally deliver used or empty drums to the landfill, Omark makes by far the largest number of such deliveries. According to Mr. Warren Fuller, a landfill employee, Omark delivers an average of from ten to 18 empty, steel, 55-gallon drums to the landfill every two weeks (Tr. 19-21). These drums are black in color. Both Mr. Fuller and Mr. Arthur Owen, foreman at the landfill, testified that only Omark delivered black barrels to the landfill (Tr. 20, 70). Apparently these drums are containers for sodium hydroxide used by Omark (Tr. 205-06).
4. Mr. Frank Rugg, an Omark employee, operates the trucks used in making the mentioned deliveries to the landfill (Tr. 245). On May 22, 1985, Mr. Rugg, using a flat-bed Ford truck, delivered a load he described as containing two pallets of wax and from eight to ten barrels to the landfill (Tr. 246). Messrs. Fuller and Owen observed the truck and the load to the extent that it consisted in part of barrels, but, because of side racks on the truck, could not see all of the load and did not closely examine its contents (Tr. 25, 26, 72). Neither Mr. Fuller nor Mr. Owen saw Mr. Rugg dump the load.
5. Complainant's Exhibit 9 is a diagram showing approximate dimensions of the active area of the landfill on May 22, 1985 (Tr. 22-24). The central feature of the diagram is an area encompassed by a solid, black line, having dimensions approximately 25 feet to 30 feet in length, 11 feet 3 inches in width and 7 to 8 feet in depth, labeled "Garbage Pit." To the south, east and northeast of the garbage pit

are areas marked "Slope" or "Slopes." Immediately to the north (left side of the diagram) of the garbage pit is an area encompassed by a dotted, blue line, having dimensions approximately 11 feet in length, 5-to-8 feet in width and a depth, which is not clear from the record.^{2/} To the east of the area labeled slopes is a rectangular area encompassed by a dotted, black line and within which is a smaller rectangular area also encompassed by a dotted, black line.

6. The evidence is in sharp conflict as to precisely where the Omark refuse referred to in finding 4 was unloaded. Mr. Rugg testified that he pulled his truck in adjacent to, and at about the center of, the garbage pit with the truck facing west, backed the truck to the east, removed the chain from the back of the load and dumped the load over the vertical side or bank into the bottom of the pit.^{3/} According to Mr. Fuller, however, the load had been dumped to the north of the garbage pit and in the northern and eastern portion of the area encompassed by the blue, dotted line on the diagram (Tr. 26, 27). Mr. Fuller testified that the barrels were dumped in the wrong spot as he would have preferred to have them unloaded within the large rectangular area to the east of the garbage pit encompassed by the black, dotted line on the diagram.

^{2/} Mr. Rugg testified that this area was level with the roadway to the west (Tr. 251). Although Mr. Fuller essentially agreed that the area within the blue dotted line was flat, he indicated that it sloped toward the roadway (Tr. 50). Mr. Neu, identified finding 13, stated that he was shown the area where the barrel involved in this proceeding was located and that this area was approximately three feet below the surface of the ground (Tr. 98, 99).

^{3/} Tr. 246-47, 253-54. Apparently, the truck was equipped with a hydraulic lift.

7. Mr. Fuller further testified that he operated the Trashmaster, a machine, having cleated, steel wheels, and a small flat blade, used for compacting trash, in an effort to move the Omark barrels to a proper location (Tr. 19, 27-31). He estimated the number of barrels at from 14 to 18 and stated that after making two or three passes, he ran over something like a large rock and observed a white barrel with blue lettering. He identified the area where he ran over the barrel as on the slopes to the northeast of the garbage pit, which he marked with a circle on the diagram, placing an X inside the circle, and adjacent to which he placed his initials and the number 4.
8. Mr. Fuller identified a photograph (Complainant's Exh 10) as being of the barrel referred to in the preceding finding (Tr. 32). As might be expected, the barrel is badly crumpled, with only the letters "ECO," and a portion of the logo being visible. The photo was taken on July 22, 1985, after the barrel had been removed from the garbage pit area. Complainant's Exhibits 11 and 17 are additional enlarged photographs of the barrel. Exhibit 11 shows the letters "OSECO" on the barrel.
9. Omark made another delivery of trash to the landfill on May 23, 1985 (Tr. 33, 34, 247-48; Asotin County Landfill Receipts, Complainant's Exh 25). For this delivery, Mr. Rugg used what he referred to as the "big truck," apparently a familiar enclosed type of trash or garbage truck. This load consisted principally of paper and plastic items and according to Mr. Fuller, was unloaded within the smaller rectangular area on the diagram to the northeast of the garbage pit.

10. At the time of the May 23 delivery referred to in finding 9, Mr. Rugg observed a fire in the corner of the garbage pit approximately 30 feet to 40 feet from where he had dumped the load of barrels and wax the previous day (Tr. 248). He informed Mr. Owen, who was in the trailer which served as an office, of the fire. Mr. Owen directed Mr. Fuller to go to the pit and do what he could to control the fire (Tr. 35, 73).
11. Mr. Fuller proceeded to the pit, obtained a garden hose and sprayed water on the fire (Tr. 35, 36). He placed the location of the fire in the northeast corner of the garbage pit, indicated by his initials and the number 6 on the diagram, and to that extent his testimony is in accord with that of Mr. Rugg. Fuller was standing at the extreme western and northern edge of the pit, indicated by his initials and the number 7 on the diagram, approximately eight to ten feet from the fire,^{4/} when he started spraying it with water. As the fire was reduced, in Fuller's words, to "where it was just pretty well smoking," he moved along the northern edge of the pit closer to the fire in order to soak it down and prevent a recurrence (Tr. 36). At a point, indicated by a circle, his initials and the number 8 on the diagram, he observed the white barrel with the blue lettering he had seen and run over the day before. The barrel was smoking and as he leaned over, estimated to be from four-to-six feet from the barrel, and sprayed water directly into it, there was a loud pop and in Fuller's words "it blew back out at me" (Tr. 37, 38). He testified

^{4/} This is determined by the diagram scale of one inch equals two feet.

that he received skin burns and sustained injuries to his eyes and lungs. He was taken to a hospital.^{5/}

12. Mr. Fuller was positive that the white barrel with the blue lettering referred to in the previous finding was of 55-gallon capacity (Tr. 40). He testified that there were a couple of black, Omark barrels in the area at the 5' to 6' mark on the slope shown on the diagram where the white, Foseco barrel was found, but no other white or gray barrels to his knowledge (Tr. 64, 65). According to Mr. Owen, no commercial company, other than Omark, delivered barrels to the landfill on May 22, 1985 (Tr. 72). He identified the barrel involved in the fire as having FOSECO lettering and was firm in his testimony that it was of 55-gallon size (Tr. 75, 77).
13. Mr. Ronald Neu, Director of Environmental Health for the Asotin County Health District, whose duties include licensing and inspecting the Asotin County Landfill, conducted an investigation of the accident on May 24, 1985 (Tr. 91-99). He was shown the barrel involved in the fire and its location at the time of the fire by Mr. Owen, represented by his initials and the numbers 1 and 2 on the diagram, the number 2 being placed within the blue dotted line. The diagram, Complainant's Exhibit 9, is based on measurements made by Mr. Neu.^{6/} He examined

^{5/} Mr. Owen located the fire in the north central portion of the area encompassed by the blue, dotted line on the diagram and testified that after Warren left for the hospital, he (Owen) used the Trashmaster to push the barrel out of the hole or pit (Tr. 74-76). The only pit identified on the diagram is the garbage pit.

^{6/} He acknowledged that these measurements were made at least one year after the incident here concerned (Tr. 112).

the barrel and collected samples therefrom. He described the barrel as having the paint burned off and being crushed flat on one side (Tr. 95). On the other side, the name FOSECO was in blue lettering at the bottom of the barrel followed by the Foseco logo. Foseco lettering and logo were barely visible at the top of the barrel. He described the contents of the barrel as having the consistency of charcoal briquets and stated the material was mixed with unburned wood chips (Tr. 96). He was positive the barrel was of 55-gallon capacity.

14. Mr. Rugg testified that he had looked at the barrel involved in the fire (Tr. 245-46). He denied ever having seen the barrel before. He acknowledged, however, that he had loaded a white, 55-gallon barrel on the day he delivered the barrels previously mentioned to the landfill (Tr. 255). Mr. Donald Powe, a millwright for Omark, who works at the Speer Plant, which manufactures bullets, remembered assisting Mr. Rugg load some barrels and unsuitable wax (the wax was on pallets) in May of 1985 (Tr. 82-86). Although he was unable to describe it, he remembered in particular a partially filled barrel containing what he referred to as "solimonic." There were no hazardous waste labels or warnings on the barrel (Tr. 86, 87). He stated, however, that the Speer Plant did not use any caustic materials and that he had no reason to believe the material was toxic. He testified that he had placed his hands in the material and experienced no reaction,^{7/} that there

^{7/} Mr. Neu testified that after taking the samples referred to in finding 13, he experienced burns on the back of his left hand, wrist and forearm and that his lungs hurt (Tr. 113). He related an incident after the fire when he accompanied Mr. Ward, Chief Chemist for Omark, and Mr. Powe to the landfill, wherein he shook hands with Mr. Powe and experienced a chemical reaction (Tr. 119-22).

was no corrosion on the inside of the barrel and that it did not have a plastic liner (Tr. 88, 89). He described the material as granular, being basically white in color and containing some particles of charcoal (Tr. 90).

15. Mr. William Nugent, an Omark employee who works at the Speer Plant, recalled that Don Powe and Frank Rugg had "thrown away" some barrels in May of 1985 (Tr. 259-60). He remembered in particular a weathered, gray barrel with a white top that was supposed to contain flux and which had been stored outside in the "bone yard" (Tr. 261-62). He described this particular barrel as being full and as not having any writing upon it. He did not, however, actually see this barrel loaded on the flatbed truck. He looked at the barrel involved in the fire at the landfill and testified that this barrel was not the barrel containing flux stored in the bone yard at Omark, because other than being crushed and involved in a fire, the barrel at the landfill was a "nice, clean barrel" and had writing on it. Although Mr. Nugent remembered being interviewed by Ms. Marsha Bailey, an EPA environmental protection specialist, on or about July 22, 1985, and remembered telling her that the barrel in the bone yard at the Speer Plant contained a flux, which had not worked properly, he insisted that this barrel was full. He testified that he didn't remember informing Ms. Bailey that he thought the mentioned barrel containing the flux and the barrel involved in the accident at the landfill were the same.^{8/}

^{8/} Tr. 263. Recalled as a witness, Ms. Bailey testified that she interviewed Mr. Nugent on July 22, 1985, and that he told her the drum involved in the accident at the landfill had come from the Speer Plant (Tr. 267). He had described the drum as being filled with an ineffective flux and as having been placed in the bone yard. Ms. Bailey acknowledged he had made the statement prior to seeing the barrel at the landfill (Tr. 270-71).

16. There is no evidence in the record of any tests or analyses of samples drawn from the Foseco barrel by Mr. Neu on May 24, 1985. An additional sample was, however, taken by EPA investigators on July 22, 1985 (Field Sample Data and Chain of Custody Sheet and Receipt for Samples, Complainant's Exhs 19 and 20). The sample (No. 300400) was analyzed by or under the supervision of Mr. Phil Davis, a physical science technician at EPA's Manchester, Washington laboratory (Tr. 124-28; Memorandum, dated October 25, 1985, Complainant's Exh 22). The analysis showed a pH of 13.0, fluoride with preliminary distillation 6.1% (7.2% without distillation), loss on ignition at 1000° centigrade of 32.7% (27.2% on the duplicate) and total sodium of 39.3%. Mr. Davis compared these results with the formulation of a product called Protol 512 as shown on a FOSECO, Inc. memorandum, dated August 26, 1985.^{9/} The formula or recipe shows fluoride of 6.1%, loss on ignition of 34.5%, sodium hydroxide of 50% and total sodium of 35.3%. Because this formula is similar to the results obtained on Sample No. 300400, he was of the opinion there was a high probability the two products were the same (Tr. 128-30). He stated that he had looked up a safety sheet on sodium hydroxide and learned that it can cause severe burns, eye damage or blindness, damage to the esophagus, if swallowed or damage to the lungs, if inhaled. He further testified that water and sodium hydroxide are incompatible unless carefully mixed and that adding water to sodium hydroxide can generate tremendous amounts of heat (Tr. 131-32).

^{9/} Complainant's Exh 3. The memorandum also includes results of Foseco analysis on a sample from the barrel which include loss on ignition of 39.6%, total sodium of 36.2% and total fluoride of 7.1%.

17. Foseco, Inc. is located in Cleveland, Ohio and its primary business is the manufacture of consumable products for the steel and foundry industries (Tr. 133). Foseco sales data were presented through Ms. Linda Thomas, legal coordinator for Foseco (Tr. 133-34). She identified Omark purchase orders, dated January 8 and March 13, 1980, and Consolidated Freightways invoices, dated January 8 and March 25, 1980, as representing the purchase by, and shipment to, Omark of two 400 pound drums of Protol 512 Flux (Tr. 139-40; Complainant's Exh 24). The items are identified on the invoices as "DRM ALUM OR ZINC FLX." Foseco has discontinued manufacture of Protol 512 (Tr. 162). From a review of Foseco sales records and a recapitulation thereof (Complainant's Exh 1), Ms. Thomas testified that Spokane Steel Castings was the only Foseco customer, other than Omark, in that area and that no other customer in the northwest area had purchased Protol 512 (Tr. 163-68).
18. Ms. Thomas identified a Material Safety and Health Data Sheet (Complainant's Exh 6A) as being applicable to Protol 512 and having been obtained from Foseco files (Tr. 136-39). She testified that when a product is formulated a material safety data sheet (MSDS) will be drafted and placed on file (Tr. 144). The MSDS for Protol 512 states, inter alia, that the product contains 50% sodium hydroxide and more than 1%, but less than 10% fluoride. The product is described as being amber-black in color, having granular particles. Although it is described as nonflammable, safety precautions include avoiding the

use of water on the material as it will react with water to produce heat, which may ignite organic material. Ms. Thomas also identified a packaging specification (Complainant's Exh 6B) as being applicable to Protol 512 and being obtained from Foseco files (Tr. 148-49; 154). The mentioned document reflects that Protol 512 is packed or shipped in 400 pound quantities in new, metal 55-gallon drums having a plastic liner. The material is indicated to be corrosive. A hazardous material code document (Complainant's Exh 4) shows DOT labeling and marking requirements for shipping Protol 512, which includes a label indicating the material is corrosive.

19. Mr. James Ward (note 7, supra) is Omark's liaison with federal and state officials for environmental matters (Tr. 201-02). He explained Omark's policy and practice of requiring all drums formerly containing toxics or chemicals to be triple rinsed prior to disposal in a landfill (Tr. 205-06; Interoffice memorandum, dated October 22, 1980, Respondent's Exh 11). Partially filled drums are not to be disposed of until they have been evaluated by the Chemistry Department (Tr. 210). He testified that Omark used a large volume of sodium hydroxide, approximately 200,000 pounds a year, as a neutralizing agent in its waste treatment plant and in the destruction of cyanide from its plating process (Tr. 205-06).
20. Sodium hydroxide is purchased in drums that are black in color (Tr. 213). The empty drums are disposed of at the landfill (Tr. 214).

Respecting the particular incident involved here, Mr. Ward testified that Omark had been ordered to remove the barrel involved in the fire from the landfill^{10/} and when they did so, they noticed it was short in comparison to a 55-gallon drum (Tr. 208-09). This is illustrated in photos (Respondent's Exhs 12, 12a and 12b) showing the crumpled barrel in relation to a 55-gallon barrel, the crumpled barrel with a tape showing a height of approximately 30 inches and a 55-gallon barrel with a tape showing a height of approximately 35 inches. Because the barrel involved in the fire was badly crumpled, Mr. Ward acknowledged that he was not certain whether it was of 35-gallon or 55-gallon size. He stated that there were remnants of a melted plastic liner in the barrel removed from the landfill (Tr. 211).

21. In the spring of 1982, Ms. Diane Ellis, safety coordinator for Omark, conducted a barrel inventory (Tr. 224, Respondent's Exh 4). She testified that the inventory was of all chemical containers and included both plants [CCI and Speer] (Tr. 225). Actually, rather than being an inventory of containers or barrels on hand, a more apt description would appear to be that it is a summary of disposal practices for various chemical containers. Indeed, the inventory (Respondent's Exh 4) is labeled "Barrel Disposal." Neither the Foseco barrel involved in the fire nor the black, 55-gallon drums of sodium

^{10/} Although he did not recall ever seeing a barrel resembling the Foseco barrel on Omark's premises, Ward indicated that there were hundreds of barrels on the property at any given time (Tr. 211-12).

- hydroxide referred to by Mr. Ward (finding 19) are mentioned or included in the inventory. Ms. Ellis testified that she did not see any barrels with a Foseco label during the inventory (Tr. 227). She acknowledged, however, that there were bone yards^{11/} at both the Speer and CCI plants and that she had not looked at the bone yards during the inventory (Tr. 225-26).
22. Mr. Delbert Ellis, a long-time Omark employee and a member of the Clarkston City Council, testified that, after the accident, he had accompanied another Omark employee, Mr. Richard Ball, to the landfill (Tr. 239-42). He quoted Mr. Owen as saying he did not know why Omark was being considered as involved, because the fire had occurred "quite aways" from where the Omark barrels had been dumped. Ellis placed this visit and conversation as within a month after the fire and accident involving the Foseco barrel.^{12/}
23. A Foseco letter, dated August 19, 1985 (Respondent's Exh 6), to Ms. Bailey, signed by Ms. Thomas, purports to enclose records of Foseco sales to Spokane Steel Castings along with MSDS's for products purchased. The letter acknowledges receipt of a sample of material from the drum involved in the landfill incident and quotes Mr. Trevor Hardy, a Foseco chemist, as stating that preliminarily the material does not appear to be a product ever manufactured by Foseco. The letter also states that disposal of waste in "our drums" by other firms continues to be a nagging and expensive problem for Foseco. A Foseco letter to

^{11/} These are areas for the storage of discarded materials which employees are free to pick up.

^{12/} Tr. 243. Although Mr. Owen recalled a conversation with Mr. Ball and another Omark employee subsequent to the fire, he testified that he did not recall making any such statement or for that matter, anything else said in the conversation (Tr. 78, 79).

Ms. Bailey, dated August 28, 1985 (Respondent's Exh 7), also signed by Ms. Thomas, encloses a memorandum (Complainant's Exh 3) stating the results of Foseco analysis of samples from the drum involved in the landfill (note 9, supra) and a comparison with the recipe for Protol 512, assertedly the only product with such a high sodium content ever manufactured by Foseco. The letter states that this analysis leaves some questions due to the chemical changes promoted by the burning of the material while in the drum and that "(u)nfortunately, this further analysis seems to provide us with no more insight than before as to what really was inside the drum and who dumped it at the landfill." Doubt is, however, expressed as to whether Omark should be relieved of responsibility in the matter.

24. Mr. Donald Anderson is a buyer or purchasing agent for Omark (Tr. 228-30). He testified that in January 1980, he was materials manager for Omark and ordered additional fluxing agent. He stated that the fluxing agent Omark was using at the time was ammonium chloride which is not caustic or toxic. He contacted Foseco to order fluxing agent, which he understood would be an ammonium chloride type substance. Foseco offered Protol 512 and according to Mr. Anderson, did not provide any information that it was toxic or hazardous.
25. Mr. William C. Thomas is also a buyer for Omark and he purchased Protol 512 for use as a fluxing agent from Foseco in March of 1980 (Tr. 232-35). He understood that the fluxing agent used by Omark was ammonium chloride and thought ammonium chloride was being purchased. He denied having knowledge, prior to the landfill incident, that

Protol 512 was caustic or toxic.^{13/} That Omark purchases and uses ammonium chloride is confirmed by a purchase order to Great Western Chemical Company, dated August 24, 1981 (Respondent's Exh 9) and a purchase order to Foseco, dated February 23, 1985 (Respondent's Exh 10). The latter purchase order is for Protol 35R Flux, which is a replacement product for Protol 512 (Tr. 236-37).

26. Ms. Marsha Bailey (finding 15) computed the proposed penalty to be assessed against Omark (Tr. 180; Penalty Computation Worksheet, Complainant's Exh 21). For this purpose, she used the Final RCRA Civil Penalty Policy, dated May 8, 1984.^{14/} The policy utilizes a matrix with "extent of deviation from requirement" on the horizontal axis and "potential for harm" on the vertical axis. Each axis is divided into "major, moderate and minor" categories, containing cells with various penalty amounts up to the statutory maximum of \$25,000 per day. Ms. Bailey testified that the potential for harm, which addresses the likelihood of exposure to hazardous waste from the violation in question, was considered major, because a barrel of highly caustic, hazardous waste was delivered to a landfill not authorized or equipped to deal with such waste (Tr. 182-83). She emphasized that in this instance injury had in fact occurred. She explained that "extent of deviation" referred to the degree of noncompliance and that, because the barrel was neither labeled nor manifested and was delivered to an

^{13/} Mr. Ward testified that he had conducted an investigation and concluded that Foseco had not provided notice to Omark of the toxicity of Protol 512 (Tr. 208).

^{14/} Although it was not admitted into evidence, the policy was referred to by both parties without objection. In any event, it is a document of which official notice can and is being taken.

unpermitted facility, the degree of noncompliance was also considered major. Although good faith as an adjustment factor was considered, Ms. Bailey testified that a downward adjustment was not made, because Omark had complete control over the situation and had not retrieved the barrel and properly disposed of it until ordered to do so by EPA. The penalty range in the matrix for major extent of deviation and major potential for harm is \$20,000 to \$25,000 and the midpoint was chosen, resulting in a proposed penalty of \$22,500 (Tr. 185). Ms. Bailey acknowledged that Omark had been cooperative, but appeared to consider good faith (or lack thereof) adjustment factors as applicable only to the question of whether the penalty should be adjusted upwards, or as applicable only to conduct subsequent to the violation (Tr. 186-90).

C O N C L U S I O N S

1. The preponderance of the evidence establishes that the barrel bearing Foseco lettering was owned by and delivered to the Asotin County Landfill by Omark.
2. The mentioned barrel contained a granular substance (sodium hydroxide) having a pH of 13.0, thus making it hazardous by reason of corrosivity (40 CFR § 261.22).
3. The barrel was not packaged, labeled, manifested or placarded in accordance with the requirements for hazardous waste (40 CFR §§ 262.12, 262.20, 262.30-33, inclusive, and 263.11 and 263.20) and the Asotin County Landfill is not authorized to receive hazardous waste.
4. An appropriate penalty for the mentioned violations is \$16,875.

D I S C U S S I O N

According to Omark, resolution of this matter turns on the credibility of Warren Fuller (Brief In Support Of Proposed Findings Of Fact and Conclusions Of law, filed November 10, 1986). Omark emphasizes that Mr. Fuller is prosecuting a civil action against it in the U.S. District Court for the Eastern District of Washington, and that his attorney was in the courtroom at the time of the hearing. Omark claims to have been surprised by Fuller's testimony that he had seen and run over the Foseco barrel in the area of the landfill where Omark had unloaded barrels on May 22, 1985, and asserts that his crisp, specific testimony in this regard is not worthy of belief. Omark also emphasizes the statement attributed to Mr. Owen, foreman at the landfill, shortly after the fire questioning whether Omark could be involved, because the fire had occurred some distance from where the Omark barrels had been unloaded (finding 22).

Omark's analysis ignores ample circumstantial evidence linking the Foseco barrel involved in the fire to Omark. Firstly, it is undisputed that Omark purchased Protol 512 from Foseco and that this product contains a high percentage of sodium hydroxide as did the material in the barrel involved in the fire. Mr. Davis, an EPA lab technician, testified without contradiction that because of the similarity between results of analysis of a sample from the barrel involved in the fire and the recipe for Protol 512, there was a high probability the two products were the same (finding 16). No other Foseco customer in the area purchased Protol 512 (finding 17).

Secondly, Omark employees Frank Rugg and Don Powe remembered loading a partially filled 55-gallon barrel, described by Mr. Rugg as white, at or

about the time of the Omark delivery to the landfill on May 22, 1985 (finding 14). The existence of a gray barrel having a white top which had been in the bone yard at the Speer Plant for several years and which was apparently among barrels discarded on or about May 22, 1985, was confirmed by Mr. William Nugent; another Omark employee (finding 15). Although Mr. Nugent described this particular barrel as being full and not having any writing on it, he indicated that the barrel contained a flux which had not worked properly. It is undisputed that Omark purchased Proto1 512 for use as a fluxing agent. Lastly, there is no evidence to contradict Mr. Owen's testimony that Omark was the only firm which delivered barrels to the landfill on May 22, 1985 (finding 12).

In view of the foregoing, the preponderance of the evidence supports the conclusion Omark owned and delivered the Foseco barrel involved in the fire to the landfill even if Mr. Fuller's testimony is disregarded. It is recognized, that Mr. Fuller's testimony he moved the barrels unloaded by Mr. Rugg on May 22, 1985, provides a possible explanation for the statement attributed to Mr. Owen that he did not know why Omark was considered as being involved, because the fire had occurred "quite aways" from where the Omark barrels had been dumped.^{15/} In any event, the fact that Mr. Fuller was an interested witness may be a reason for carefully scrutinizing his testimony, but is hardly a reason for disregarding it and I find no reason to do so. While acceptance

^{15/} Finding 22. This, of course, assumes that Owen was unaware the barrels had been moved. Owen's testimony that he recalled the conversation, but nothing said at the time (note 12, supra) is not convincing and it is concluded that he in fact made the statement. Complainant speculates that the statement may have referred to the delivery on May 23 or, because Mr. Ellis is a political figure in Asotin County may have been an effort to keep his job (Reply Memorandum, dated November 19, 1986, at 2). The former supposition is obviously inaccurate as there is no evidence the delivery on May 23 contained any barrels.

of his testimony that he ran over and observed the Foseco barrel on the slopes to the northeast of the garbage pit would leave unresolved the question of how the barrel came to be involved in a fire in the corner of the garbage pit (finding 11), such omissions and discrepancies are common place and more likely attributable to failures of memory or perception rather than dissembling.^{16/}

There are, of course, other discrepancies in the testimony which tend to negate the conclusion the material in the barrel at the landfill was Protocol 512. For example, Mr. Powe described the material in the barrel at the Speer Plant as granular, being basically white in color and containing some particles of charcoal (finding 14), while the MSDS for Protocol 512 states that it is amber-black in color, having granular particles (finding 18). The consistency of charcoal briquets described by Mr. Neu (finding 13) may be attributable to the fact the material was involved in a fire, but the unburned wood chips referred to by him defy any such explanation. Moreover, Mr. Nugent (finding 15) remembered the barrel in the bone yard at the Speer Plant as being full and not having any writing upon it, which is obviously not true as to the Foseco barrel at the landfill. Significant as these discrepancies and conflicts may be, it is nevertheless concluded for the reasons previously stated that, on this record, the preponderance of the evidence permits only one conclusion, i.e., that the Foseco barrel involved in the fire was owned by and delivered to the landfill by Omark.

^{16/} In addition to the question of whether he moved the Foseco barrel into the garbage pit, other helpful questions of Mr. Fuller would center on whether and, if so, where he saw the two pallets of wax which were also on the Omark load delivered to the landfill on May 22, 1985.

- The only question remaining is the amount of the penalty. Omark argues that, if it is somehow found responsible for the Foseco barrel being placed at the landfill, the most that can be said is that it was contrary to the company's policies and established program for complying with environmental regulations pertaining to the disposal of chemical drums (Brief at 2). Omark further argues that there is no evidence which would place it on notice these policies were not being implemented and that the evidence is overwhelming Foseco did not inform Omark of the toxicity of Protol 512. Accordingly, Omark contends that no penalty should be assessed.

While I am not bound by the Final RCRA Civil Penalty Policy (40 CFR § 22.27(b)), I must give reasons for deviating therefrom and in this instance, I see no reason for doing so. Ms. Bailey's explanation for determining both the extent of deviation from the requirement and the potential for harm as major are unexceptionable and in strict accordance with the policy. Accordingly, the gravity based penalty of \$22,500 is affirmed. Her reasons for not making a downward adjustment in the gravity based penalty for good faith efforts to comply with applicable requirements appear, however, to be based upon a misinterpretation of the policy and are not accepted. Omark had in place a policy of requiring partially filled drums to be checked by chemistry before disposal. While that policy was not followed in this instance, it is certainly evidence of good faith efforts to comply with RCRA.^{17/} Moreover, the record

^{17/} It is noted that the Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act (45 FR 59770, September 10, 1980) include situations where the violation was caused by an employee violating his employer's instructions as an instance warranting some reduction in penalties (Id. at 59773).

supports the conclusion Omark had no reason to believe the material in the drum was hazardous. Ms. Bailey's other reason for declining to make a downward adjustment, i.e., Omark did not remove the barrel until ordered to do so, is perhaps more valid, but nevertheless understandable from Omark's viewpoint. By rushing to retrieve a barrel which may not have belonged to it, Omark would in effect be acknowledging responsibility therefor. On the other hand, after being ordered to remove the barrel, its actions are defensible, even if ownership is established in another. While it has been concluded herein that the Foseco barrel belonged to and was delivered to the landfill by Omark, there is, as indicated above, evidence tending to detract from that conclusion. Omark was certainly entitled to a reasonable time to investigate the situation and under all of the circumstances, a 25% downward adjustment is considered to be warranted and in accordance with the penalty policy.^{18/}

ORDER 19/

The violations alleged in the complaint having been established, in accordance with § 3008 of the Resource Conservation and Recovery Act, as amended (42 U.S.C. 6928), a penalty of \$16,875 is assessed against Omark

^{18/} The policy at 18 includes whether the violator took reasonable precautions against the events constituting the violation as an instance to be considered in determining the degree of willfulness or negligence. While Omark entered into a consent agreement and paid a penalty of \$10,000 for prior RCRA violations relating to its on-site treatment and disposal facility (Tr. 203), Ms. Bailey did not give this as a reason for refusing to make a downward adjustment and, because that situation is unrelated to the violation involved here, I too decline to consider it.

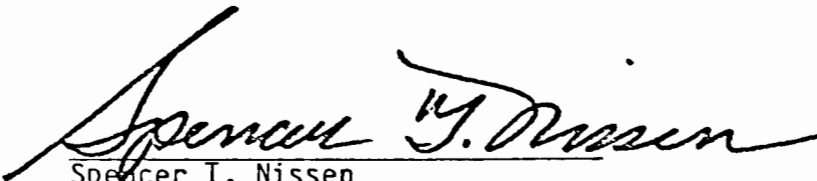
^{19/} Unless appealed in accordance with Rule 22.30 (40 CFR Part 22) or unless the Administrator, elects, sua sponte, to review the same as therein provided, this decision will become the final order of the Administrator in accordance with Rule 22.27(c).

Industries, Inc. Payment of the penalty shall be made by sending a certified or cashier's check payable to the Treasurer of the United States in the amount of \$16,875 to the following address within 60 days after receipt of this order:

EPA, Region X
Regional Hearing Clerk
P. O. Box 360903M
Pittsburgh, Pennsylvania 15251

The compliance order insofar as it directs Omark to submit, within 30 days of the receipt of this order, a written statement as to actions taken to ensure that hazardous waste is properly manifested, packaged, labeled, placarded, marked, transported, and disposed of, in accordance with the requirements of 40 CFR Parts 262 and 263 or Omark's hazardous waste permit, is affirmed.

Dated this 6th day of January 1987.


Spencer T. Nissen
Administrative Law Judge