UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
	)	Docket No. RCRA-III-264
BIL-DRY CORPORATION	)	
	)	
Respondent	)	

INITIAL DECISION

Resource Conservation and Recovery Act of 1976. This proceeding involves a Complaint filed by the U.S. Environmental Protection Agency, seeking $231,800 in civil penalties pursuant to § 3008(a)(1) of the Solid Waste Disposal Act of 1976, as amended by the Resource Conservation and Recovery Act of 1976. Respondent is alleged to have committed nine violations of the authorized Hazardous Waste Management Regulations of the Commonwealth of Pennsylvania, 25 Pa. Code § 75.259 et seq., and the Federal Hazardous Waste Management Regulations , 40 C.F.R. Parts 260-271. An evidentiary hearing in this matter was held in Philadelphia, Pennsylvania on December 2-3, 1997. **Held:** Respondent is found liable under all counts of the Complaint and is assessed a civil penalty in the total amount of **$103,400**.

Before: Stephen J. McGuire
Administrative Law Judge

Date: October 8, 1998

APPEARANCES: For Complainant:

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Assistant Regional Counsel
Benjamin Fields
Senior Assistant Regional Counsel
Office of the Regional Counsel
U.S. EPA, Region 3
1650 Arch Street
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For Respondent:

Glenn R. Matecun
Bil-Dry Corporation
3505 West Grand River Avenue
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I. INTRODUCTION

This is a civil administrative proceeding instituted by issuance of a Complaint on September 30, 1996, by the United States Environmental Protection Agency, Region 3, Philadelphia, Pennsylvania (Complainant/EPA), pursuant to § 3008(a)(1) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a)(1) and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22. The Complaint alleges that Bil-Dry Corporation (Respondent/Bil-Dry) violated numerous provisions of the authorized Hazardous Waste Management Regulations of the Commonwealth of Pennsylvania, 25 Pa. Code § 75.259 et seq., and the Federal Hazardous Waste Management Regulations, 40 C.F.R. Parts 260-271 (Complainant's Exhibit 14).[(1)]

EPA asserts inter alia, that Respondent is liable for the unpermitted and improper management, storage and disposal of "hazardous wastes" in four (4) fifty-five (55) gallon drums and three (3) underground storage tanks at its facility located at 5525 Grays Avenue, Philadelphia, Pennsylvania (facility). EPA further charges Respondent with failure to comply with the administrative and financial assurance obligations imposed upon an owner and/or operator of a Hazardous Waste Management facility (HWM facility).

A. The Complaint

The Complaint asserts nine counts of alleged violations and proposes a recommended civil penalty of $231,800 (CX-14) as follows:

Count I alleges that Respondent is the owner and operator of a hazardous waste storage facility for which a permit or interim status is required under 25 Pa. Code § 270.1(a) (25 Pa. Code § 75.270(a)). EPA asserts that Respondent's failure to comply with this section constitutes a moderate extent of deviation supporting the assessment of a gravity based penalty of $6,000. The EPA requested a multi-day penalty component for this violation of $250 per day for a total of $30,000 based on the duration period of December 11, 1995, through April 10, 1996 (120 Days). The total penalty proposed for Count I by EPA is $36,000.

Count II alleges that Respondent violated 25 Pa. Code § 262.11 (25 Pa. Code § 75.262(b)), by failing to determine that its ignitable (D001), corrosive (D002), chromium (D007) and Methyl Ethyl Ketone ("MEK") (D035) wastes, were hazardous wastes. EPA asserts that Respondent's failure to determine that the wastes it generated were hazardous wastes constitute a moderate deviation from the regulatory requirements supporting the assessment of a gravity-based penalty of $6,000. EPA requested a multi-day component for this violation of $250 per day for a total of $30,000 based on the duration period of December 11, 1995, through April 10, 1996 (120 days). The total penalty proposed for Count II by EPA is $36,000.

Count III alleges that Respondent violated 40 C.F.R. § 268.7(a) by failing to determine that its chromium and MEK wastes were Land Disposal Restricted ("LDR"). EPA asserts that given the amount of material at issue, the Respondent's failure to determine that the wastes were LDR, constituted a moderate deviation from the RCRA requirements supporting a gravity-based penalty of $6,000. EPA requested a multi-day component for this violation of $250 per day for a total of $30,000 based on the duration period of December 11, 1995, through April 10, 1996 (120 Days). The total penalty proposed for Count III by EPA is $36,000.

Count IV alleges that Respondent's failure to properly store land disposal restricted waste as required by 40 C.F.R. § 268.50, could have posed a significant

risk to human health and the environment through deviation from the requirement that facilities properly manage their hazardous wastes prior to disposal. EPA asserts that Respondent's failure to properly store LDR waste constituted a moderate deviation from the regulations, supporting a gravity-based penalty of $6,000. EPA requested a multi-day component for this violation of $250 per day for a total of $30,000 based on the duration period of December 11, 1995, to April 10, 1996 (120 Days). The total penalty proposed for Count IV by EPA is $36,000.

Count V alleges that Respondent's failure to establish a schedule for inspections of the facility in compliance with 25 Pa. Code § 262.15(b) (25 Pa. Code § 75.265(e)(2)), constituted potentially significant harm to the RCRA regulatory program, human health and the environment. EPA asserts that Respondent's failure to comply with this section constituted a moderate deviation from the regulatory requirements, supporting a proposed gravity-based penalty totaling $1,000.

Count VI alleges that Respondent violated 25 Pa. Code § 265.112 (25 Pa. Code § 75.265(o)(3)) by not having a closure plan for the facility, which represented a significant potential harm to human health and/or the environment because of possible delays in the closure process. EPA asserts that Respondent's failure to provide a closure plan constituted a significant deviation from the regulatory requirements supporting a gravity-based penalty of $6,000. EPA requested a multi-day penalty component for this violation of $250 per day for a total of $30,000 based on the duration period of December 11, 1995, through April 10, 1996 (120 Days). The total penalty proposed for Count VI is $36,000.

Count VII alleges that Respondent violated 25 Pa. Code § 265.142 (25 Pa. Code § 75.265(p)(2)) by failing to have a written cost estimate for closing the facility and/or by failing to update or adjust its cost estimate, incrementally contributing to the harm caused by respondent's failure to develop a closure plan in the first instance. EPA asserts that these regulations are intended to ensure that the owner and operator of a hazardous waste facility is aware of the funds needed to ensure proper closure of the facility and meet the program goal of advance planning and preparation for hazardous waste activities. The Respondent's alleged failure to have a written cost estimate in this case, was determined by EPA to constitute a moderate deviation from the regulatory requirements supporting a gravity-based penalty totaling $1,400.

Count VIII alleges that Respondent violated 25 Pa. Code §§ 265.171, 265.173 and 265.178 (25 Pa. Code Sections §§ 75.265(q)(1), 75.265(q)(3) and 75.265.265.(q)(10)) by storing hazardous waste in containers in poor condition; by storing at least one container of hazardous waste that was not covered with a lid when it was not necessary to add or remove hazardous waste; and by storing hazardous wastes in containers which were kept in a storage containment area without a container system capable of collecting and holding spills, leaks and precipitation. EPA asserts that Respondent's failure to properly store hazardous waste constituted a significant deviation from the regulations supporting a gravity-based penalty of $6,000, moderated only by the relatively small number of drums and tanks known to contain hazardous waste at the facility. EPA requested a multi-day component for this violation of $250 per day for a total of $30,000 based on the duration period of December 11, 1995, to April 10, 1996 (120 Days). The total penalty proposed for Count VIII by EPA is $36,000.

Count IX alleges that Respondent violated 25 Pa. Code § 267.11 (25 Pa. Code § 75.311) by failing to file a bond payable PADEP to prevent the creation of a Superfund site at the facility. The Respondent's alleged failure to file a bond for a facility storing the amount of waste known to be present at the facility, constituted a moderate deviation from the regulatory requirements, supporting a gravity-based penalty of $1,400. EPA requested a multi-day component for this violation of $100 per day for a total of $12,000 based on the duration period of December 11, 1995, through April 10, 1996 (120 Days). The total penalty proposed for Count IX by EPA is $36,000.

On October 30, 1996, Respondent filed an Answer denying the allegations contained in the Complaint and requested a settlement conference and evidentiary hearing in

the matter. Subsequently, on April 7, 1997 Respondent filed its Pre-hearing Exchange and on April 24, 1997, Complainant filed its Rebuttal Pre-hearing Exchange.

II. FINDINGS OF FACT

1. Since 1985, Respondent Bil-Dry Corporation, has been the owner and operator of a facility which manufactures grout and cement patching products, wall and floor coatings and other consumer products located at 5525 Grays Avenue, Philadelphia, Pennsylvania (CX-1). Bil-Dry is a Nevada corporation with wholly-owned subsidiaries located in Florida (Stone Mountain Manufacturing of Florida, Inc.) and Georgia (Stone Mountain Manufacturing of Georgia, Inc.) (CX-1).

2. On December 11, 1995, Inspector Ronald Jones, an Environmental Protection Specialist, in response to a request from the EPA's Region 3 office in Philadelphia, Pennsylvania, conducted an inspection at the Bil-Dry facility to determine the existence and condition of any underground storage tanks (USTs) located at the site (CX-3; Tr. 56-59). Inspector Jones had previously contacted Joseph Mazza, General Manager of the facility, on November 29, 1995, and received permission to perform the inspection (Tr. 57). Mr. Mazza denied the existence of any USTs on the property (Tr. 58; CX-3).

3. During the December 11 inspection, Inspector Jones discovered tank caps, vent pipes, fill pipes and a dispenser unit which indicated the presence of two to four USTs in the front of the facility (Tr. 48, 59, 65; CX-3). Inspector Jones stated that the dispenser and four steel caps were immediately visible from outside the fenced-in loading area prior to his entry to the Bil-Dry facility (Tr. 59, 65-66).

4. After presenting a notice of inspection to Mr. Mazza (Tr. 60; CX-3), Inspector Jones toured the facility and pointed out the presence of the steel caps and dispenser unit on the property. Mr. Mazza agreed with Inspector Jones' assessment that USTs were indeed present under the concrete in the loading area of the facility (Tr. 60-61). No records were available at the Bil-Dry facility concerning the contents of the USTs (Tr. 60, 65-66; CX-3) and Mr. Mazza stated that Bil-Dry was unaware of the presence of USTs prior to the December 11 inspection (Tr. 58, 472-473; CX-3).

5. Due to the fact that the tanks were locked and sealed, Inspector Jones was unable to conduct sampling of the UST's contents during the December 11 inspection (Tr. 66). He did note that the caps looked like they had been locked and sealed for a long period of time (Tr. 64; CX-3). There were no signs or labels present on the UST's associated equipment or in their vicinity to indicate the contents of the tanks (Tr. 66-67).

6. Inspector Jones and Mr. Mazza toured the remainder of the facility to determine the presence of any additional USTs (Tr. 64). During this tour, Inspector Jones observed "around 100 drums" (Tr. 65, 104) stored in a building adjacent to an open area at the rear of the facility (Tr. 64; CX-3). Inspector Jones noted that some of the drums were rusty and appeared to be in poor condition (Tr. 64, 67; CX-3). Mr. Mazza stated that he did not have any records concerning the drums at the rear of the facility (Tr. 65-66), except that he was aware that they had been there since 1985 or 1986 when Bil-Dry took possession of the facility (Tr. 66). Inspector Jones attempted to move several of the drums and found that they contained materials (Tr. 68). No samples were taken from the drums (Tr. 100, 106) and no determination was made concerning Bil-Dry's storage of waste materials (Tr. 107).

7. On March 21, 1996, the Pennsylvania Department of Environmental Protection (PADEP) received a citizen complaint regarding suspected improper storage of drums at the Bil-Dry facility (Tr. 134; CX-6, CX-7). The complaint stated that "some 15 to 20 drums are being stored outside at this facility; some are rusted and there appears to be no containment area" (CX-7).

8. On April 1, 1996, a PADEP inspection team led by Heather Bouch arrived at the Bil-Dry facility to conduct an inspection of the site (Tr. 133, 136; CX-6). Mr. Mazza suggested at that time that there was no reason for the PADEP to conduct an

inspection of the facility because the EPA had already done so and that an inspection would not be allowed to take place (Tr. 136). After explaining the legal basis for the inspection and the concurrent jurisdiction of the EPA and the PADEP, Inspector Bouch was allowed to begin her inspection of the facility (Tr. 137, 152). Neither PADEP nor Inspector Bouch had been informed of the inspection on December 11, 1995, or the planned April 9, 1996 inspection by the EPA (Tr. 140).

9. After inspecting the production areas of the facility, Inspector Bouch noted in her report that the primary waste generated by Bil-Dry was unusable packaging and that there were no violations of Pennsylvania Hazardous Waste Management ("HWM") Regulations associated with the ongoing manufacturing processes (Tr. 138, 151-152; CX-6).

10. During the course of the inspection, Inspector Bouch observed a "large quantity" of drums located within a building at the rear of the facility (Tr. 139; CX-6). According to Inspector Bouch, Mr. Mazza stated that the contents of the drums had been sampled by Bil-Dry (Tr. 139, 152) however, he did not have the results at that time. Inspector Bouch noted that there were approximately 130 drums within the building (Tr. 140; CX-6) and that a large percentage appeared to be in rusted and poor condition (Tr. 139; CX-6). Outside the building, Inspector Bouch observed an open roofed area containing between 100 and 150 drums stacked three pallets high six pallets wide and two pallets deep, most containing three or four drums (Tr. 143; CX-6). The drums were noted to be in poor condition, some with materials hanging out of the top and down the side (CX-6).

11. During the inspection, Inspector Bouch observed markings on drums located both inside the building and in the open roofed area, but was unable to determine their meaning (Tr. 141-142). No samples were taken during this inspection for laboratory analysis to determine if hazardous waste was present at the facility (Tr. 150). Nor were any photographs taken of the condition of the drums on site (Tr. 150).

12. In a follow-up to the December 11 inspection, EPA Inspector Jones contacted Mr. Mazza on March 25 and 26, 1996 to request an additional inspection to obtain samples from the USTs and drums (Tr. 69). On April 9, 1996 an EPA inspection team consisting of Inspector Jones, Environmental Protection Specialist Jerry Donovan, and RCRA Enforcement and Compliance Officer Zelma Maldonado, conducted an inspection of the entire Bil-Dry facility (Tr. 70, 373-374). Inspectors Jones and Donovan returned on April 10 to complete the inspection (Tr. 70). Present for both days of inspections representing Bil-Dry were Mr. Mazza, William Rodgers, President of Bil-Dry Corporation, and George Sode, Senior Process Engineer (Tr. 70, 372, 446).

13. Prior to commencing the inspection, Inspector Jones inquired about the existence of any records concerning the USTs and the drums at the facility. He was told by Mr. Sode that no records existed for the USTs. Mr. Sode did however, present a nine-page "inventory" list for the drums (Tr. 71, 82). Inspector Jones then went to the rear of the facility by himself to verify that markings on the drums matched those on the inventory list. He was unable to determine whether the drums matched those on the list, but never requested assistance from any Bil-Dry representative to interpret the information (Tr. 71-72, 118, 445).

14. Samples were taken from seven random drums (EPA Drums No. 1 through 7) and four USTs (Tanks A through D) during the April 9 and 10 inspection according to standard EPA procedures (Tr. 72- 75, 77-78, 83, 84, 372, 416-417, 446; CX-4). EPA Drums No. 1 through 3 were located inside a building at the rear of the facility and Drums No. 4 through 7 were located outside the building. Bil-Dry representatives did not obtain split samples from the EPA inspectors nor did they undertake any sampling of their own while the inspectors were present. (Tr. 77, 85-86, 115, 416).

15. Inspector Jones noted that the drums which had been stacked outside at the rear of the facility had been placed on a concrete pad and several had plastic lids covering tops which had rusted out (Tr. 78-79, 81, 121; CX-4). In addition, some of the drums Inspector Jones had seen during the December 11, 1995, inspection were missing from the storage area. In response to the inspector's questions about this change, Mr. Mazza stated that the drums had been either used or repacked since the

December inspection (Tr. 80, 115-117, 367; CX-4). Inspector Jones estimated that there were 50 to 100 drums present at the facility at the time of the April 9 and 10 inspection (Tr. 78; CX-4). Inspector Bouch estimated that there were between 100 and 150 drums present, in poor condition with no labels, but containing some sort of "chicken scratch" numbers or markings (Tr. 139-142).

16. Drums at the rear of the facility were observed to be in poor overall condition and this, combined with Mr. Mazza's statement that they had been stored there since 1986, resulted in the inspectors' classification of their contents as solid waste (Tr. 83, 118-121; CX-4). At the time of the April 1996 inspection, Mr. Sode stated that Bil-Dry's position was that the contents of the drums were "raw materials" and therefore not solid waste. Bil-Dry representatives however, were unable to answer why the drums had been stored as they had since 1985, when the property was acquired by Bil-Dry. (Tr. 474-476; CX-4).

17. Analysis performed by the EPA's Office of Analytical Services and Quality Assurance (OASQA) in May/June of 1996 on the samples taken from Drums No. 1 through 7 and Tanks A through C. The contents of Tanks A, B and C and Drums No. 3, 4 and 5 exhibited the characteristic of "hazardous waste" according to Dr. Samuel Rotenberg, EPA Regional Toxicologist (CX-10): the contents of Tank A exhibited the characteristic of ignitability (EPA Hazardous Waste No. D001) (Tr. 222-223; CX-5, CX-11); the contents of Tank B exhibited the characteristic of toxicity for 2-Butanone (also known as Methyl Ethyl Ketone ("MEK")) (EPA Hazardous Waste No. D035) (Tr. 223; CX-5, CX-11); the contents of Tank C exhibited the characteristic of ignitability (EPA Hazardous Waste No. D001) and MEK (EPA Hazardous Waste No. D035) (Tr. 223; CX-5, CX-11); the contents of Drum No. 3 exhibited the characteristic of ignitability (EPA Hazardous Waste No. D001) and toxicity for MEK (EPA Hazardous Waste No. D035) (Tr. 212-214, 216-217; CX-5, CX-11); the contents of Drum No. 4 exhibited the characteristic of ignitability (EPA Hazardous Waste No. D001) (Tr. 217-218; CX-5, CX-11); and the contents of Drum No. 5 exhibited the characteristic of corrosivity (D002) and the characteristic of toxicity for chromium (EPA Hazardous Waste No. D007) (Tr. 218-220; CX-5, CX-11).

18. MEK is a colorless, flammable liquid used in the production of protective surface coatings, adhesives, paint removers and special lubricating oils. Exposure to MEK can occur following releases into the air, water, land or groundwater and can enter the human body through breathing contaminated air, consumption of contaminated food or water, or absorbed through skin contact. MEK evaporates when exposed to air and dissolves when mixed with water and does not bind well to soil. Breathing MEK for short periods of time can have adverse effects on the nervous system, ranging from headaches to unconsciousness depending upon levels of exposure. MEK vapors irritate the eyes, nose and throat. Direct, prolonged contact with liquid MEK irritates the skin and damages the eyes. Concentrations greater than 200 parts per million ("ppm") are considered to be toxic according to the EPA. (Tr. 213-214, 224-225; CX-5, CX-11, CX-12-a, CX-12-c, CX-12-d, CX-12-e)

19. Chromium is a naturally occurring element found in rocks, soil, plants, animals and volcanic dust and gases. In the compound known as chromium (IV), it is used for making steel and other alloys, bricks in furnaces, dyes and pigments, and for chrome plating, leather tanning and wood preserving. Very small amounts of the compound chromium (III) are found in everyday foods. Manufacturing, disposal of products or chemicals, or burning of fossil fuels release chromium into the air, soil and water. Chromium binds easily to soil and when mixed with water, sticks to dirt particles that fall to the bottom. Only small amounts dissolve or move through soil into groundwater. Exposure can occur through air or ingesting water or food from soil contaminated with chromium. Chromium (IV) can be toxic at high levels, resulting in damage and irritation to nasal passages, lungs, stomach and intestines. Ingestion of very large amounts can cause stomach ulcers, convulsions, kidney and liver damage, even death. Skin contact may lead to allergic reactions and skin ulcers. Concentrations greater than 5,000 parts per billion are considered to be toxic according to the EPA. (Tr. 227-228, 238-240; CX-5, CX-11, C-12-b).

20. The EPA standard for ignitability in hazardous waste determinations is a flashpoint of less then 60 degrees Celsius. Materials which ignite and burn at less

than this temperature are considered to be hazardous waste. (Tr. 212-214; CX-11).

21. The content of Drum No. 2 was found by the OASWA laboratory to exhibit the characteristic of corrosivity (EPA Hazardous Waste No. D002) by registering a pH value of 12.6 during inorganic analytical testing according to Dr. Rotenberg (Tr. 211-212; CX-5, CX-11). During the initial organic testing of the sample, the laboratory report states that the pH was 11.8. (Tr. 397; CX-5). EPA standards for corrosivity testing designate materials which have pH values of greater than 12.5 and lower than 2 as hazardous in nature (Tr. 166, 211; CX-11). James Barron, an EPA Chemist called as an expert witness, stated at the hearing that the difference in pH values existed because the inorganic testing was done with an Orion brand electrometric pH meter according to RCRA methodology SW-846, while the organic testing was done with pH paper, a less reliable method (Tr. 167, 170, 188, 197, 200-201). Only the analysis for the inorganic testing was properly calibrated to take into account the presence of sodium in high alkaline solutions, temperature, positioning of electrodes and the age of the sample (Tr. 171-175).

22. On May 30, 1996, based upon Inspector Bouch's findings from the April 1, 1996, inspection, PADEP sent a letter to Bil-Dry which cited 14 violations of the Pennsylvania Solid Waste Management Act of July 7, 1980 ("SWMA"), (P.L. 380, No. 97), as amended 35 P.S. § 6018.101 et seq. and the rules and regulations promulgated in 25 PA. Code. Violations cited included failure to perform a hazardous waste determination, failure to notify the PADEP and EPA of hazardous waste activities, failure to obtain an EPA identification number, operating a hazardous waste disposal facility without a permit and failure to maintain records to identify quantities of hazardous wastes generated at the site (Tr. 145-146; CX-8). The notice did not impose any obligation upon Bil-Dry and served to provide an opportunity for Bil-Dry to come into compliance with the provisions of the SWMA through voluntary action (CX-8).

23. In response to PADEP's letter citing numerous violations of the SWMA, Bil-Dry sent a letter dated June 14, 1996, to Inspector Bouch, stating Bil-Dry's belief that despite the condition of the containers, the drums contained useable raw materials.The absence of a readable marking system was attributed to heavy rain and snow during the previous winter which resulted in a wearing-off of previously made marks. In order to comply with PADEP regulations however, Bil-Dry offered to remove all materials from the facility's previous paint production processes, repackage all materials from drums showing signs of wear, apply for and adhere to all permit regulations affecting its operations, develop or update pollution prevention, spill contingency and emergency action plans and empty and close the USTs on the facility's property. (RX-26).

24. On June 12, 1996, Bil-Dry was requested to send certain information to the EPA concerning the USTs, pursuant to RCRA §§ 9001 et seq. (Regulation of Underground Storage Tanks) and 40 C.F.R. Part 280 (Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks). The information requested included a copy of Bil-Dry's Notification for Underground Storage tanks submitted to PADEP; the identities of prior and current owners/operators of the USTs and the dates of respective ownership; technical information on each UST and associated underground piping; a complete description of release detection methods used on each UST; information regarding the manufacturing processes undertaken at the facility and the waste streams generated by those processes; and all information relating to hazardous waste determinations made by Bil-Dry in accordance with 40 C.F.R. § 261.24. A response was mandated within 30 days of receipt by Bil-Dry. (CX-18-a).

25. Bil-Dry responded by stating that it was not aware of the presence of the USTs until the December 11, 1995 inspection. It did not consider itself to be the current owner/operator of the tanks and was unable to provide any information concerning their operation, contents or construction. Copies of the EPA laboratory analyses of the samples taken from the USTs was also requested at this time. (CX-18-b).

26. On August 29, 1996, Bil-Dry received a letter from EPA mandating that information be provided regarding the type, generator or producer, amount and date

of acquisition and use, purpose for acquisition, current and previous condition and date of storage and sampling for each container that had been at the open-roofed area at the Bil-Dry facility since its acquisition. The letter also requested that Bil-Dry furnish all documents relating to the containers on site, records regarding the transport of materials in the containers from the facility, methods of storage, the existence of hazardous waste determinations, the contents of EPA Drum Nos. 1 through 7, training records of personnel, inventories of items located on the third floor of the production building and what action had been taken in response to the PADEP's letter dated June 14, 1996. Bil-Dry was given until September 13, 1996 to reply to this inquiry. (CX-19-a)

27. Thereafter, on September 30, 1996, EPA issued an administrative complaint notifying Bil-Dry that it was in violation of RCRA Subtitle C, 42 U.S.C. §§ 6921-6939(e) and the regulations thereunder at 40 C.F.R. Parts 260-271, as well as Pennsylvania's HWM program. The Complaint listed seven counts of violations of the Pennsylvania HWM program and two counts of violations of the federal Hazardous Waste Management Act's restrictions on land disposal of certain materials. The Complaint also contained a compliance order mandating that Bil-Dry cease storing hazardous waste at its Philadelphia facility, conduct a hazardous waste determination of all materials currently stored at the facility, obtain a hazardous waste identification number and submit a closure financial assurance plan for the facility and the materials currently stored there (CX-14; RX-11)

28. A recommended penalty was prepared by Ms. Maldonado based upon the violations of federal and the Pennsylvania HWM programs described in the Complaint. The penalty calculation utilized guidelines established by the RCRA Civil Penalty Policy, dated October 1990 (Tr. 245-247; CX-14; RX-12). The calculation consisted of the gravity of each violation (Tr. 247, 250-251, 255, 258-259, 262-266, 270-274; CX-14; RX-12), the duration between the initial inspection of December 11, 1995, and the April 9-10, 1996, inspection (120 Days) (Tr. 247, 251, 257-259, 262, 264, 270-274; CX-14; RX-12) and the damage done to the administration of the RCRA regulatory program (Tr. 247, 252-255, 267-268; CX-14; RX-12). The proposed penalty for all nine counts contained in the Complaint combined with the multi-day duration component for non-compliance totaled $231,800. (Tr. 246, 275; CX-14; RX-12).

29. By letter to the Regional Hearing Clerk on October 30, 1996, Respondent answered the administrative complaint by asserting that it did not consider itself to be the owner or operator of a hazardous waste treatment, storage or disposal facility and that a permit or application for interim status under Pennsylvania or federal law was unnecessary as a result. The answer also went on to state that Bil-Dry had determined that the materials at issue were not hazardous wastes and therefore Bil-Dry was not in violation of either Pennsylvania or applicable federal laws covering hazardous wastes. Respondent also stated that it considered the proposed penalties to be excessive and unreasonable, payment of which would jeopardize the company's existence. (CX-17).

30. On November 19, 1996, Bil-Dry responded to EPA's August 29, 1996 request for information concerning the containers stored in the open area at the rear of its facility (Tr. 411, 412; CX-19-b). The letter noted that the EPA request was "extremely broad" and that while Bil-Dry had answered the request to the best of its ability, nothing in the response should be interpreted to be an admission that Bil-Dry was storing hazardous wastes because it had concluded that the materials were useable (CX-19-b). Bil-Dry also stated that the drums had been the property of Harrod Paints, the previous owner of the property and were in generally good shape overall but "Rather than getting into a dispute with the EPA, Bil-Dry [has] decided that the better alternative would be to have the drums tested for disposal and disposed" (CX-19-b). As of the date of the letter, Bil-Dry claimed that the material in the USTs and 150 drums had been removed and disposed of and a further 110 drums were awaiting analysis pending disposal (RX-18, RX-19, RX-20, RX-21, RX-23; CX-19-b). The letter also stated that it was not aware of the contents or locations of EPA Drum Nos. 1 through 7 and had no other documentation than that which was provided to the inspectors during the April 9-10 inspection (Tr. 411-412; CX-19-b).

31. All of the drums which were the subject of the EPA's Complaint (Nos. 2 through

5), were disposed of by the end of November 1996, according to Mr. Sode (Tr. 426-429). No detailed sampling was done to determine the contents of these containers prior to their disposal.

32. At some point after the April 9 -10 inspection of the Bil-Dry facility, Mr. Sode received a sample of material which he claimed was drawn from Drum No. 2. Mr. Mazza was personally instructed by Mr. Sode to collect samples from each of the seven drums which were labeled by the EPA as Drum Nos. 1 through 7. However, no verifiable chain of custody exists for this sample (Tr. 381-384, 422). In April 1997, Mr. Sode conducted a pH analysis on the sample he believed to be from Drum No. 2 and received a pH value of 12.17 (Tr. 422, 394; RX-13-27). This result was documented through photographs of a sample with electrodes in place and a pH meter showing the result of the test (Tr. 423-424; RX-13-27).

33. Between 1991 and 1996, Bil-Dry had attempted to formulate a tile and grout cleaner at the Grays Avenue facility based upon Hillyard Industries' "Tile and Grout Cleaner/Renovator" and "Super Shine All" brand tile cleaner in conjunction with New York Carpet World (Tr. 421-422, 440, 450-451; RX-4). Both of these products as well as a solvent that Mr. Rodgers and Mr. Sode attempted to develop contained materials similar to those at issue in the drums located at the rear of the Bil-Dry facility (Tr. 447-454; RX-2, RX-3, RX-5, RX-7, RX-10). Mr. Rodgers and Mr. Sode also produced "maintenance" paints for its own use and attempted to develop commercial paints from materials located around the facility, including those in the same area as EPA Drums No. 2 through 5 (Tr. 441-444; RX-13-6).

34. On December 2-3 1997, an evidentiary hearing was held before the undersigned in Philadelphia, Pennsylvania, at the Environmental Protection Agency's Region 3 courtroom.

III. APPLICABLE LAW

On January 30, 1986, pursuant to § 3006(b) of RCRA, 42 U.S.C. § 6926(b) and 40 C.F.R. Part 271, Subpart A, the Commonwealth of Pennsylvania was granted final authorization[(2)] to administer a state hazardous waste management program in lieu of the federal hazardous waste management program established under RCRA Subtitle C, 42 U.S.C. §§ 6921 - 6939(e). The provisions of Title 25 of the Pennsylvania Code, § 75.259 et. seq., through this final authorization, have become the applicable requirements of RCRA Subtitle C and are accordingly enforceable by EPA pursuant to § 3008(a) of RCRA, 42 U.S.C. § 6928(a).

Title 25, Pa. Code § 260, Definitions and Requests for Determination, "Definitions" (25 Pa. Code § 75.260(a) (1986)), defines the following pertinent terms:

Hazardous Waste - -

Any garbage, refuse, sludge from an industrial or other waste water treatment plant, sludge from a water supply treatment plant, or air pollution control facility and other discarded material including solid, liquid, semisolid or contained gaseous material resulting from municipal, commercial, industrial, institutional, mining, or agricultural operations, and from community activities, or any combination of these factors, which, because of its quantity, concentration, or physical, chemical or infectious characteristics may:

> .....(ii) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed.

Solid Waste - - Waste, including but not limited to, municipal, residual, or hazardous waste, including solid, liquid, semisolid, or contained gaseous materials.....

IV. DISCUSSION

On September 2, 1998 the undersigned issued an Order Requiring Further Briefing issued in light of the August 25, 1998 decision of the U.S. District Court for the Western Division of the Western District of Missouri in Harmon Industries, Inc. v. Browner, et al., Docket No. 97-0832-CV-W-3 (W.D. Missouri, August 25, 1998). Complainant filed its brief on September 24, 1998. Respondent elected not to file a brief on this issue.

The court in Harmon Industries addressed issues pertinent to this proceeding in that it severely narrowed and restricted EPA's authority under RCRA to initiate an enforcement action in a State with an authorized program. However, the Court's decision contradicts the unambiguous language of RCRA, the statute's legislative history, and a long line of judicial and administrative rulings to the contrary. Moreover, Complainant has provided sufficient case authority to establish that the Court's decision is not binding on the case at bar. For these reasons, the undersigned declines to adopt the Court's rationale in Harmon Industries and concludes that Complainant is fully authorized to initiate the current enforcement action. Accordingly, a discussion on the issues of liability and penalty will follow.

A. Liability

The Complaint alleges that Respondent managed, stored and disposed of hazardous wastes in three tanks (A-C) and four drums (Nos. 2-5), at its Grays Avenue facility from 1985 until 1996, in violation of federal and state regulations. Respondent's defenses to the allegations are 1) that the material in the drums was not waste, but rather raw materials used occasionally at the facility; 2) that it is not the owner or generator of material in the USTs, as it neither used the material nor had knowledge that the tanks existed prior to EPA's inspection; and 3) that it is unable to pay the proposed penalty.

Three inspections conducted at Respondent's facility form the basis for the allegations contained in the Complaint: the December 11, 1995 EPA inspection led by Inspector Ronald Jones (CX-3); the April 1, 1996, PADEP inspection, led by inspector Heather Bouch (CX-6); and the April 9 and 10, 1996, EPA inspection led by Inspector Ronald Jones (CX-4). A discussion of Respondent's liability follows.

1. Underground Storage Tanks

Respondent asserts that it is not liable for the material stored in the three USTs as it was neither the "owner", nor the "generator" of such material under Pennsylvania law (25 Pa. Code § 75.260(a) and § 75.261). Rather, Respondent asserts that its predecessor, Harrod Paint should be considered the generator of the material in the tanks, and relies upon the affidavit of its owner, Dr. Joon Moon, as support for its argument that Respondent was unaware of the USTs and that the tanks were abandoned prior to Respondent's purchase of the facility. Such arguments however, are unpersuasive.

Respondent has stipulated that it has been the owner of the Grays Avenue facility from late 1985 to the present (CX-1). It has failed to cite to any evidence that when it purchased the facility it did not purchase Tanks A-C (Ex. C-19-b). Respondent's alleged lack of knowledge of the existence of the tanks for more than ten years is also not supported by the evidence. Inspector Jones testified that the tank caps, vent pipes, fill pipes and dispenser unit were in plain view and easily discoverable during his inspection (FOF 3; CX-3; Tr. 59, 65-66). Moreover, the testimony of Respondent's President, Mr. Rodgers, with respect to the caps, that "I would think that we probably saw them and didn't think a thing about it" (Tr. 472) further undermines the credibility of such argument.

Respondent stipulated to EPA's June 1996, test results which revealed that the contents of the tanks exhibited hazardous characteristics (CX-1 at 17(a-e); CX-5). Respondent further admitted at the hearing that it was undisputed that the contents

of the tanks were hazardous waste (Tr. 483). In addition, no evidence has been introduced by Respondent which demonstrates any activities by Harrod Paint with regard to the tanks. In the absence of such evidence, Respondent is deemed the "generator" of the contents of Tanks A-C, due to its decision to abandon or discard the tanks after its purchase of the facility in 1985. Under the corresponding federal definition of a "generator" at 40 C.F.R. § 260.10, such initial acts by Respondent first caused the materials to become solid waste and, thereby subject to regulation as hazardous waste under Pa. Code § 75.260(a).

The Environmental Appeals Board (EAB), in In re Rybond, Inc., Dkt. No. RCRA-III-247 (3008) Appeal No. 95-3, 1996 RCRA LEXIS 16 at *57-58, 6 E.A.D. 614 (Final Order, November 8, 1996) clearly held that "ownership" of a facility, and not knowledge of the conditions present thereon, is determinative of a person's liability under RCRA. Therefore, Respondent's alleged lack of knowledge of the existence of the storage tanks is not a defense to the allegations of the Complaint. However, in reducing the amount of penalty imposed, the EABstated that "we find persuasive Rybond's argument that its penalty for these violations should reflect the fact that its involvement in these violations was indirect" supra, at 61-62.

The contents of the tanks having been found to contain hazardous waste, and given Respondent's Stipulations Nos. 6, 8, 10, 12, 14 (CX-1), Bil-Dry's non-compliance with the statutory requirements, has been established. Respondent is thus liable under each count of the Complaint as they pertain to Tanks A-C.

2. Drums

The Complaint also addresses Respondent's alleged improper management, storage and disposal of hazardous wastes in various drums during the period between 1985 and 1996. Of seven drums sampled by EPA, four (Drums 2-5), tested as having hazardous characteristics (CX-5). EPA argues that the evidence clearly demonstrates that the contents of Drums 2-5 had been discarded by Respondent and therefore were "solid waste", and thus subject to regulation as "hazardous waste" due to their chemical and physical properties.

a. Applicable Definition of Hazardous Waste

It is Respondent's position that the material in the drums was not "discarded material.... resulting from.....operations" at the facility, and thus does not fit within the definition of "hazardous waste" pursuant to 25 Pa. Code § 75.260. Respondent argues that EPA erroneously relies on the broader federal definition of hazardous waste not contained in the Pennsylvania law, which additionally includes waste "discarded or accumulated prior to being discarded", 40 C.F.R. § 261.2(b) (1984). Respondent argues, in effect, that the Pennsylvania regulations should be interpreted as applying only to materials that are discarded, and not accumulated prior to being discarded (Respondent's Brief at 9-10). These arguments however, are clearly without merit.

Under the authorized Pennsylvania regulations, "hazardous waste" is defined, in pertinent part, as a "solid waste which is not excluded as hazardous waste under subsection (c)..."25 Pa. Code § 75.261(b)(1). Therefore, in order for a material to qualify as a "hazardous waste," it must first satisfy the definition of a "solid waste". The term "solid waste" is defined by the Pennsylvania regulations as "[w]aste, including but not limited to, municipal, residual, or hazardous waste, including solid, liquid, semisolid, or contained gaseous materials." 25 Pa. Code § 75.260(a). The term "waste" is not further defined in the Pennsylvania authorized regulations.

However, it is well-established that authorized state hazardous waste programs must be "consistent with" and "equivalent to" the federal regulations in effect at the time of authorization.

RCRA § 3006(b), 42 U.S.C. § 6926(b). See, also, Chemical Waste Management , Inc., v. Templet, 967 F.2d 1058 (1992), cert. denied 113 S.Ct. 1048, 122 L.Ed. 2d 357. The preamble to the September 4, 1982 Pennsylvania Bulletin further

provides "[t]hese revisions to Pennsylvania regulation on generation, transportation, treatment, storage, and disposal of hazardous waste are designed to bring Pennsylvania's regulation of hazardous waste into conformance with revisions to the Resource Conservation and Recovery Act (42 U.S.C.A. § 6901, et. seq.) enacted since November, 1980"(25 Pa. Code, Chapter 75 Preamble, at 2981).

Under RCRA, federal guidelines establish *minimum* hazardous waste control standards below which a state hazardous waste program may not operate, although a state may institute stricter standards. State ex rel. Iowa Dept. Of Water, Air and Waste Management v. Presto-X Co., 417 N.W. 2d 199 (1987). RCRA sets a floor, rather than a ceiling, for state regulation of hazardous wastes. Old Bridges Chemicals, Inc. v. New Jersey Dept. of Environmental Protection, C.A.3 (N.J.) 965 F.2d 1287 (1992), cert. denied 113 S.Ct. 602, 121 L.Ed. 2d 538. In People v. Roth, 492 N.Y.S. 2d 971, 129 Misc.2d 381 (1985), the Court held that although the Congress, in enacting the Solid Waste Disposal Act, did not choose to occupy the hazardous waste field to the total exclusion of states, it did choose to establish minimum ecological standards and preempt states from establishing less stringent rules, and thus the Commissioner of Environmental Control was mandated to adopt, as a minimum, the federal list of hazardous wastes.

Respondent's assertion that the court adopt the narrower state definition of hazardous waste to the exclusion of the RCRA definition is, therefore, contrary to law and is rejected.

b. Allegation That Drums 2-4 Contained Raw Material

Respondent next asserts that the material contained in Drums 2-5 was actually "raw material" and does not fit within the § 75.260 definition of hazardous waste. Rather, Respondent submits that such material was "used occasionally" at its facility for use in its products and is thus exempt from regulation as hazardous waste (Tr. 117, 367-369; Respondent's Brief at 4). Respondent's argument however, has no legal or evidentiary support.

At the time of Pennsylvania's authorization, the federal regulations defined "solid waste" to include "other waste material". 40 C.F.R. § 261.2(a) (1984). The term "other waste material" was further defined by the federal regulations to include "any solid, liquid, semi-solid or contained gaseous material...which (1) is discarded or is being accumulated [or]stored....prior to being discarded". 40 C.F.R. § 261.2(b) (1984) (emphasis added).A material is "discarded" if its "abandoned (and not used, reused, reclaimed or recycled) by being (1) disposed of ...". 40 C.F.R. § 261.2(c) (1984). Concomitantly, a material is "disposed of" if it is "discharged ...or placed into or on any land or water so that such material...may enter the environment..." 40 C.F.R. § 261.2(d) (1984).

The EAB has held that the spill or potential spill of stored raw materials can constitute discard of waste, for purposes of Subtitle C. In the Matter of Sandoz Pharmaceuticals Corporation, RCRA Appeal No. 91-14; 4 E.A.D. 75; 1992 RCRA LEXIS 25 (Order denying review in part and remanding in part, July 9, 1992), the EAB held that "the term 'solid waste' as defined in RCRA generally does not extend to stored raw materials or fuel. The investigation requirements at issue here, however, are directed to *potential releases or spills of the stored materials, not to the materials in their original condition of storage.* A spill or release of stored materials into the surrounding area would generally constitute 'solid waste' under RCRA." (emphasis supplied).

Similarly, the EAB citing In the Matter of Amerada Hess Corporation Port Reading Refinery, RCRA Appeal No. 88-10, 2 E.A.D. 910, 1989 RCRA LEXIS 16 (Order denying review, August 15, 1989), held that "....Despite the original status of the stored [raw] materials, however, a spill or release in the excavated area would be 'solid waste' under RCRA because the spilled materials would be unquestionably discarded. Hess is correct that the Agency's RCRA

jurisdiction does not extend to [raw] product or feedstock which is not otherwise solid waste. The disputed soil sampling requirements, however are not directed toward the storage of product or feedstock, but instead address a potential release of solid waste to the environment."

Respondent has failed to meet its burden of showing that the contents of Drums 2-4 were beneficially used or reused, or legitimately recycled or reclaimed at the Grays Avenue facility. See, The Ekoteck Site PRP Committee v. Self, 881 F. Supp. 1516, 1524 (C.D. Utah 1995). Respondent's brief goes into great detail generally alleging its "occasional" use of such materials for solvents, wallpaper paste and maintenance paints and asserts that the contents of Drum No. 2 was a dilute sodium hydroxide solution (Tr. 380-381, 447; CX-4, photo No.20); that Drum No. 3 contained a "useful solvent blend" (Tr. 233, 410-411); and that Drum No. 4 contained a possible acrylic co-polymer (Tr. 407-408). However, evidence demonstrating that Respondent actually used these materials for a beneficial purpose is unpersuasive.

Rather, the preponderance of the evidence regarding the storage and condition of these drums indicates that for regulatory purposes, Respondent failed to provide the level of containment for Drums 2-4 necessary to protect human health and the environment pursuant to 40 C.F.R. § 265.171. (CX-4, photos 19-24; C-6; C-8; Tr. 64-67, 243-244). Given Bil-Dry's lack of record-keeping regarding these materials it is reasonable to conclude that the contents of these drums were discarded by the Respondent.

The preamble to the rulemaking which defined the term "solid waste" as set forth in 40 C.F.R. Parts 260-261, explicitly provides that a facility's failure to maintain records of its materials generally is evidence that such materials are not being beneficially or legitimately used or reused by the facility.[(3)] Other than the "inventory" of drums in the rear of the facility (Tr. 371),[(4)] which constituted a less than adequate marking system pursuant to 40 C.F.R. § 262.32 and 268.50(a)(1)(Tr. 141-142), Respondent has produced no documentation, such as receipts, purchase dates, supplier names, etc., concerning the existence or use of alleged raw materials in the drums in question. This undermines its assertion that the alleged raw materials in issue were not discarded material "resulting from operations"under 25 Pa. Code § 75.260. Nor has Respondent definitively demonstrated from witness testimony that the contents of Drums 2-4 were beneficially used or actually utilized at the Grays Avenue facility (See, testimony of Mr. Sode at Tr. 69; Mr. Rodgers at Tr. 447).[(5)] Mr. Mazza's statements to inspectors that he had no knowledge as to the contents of the drums in the rear of the facility or why the drums had been located on site since Respondent had purchased the plant in 1985, clearly contradict such assertions (Tr. 65; CX-3, CX-4 and CX-6 at 2).

The evidence thus demonstrates that Respondent handled the contents of Drums 2-4 not as raw materials actively used in the facility's production processes, but as discarded materials. Inspectors Bouch and Jones both testified that some of the drums in the rear of the facility were "open" with material "hanging out of the top and down the sides of some drums" (CX-6 at 3), which Respondent's President, Mr. Rodgers conceded, were "unusable" and could not be considered raw materials (Tr. 477-478). Contrasted with the handling practice of materials actually used at the facility, stored inside a dry warehouse, in clearly marked containers and maintained in drums designed to preserve their value (CX-3, photo 13), it is evident that the drums at the rear of the facility were stored and handled as discarded materials.

Respondent's post-inspection activities further support this conclusion. During the August 1996 off-site disposal of more than 260 drums located at the rear of its facility, both analyses of the contents of said drums and the certification of Mr. Sode, on behalf of Respondent, indicated that the materials contained therein were "hazardous waste" (RX-23). The expense related to the disposing of such material is clearly inconsistent with the handling of valuable, useful, raw materials being actively used at the facility. Respondent's stated rationale for disposing of such alleged valuable

materials in an effort to accommodate the PADEP is therefore, unpersuasive (RX-26).

Respondent has failed to demonstrate, through documentary or testimonial evidence, that the contents of Drums 2-4 were legitimately used or recycled raw materials and not previously discarded or abandoned . Courts have generally been hesitant to adopt such arguments, see United States v. ILCO, 996 F.2d 1126 (11th Cir.1993), and Respondent has not shown that this alleged useful material was anything other than "solid waste."

c. Drum No. 5

_Unlike the evidence relating to Drums 2-4, Respondent *has* provided sufficient evidence to allow a finding that the contents of Drum No. 5 were beneficially used and thus were not discarded waste material. Although Drum 5 tested as corrosive (See, Discussion at Section IV, A (2)e), EPA's analysis indicated that such material was in fact phosphoric acid raw material (Ex. C-5, Organics p. 8).

The testimony from Respondent's President, Mr. Rodgers, shows that the material from Drum No. 5 was being used to develop a phosphoric acid based tile and grout cleaner (Tr. 448-449). Rodgers identified from CX-4, photograph 24, marked Drum No. 5, a "bladder" drum, used for storage of acid-based materials. He further asserted Respondent's efforts over 2½ years to formulate a tile and grout cleaner. Specifically, Rodgers described identifying a target competitor's product, requesting MSDS sheets, data sheets and a label and then attempting to formulate the product (Tr. 450).

One of the materials in the target tile and grout cleaner was phosphoric acid. In seeking to emulate the target product, Respondent made some samples, using phosphoric acid from the Grays Avenue facility. Such material, as contained in Drum No. 5, was stored in bladder drums in order to prevent the acid from corroding the interior of the drum. Rodgers testified that he used material contained in these drums to formulate samples. He also formulated products using this solvent on "several" occasions to produce maintenance paints for use in the facility(Tr. 449-452).

Rodgers testimony is corroborated by the affidavit of Pete Bentley, a representative of Respondent's largest customer, New York Carpet World (NYCW), who requested Respondent to develop a comparable product to a high industry performer, Hillyard Chemical's Tile and Grout Cleaner/Renovator No. 475. Respondent had since been working to develop such a product for sale to NYCW (RX-4).

Although Rodgers did not unequivocally identify Drum No. 5 as the bladder drum used for formulating product, the undersigned, construing the evidence in the light most favorable to Respondent, concludes that minimally sufficient evidence exists which shows that the contents of Drum No. 5 were not discarded waste, but material beneficially used by Respondent. To find otherwise would be to ignore credible evidence which supports such a conclusion.

d. The December 11, 1995 Inspection

_Respondent next asserts that the EPA inspection of the Grays Avenue facility on December 11, 1995, should have no bearing on whether the four drums at issue contain hazardous waste. Respondent correctly asserts that EPA took no samples during the December 1995, inspection (Tr. 100) and that Inspector Jones could not identify any of the four drums at issue from that inspection (Tr. 105-106). Similarly, Respondent argues that the photographs taken during this inspection have no probative value with respect to whether Drums 2-4 contained hazardous waste (CX-3).

Such evidence may be considered as relevant in showing Respondent's general

handling and storage activities at the Grays Avenue facility, but does not demonstrate that Drums 2-4 were on site or contained hazardous waste *as of December 11, 1995*. EPA asserts that Respondent has failed to "introduce any evidence to support its claim that Drums 2-4 were not present at the time of EPA's first inspection" (Complainant's Reply Brief at 6). EPA however, misplaces the evidentiary burden in this proceeding.

The Consolidated Rules of Practice, at 40 C.F.R. § 22.24, indicate that EPA "has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty....is appropriate". See, In the Matter of Sandoz, Inc., Docket No. RCRA-84-54-R, Appeal No. 85-7; 2 E.A.D. 324, 1987 EPA App. LEXIS 7 (Final Decision, February 27, 1987). With respect to the December 11 inspection, EPA has failed to meet that burden.

The Complaint asserts, with respect to Drums 2-4, that "Respondent is liable pursuant to RCRA § 3008(a)(1)....for the unpermitted and improper management, storage and disposal of hazardous waste and failure to comply with the administrative and financial assurance obligations imposed upon an owner and operator of a hazardous waste management facility" (CX-14). The penalty portion of the Complaint further asserts a "multi-day" component of "120 days of violation (12/11/95 through 4/10/96)"(CX-14).

EPA's penalty calculation *infers* Respondent's liability for Drums 2-4 from December 11, 1995. However, it has offered no definitive evidence which would establish liability for these specific drums as of that date. EPA admits that "the primary purpose of the December 1995, inspection was to determine the existence and compliance status of any *tanks* located at the Grays Avenue facility. As a result, Inspector Jones was neither expecting nor equipped at that time to collect samples for drums" (emphasis supplied)(Complainant's Reply Brief at 7). His December 11 inspection report only generally notes "the way drums are stored and the condition of these drums in both areas"(CX-3). No samples were taken and no identification of Drums 2-4 was ever made until the follow-up inspection and testing on April 9-10, 1996 (CX-4).

Thus, the evidence has failed to establish any violations pertaining to Drums 2-4 as of December 11, 1995. Respondent's liability can only be viewed in the context of the April 1996, inspection and any test results emanating therefrom.

e. Testing of Drums 2 through 4

With regard to the testing of samples taken from seven drums during the April 9-10, 1996 inspection, and memorialized in an Analytical Report dated June 17, 1996 (CX-5), the parties have stipulated that except for the pH analysis performed on the sample from Drum No. 2 that: a proper chain of custody was maintained for all samples, including Drum No. 2; the equipment and materials used for the analyses of all samples, except concerning the pH analysis on the sample from Drum No. 2, were properly calibrated and maintained; and the methodology utilized for the analyses of all samples, except concerning the pH analysis on the sample from Drum No. 2, was correct, in accord with accepted and required standards (CX-1 at 17).

Respondent argues that the contents of Drum No. 2 were not hazardous waste because they possessed a pH level below 12.5,[(6)] and therefore did not exhibit the hazardous characteristic of corrosivity (Tr. 394; CX-1 at 17). Both EPA and Respondent performed separate pH analyses on the material in Drum No. 2 to determine whether it displayed hazardous characteristics.

EPA's corrosivity analyses for Drum No. 2 were conducted by chemist James Barron of EPA's OASQA, whose testimony detailed the precautions taken to insure accuracy of the tests against a myriad of variables, including the averaging of two pH tests, which was standard EPA policy and consistent with industry practice (CX-5; Tr. 164, 166-167, 170-175, 179-203). In sum, Mr. Barron's analysis revealed that the contents of Drum No. 2 had an average pH

level of 12.6 and therefore exhibited the hazardous characteristic of corrosivity (Tr. 201-202). Upon review of the evidence, Respondent has failed to demonstrate any error in the EPA's corrosivity analysis on the contents of Drum No. 2. [(7)]

Rather Respondent's argument that the contents of Drum No. 2 were non-hazardous, is based entirely on the analysis of George Sode, its chemical engineer, with experience in sampling techniques relating to acids and bases (RX-6; Tr. 359-360). Sode's three pH tests on Drum No. 2 revealed readings of 12.24, 12.17 and 12.17, all under the hazardous limit of 12.5 (RX-13, photos 24-27; Tr. 388). Unlike the EPA tests however, Sode's methodology and resulting analysis raise serious concerns as to reliability and accuracy, and are not accorded substantial weight (Tr. 385-386).

The sample tested by Sode was not a split sample of the material collected by EPA during the April 1996, inspection. Inspector Jones did not see Bil-Dry personnel take separate samples of the drums, nor did they ever request a split sample of such materials (Tr. 77, 115). Moreover, the sample analyzed by Sode has an uncertain chain of custody. Although Sode asserted that he had instructed the Grays Avenue facility manager, Mr. Mazza, on how to properly collect a sample, Mr. Mazza was neither trained in such collection methods nor was he present at the hearing to testify (Tr. 382-385). As such, Respondent is unable to show what sampling methods or equipment were used to collect this sample.

In addition, many of the variables addressed and accounted for by the EPA analysis which could significantly effect the test results, i.e., temperature, time[(8)], application of a properly prepared buffered calibration solution, the "sodium effect", etc., were missing from Sode's analysis. Nor did Respondent document its test results in a detailed lab report, but merely through photographs of a calibrated pH meter and even then for only a single test. Such deficiencies render Sode's conclusion that such material was non-hazardous, unfounded and unreliable (Tr. 179, 388-389, 423-424; RX-13, photo 24-27).

The evidence therefore indicates that the contents of Drum No. 2 had a pH level exhibiting the hazardous characteristic of corrosivity. It has been previously concluded that the contents of Drums 2-4 have not been shown to be beneficially used raw materials. Given Respondent's stipulation that Drums 3-5 contained hazardous characteristics, it is concluded that the contents of Drums 2-4 contained "solid waste" and thus subjected them to regulation as "hazardous waste" pursuant to 25 Pa. Code § 72.259 et. seq., as enforceable by RCRA § 3008(a)(1), 42 U.S.C. § 6928(a)(1). As a result, Respondent is found to have violated its regulatory obligations and is liable under the nine counts contained in the Complaint.

Summary of Liability

Respondent's management, storage and disposal of the aforesaid hazardous wastes in Tanks A-C and Drums 2-4 rendered its Grays Avenue plant a HWM facility. As owner and operator of such facility, Respondent was required to comply with the permitting, management, and administrative obligations imposed by the authorized Pennsylvania HWM regulations at 25 Pa. Code § 75.259 et. seq., which are directly enforceable under RCRA § 3008(a), 42 U.S.C. § 6928(a). Having failed to do so, Respondent is liable under all nine counts of the Complaint. Discussion of the appropriate penalty for these violations follows.

V. PENALTY

A. Ability to Pay

In civil penalty cases, the courts have held that the agency has the burden of proof on all factors which the statute requires it to consider in assessing a

penalty. Premex, Inc. v. Commodity Futures Trading Comm., 785 F.2d 1403 (9th Cir. 1986); Bosma v. U.S. Dept. Of Agriculture, 754 F.2d 804 (9th Cir. 1984). Pursuant to the RCRA penalty provision, 42 U.S.C. § 6928(a)(1) and (3), in assessing a penalty, EPA must consider the seriousness of the violation and the good faith efforts to comply by the violator.

Respondent asserts that the penalty should be reduced because payment of the proposed penalty "will put Bil-Dry out of business" (Respondent's Brief at 33). RCRA however, does not include ability to pay as one of the factors that EPA must consider in assessing a penalty, and is therefore not an element of EPA's proof. In the Matter of Central Paint and Body Shop, Inc., RCRA Appeal No. 86-3, 2 E.A.D. 309, 313-314, 1987 EPA App. LEXIS 8 (Final Decision, January 7, 1987).

EPA's RCRA Civil Penalty Policy of October 1990, however, allows EPA to consider a Respondent's ability to pay, if the Respondent presents sufficient information to substantiate its claim. The Penalty Policy states that the Agency "generally will not assess penalties that are clearly beyond the means of the violator." It also clearly provides that "EPA reserves the option, in appropriate circumstances, to seek penalties that might *put a company out of business*" (emphasis supplied). The Policy further provides "the burden to demonstrate inability to pay rests on the Respondent, as it does in any mitigating circumstance.....If the respondent fails to fully provide sufficient information [to meet this burden] then .....enforcement personnel should disregard this factor in adjusting the penalty" (CX-13 at 36).

As the proponent of a reduction in the penalty, Respondent has the burden of persuasion on its alleged inability to pay, as it has control over information on its financial condition. In the instant proceeding, the only information offered by Respondent to support its inability to pay claim consisted of four consolidated tax returns for FY 1993 through 1996, and the testimony of its President, William Rodgers (RX-14-17; Tr. 469-470). Generally, however, such self serving testimony is entitled to little weight. In the Matter of F& K Plating Company, RCRA Appeal No. 86-1A, 2 E.A.D. 443, 449 (Final Decision, October 8, 1987); Central Paint, supra.

Respondent has failed to meet its burden. Other than making conclusory comments that a full penalty assessment would put Respondent out of business (Tr. 470), Rodgers failed to provide the type of detailed analysis required to establish Respondent's inability to pay claim. Rodgers did cite to Respondent's FY 1995 and FY 1996 consolidated tax returns as indicating the company had incurred taxable income losses of $36,026 and $66,170 respectively (Tr. 457).

These conclusions were questioned however, by EPA's financial expert, Dr. Joan Meyer, who noted that such losses were the result of questioned discretionary expenses (Tr. 317, 320). It is not imperative however, that Respondent show a profit in order to pay a civil penalty. In TSCA cases, it has been held that EPA may assess a penalty of 4% of gross sales, even where a firm's net income is negative. Central Paint, supra, at 317, n.13.

The financial statements show that Respondent's sales have been fairly constant over the past 4 years at around $3,500,000, as have labor costs, which increased in 1996 (Tr. 307-308, 311). Dr. Meyer did note however, discretionary expenses over the previous 4 years which Respondent did not have to make in order to produce the products and services it sells to customers (Tr. 308). Meyer specifically cites to a $100,000 FY 1995 payment to Respondent's officer, Dr. Joon Moon, a 17% minority shareholder, concluding that such payments were excessive given the size of the company and the time Moon devoted as an officer. (Tr. 308, 315-318).

Dr. Meyer further questioned discretionary expenses in FY 1996, including management, cash flow, advertising fees and a $500,000 "loan" carried for FY's 1993 through 1996 from Respondent's affiliated companies (Tr. 309, 312-315,

319-323). Under general accounting principles, the loan is but "equity capital" and as such, is not considered as debt (Tr. 323-324). In summation, Dr. Meyer concluded that payment of the entire proposed penalty would not cause Respondent undue financial hardship, given the various resources at its disposal (Tr. 325-326).

Apart from the merits of Meyer's conclusions, they were offered in rebuttal of Respondent's case in chief. They are therefore only relevant upon Respondent's having satisfied its burden of proving an inability to pay. This it has failed to do. Respondent could have submitted evidence "such as examples of austere measures being taken at the business because of hard times, loan extensions obtained, or statements of back taxes owed." Central Paint, supra, at 318. Short of this, its inability to pay an appropriate penalty is not established.

B. Assessment of Appropriate Penalty: Statutory Criteria

Respondent being liable under Counts I-IX of the Complaint, the next task is to determine an appropriate civil penalty. Rule 27(b) of the Consolidated Rules states that an administrative law judge (ALJ) is to assess a civil penalty "in accordance with any criteria set forth in the Act". 40 C.F.R. § 22.27(b). The ALJ must also "consider" any civil penalty guidelines or policies issued by the agency. Ultimately however, any penalty assessed must reflect "a reasonable application of the statutory penalty criteria to the facts of the particular violations." In re Predex Corporation, FIFRA Appeal No. 97-8, 1998 EPA App. LEXIS 84 (Final Decision, May 8, 1998), at 15, citing In re Employers Ins. of Wausau, TSCA Appeal No. 95-6, 6 E.A.D. 735, 758, 1997 EPA App. LEXIS 1 (Order Affirming Initial Decision, in Part and Vacating and Remanding in Part (February 11, 1997).

Section 3008(g) of RCRA sets forth the following with regard to assessment of a penalty:

> Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall for purposes of this subsection, constitute a separate violation.

Section 3008(a)(3) sets forth the criteria for the penalty assessment:

> In assessing such a penalty, the Administrator shall take into account [1] the seriousness of the violation and [2] any good faith efforts to comply with the applicable requirements (emphasis supplied)..

42 U.S.C. § 6928(a)(3) and (g).

In an effort to provide guidance for the calculation of civil penalties, in October 1990 EPA issued the RCRA Civil Penalty Policy (CX-13 at 5), which incorporates a gravity based matrix, a multi-day component to account for duration, an adjustment for case specific circumstances and a calculation for the amount of economic benefit gained through non-compliance (CX-13 at 1).

Zelma Maldonado, the Region III RCRA Compliance and Enforcement Officer, testified extensively as to the penalty policy methodology used to calculate the recommended penalty (Tr. 241-288). Ms. Maldonado's testimony related to what the agency viewed as a reasonable framework for incorporating the statutory criteria into a recommended penalty assessment.

Respondent's challenge to the appropriateness of the proposed penalty stems not from the propriety of EPA's calculations, but from the application of the rationale for reducing said penalty based on its interpretation of EAB's decision in In re Rybond, Inc., supra. Respondent asserts that its involvement in the violations at bar, like Rybond, were indirect and thus justifies a reduction of the proposed penalty. Such argument is of limited persuasion. Unlike Rybond, the facts here show clear evidence of Respondent's "affirmative

misconduct" and its direct involvement as owner/operator of the facility after 1985.

The facts of the instant case are distinguishable from Rybond in that the violations at issue posed a potential for serious and substantial risk of harm to the Grays Avenue community and environment.[(9)] Respondent has conceded that the "housekeeping", i.e., storage and handling of hazardous waste at its facility was "terrible" (Tr. 443). It continued to operate under such conditions however, for a period of up to ten (10) years without regard to its regulatory obligations. Having failed to demonstrate that its activities were exempt from regulation, it must now bear a substantial penalty for its neglect.

However, EPA's recommended penalty of $231,800 is inappropriate given the facts and violations at issue. Upon careful analysis of the evidence, in the exercise of his discretion, the undersigned departs from EPA's calculations and assesses a penalty different from that proposed by the agency. See, Predex Corp., supra at 14, citing In re James C. Lin and Lin Cubing, Inc., FIFRA Appeal No. 94-2, 1994 EPA App. LEXIS 4, 5 E.A.D. 595, 598 (Final Order, December 6, 1994).

EPA's penalty calculations are incompatible with previously reached conclusions that Drum No. 5 did not contain solid waste, and the fact that violations pertaining to Drums 2-4 are found to have only occurred as of April 9, 1996. The proposed penalty's "multi-day component" of 120 days, which constitutes a large portion of EPA's assessment and which runs from December 11, 1995 through April 10, 1996, is not only inapplicable to the violations pertaining to the drums, but is found to be arbitrarily calculated in general.[(10)] As such, the proposed penalty offers no guidance for the application of the multi-day component in assessing separate penalties for the drums and the tanks. EPA did not utilize this approach either in framing the counts in the Compliant or in calculating the proposed penalty, and it is not practical to do so now.

Given the difficulty of extrapolating a multi-day assessment under the RCRA penalty policy and the facts of this case, the undersigned, pursuant to § 3008(g), will treat each count as a singular violation, requiring assessment of a penalty not to exceed $25,000. In doing so, the undersigned has considered the penalty policy's gravity and economic benefit from non-compliance components. The undersigned further allows a downward adjustment for Respondent's minimal good faith effort to comply, which was not credited in the proposed penalty calculation.

Application of § 6928(a)(3) of RCRA statutory criteria to the evidence presented in this case, including Respondent's Stipulations at Nos. 4, 6, 8, 10, 12, 14 and 17 (CX-1), results in the assessment of an appropriate civil penalty totaling $103,400, as analyzed below:

1. Seriousness of the Violation

Count I- Violation of 25 Pa. Code § 75.270(a)-Failure to Have a Hazardous Waste Permit or Interim Status- A penalty of **$20,000,** corresponds to the relative seriousness of the violation. Ms. Maldonado testified that a facility like Respondent's, which fails to comply with the RCRA permitting requirements also usually fails to follow the proper management procedures outlined in the regulations. This, she indicated, results in an increased likelihood of releases of hazardous wastes being managed and a major potential for harm to human health and exposure of the environment (Tr. 252). Compounding the factor in this case, is the location of the Grays Avenue facility in a residential area.

The fact that only 3 drums of the nearly 260 located at the site were found to contain hazardous waste, in addition to the 3 USTs reduces the potential for harm given the amount of waste in question (Tr. 253). However, Respondent's

argument that it was unaware of the USTs until the December 11, 1995, inspection lacks credibility. Despite the fact that much of the material in issue may have been originally produced as a result of Harrad Paint's operations, Respondent had as long as ten (10) years to ascertain its hazardous waste management responsibilities and failed to do so. Combined with the fact that these items were subsequently mishandled and stored as abandoned materials, Respondent's failure posed a substantial risk to the community and constitutes a serious violation.

Count II-Violation of 25 Pa. Code § 75.262(b)-Failure to Perform Hazardous Waste Determinations-A penalty of **$15,000** for the seriousness of the violation is appropriate. The types of hazardous wastes contained in Respondent's drums and tanks significantly increased the risks posed to residents of the local community. EPA's expert toxicologist testified that the contents of Drums 3 and 4 were highly ignitable wastes which could have adversely effected the remaining 260 drums at the site, further jeopardizing the health of local residents. However, other evidence indicates that the drums containing base solutions and acid solutions were stored in different areas of the facility thereby lessening the chance for interaction (Tr. 211-213). Tanks B and C however, contained "MEK" a known irritant which if released, could adversely affect the respiratory and nervous systems of those who come in contact with it. (CX-12(a-e)). Respondent's failure to identify the contents of the tanks and drums as hazardous waste constituted a serious violation and created a potential for harm to the environment and the health of residents of the local community.

Count III-Violation of 40 C.F.R. § 268.7(a)-Failure to Perform LDR Waste Determination-A penalty of **$15,000,** for the seriousness of the violation is appropriate. LDR wastes which are not identified may be improperly treated and disposed of in landfills not equipped to minimize or prevent their leaching into groundwater and drinking water sources, and thereby pose a significant threat to human health (CX-12 (a, b)). Inspector Jones further testified that Respondent's management practices created an extreme danger of fire and explosion and release of the hazardous waste in the drums and tanks into the environment (Tr. 87-88). As noted above, however, the drums containing base solution and acid solution were unlikely to be mixed given their separate locations at the facility (Tr. 211-213). Nevertheless, by not performing LDR determinations, the resulting potential for harm to human health and the environment was serious. Respondent failed to comply with pertinent LDR management requirements, thereby negating the express objectives of the statute.

Count IV-Violation of 40 C.F.R. § 268.50-Prohibitions on Storage of Restricted Waste-A penalty of **$15,000,** is appropriate for the seriousness of the violation. As mentioned in previous counts, Respondent's failure to properly manage the LDR wastes in the drums and tanks posed significant health risks to the local community. PADEP Inspector Bouch testified that Respondent's management practices of hazardous wastes in its drums posed a major safety hazard (Tr. 140). Respondent having completely deviated from its regulatory obligations concerning the proper storage of LDR wastes and the attendant requirement to prevent contamination of groundwater and human exposure to such wastes constitutes a serious violation.

Count V-Violation of 25 Pa. Code § 75.265(e)(2)-Failure to Maintain General Inspection Schedule-A penalty of **$1,000** is appropriate. The undersigned finds the EPA's proposed penalty for this violation to be consistent with the statutory criteria for the seriousness of the violation. The Agency reasonably concluded that Respondent's violation of this regulatory requirement warranted a minor penalty for potential harm to the environment and human health. The significance of maintaining an inspection schedule serves a preventative purpose, i.e., insuring that a facility is able to ascertain and prevent releases of hazardous substances in order to eliminate a potential threat to human health and the environment. Based on the facts of this case, Respondent's failure to meet its required inspection schedule obligation

constitutes a minor violation.

Count VI-Violation of 25 Pa. Code § 75.265(o)(3)- Failure to Prepare a Written Closure Plan for the Facility-An assessment of **$15,000** is appropriate. Respondent in this case failed to ever develop or submit to the Agency a closure plan for the Grays Avenue facility. Such failure is considered to be a serious violation as such plan insures that when a facility ceases operation it will be closed in a manner designed to minimize the release of hazardous waste into the environment. Failure to comply with this section poses a major threat to human health and abrogates the purpose of preventing such facilities from becoming future Superfund sites (Tr. 267-268).

Count VII-Violation of 25 Pa. Code § 75.265 (p)(2)-(4)-Failure to Prepare a Written Cost Estimate for Closure of the Facility-An assessment of **$1,400** is appropriate for the seriousness of the violation. The undersigned finds that EPA's proposed penalty for this violation to be reasonable given the fact that such violation is deemed to be minor with respect to potential for harm to human health and the environment. The integrity of the RCRA program requires compliance with this type of record-keeping obligation despite the fact that it does not cause any actual impact on the environment (Tr. 269-270; CX-13 at 13).

Count VIII-Violation of 25 Pa. Code § 75.265(q)(1), § 75.265(q)(3), § 75.265(q)(10)-Improper Management of Containers Containing Hazardous Waste-An assessment of **$15,000**, is appropriate. An extensive analysis of Respondent's management practices with respect to the handling, storage and labeling of the contents of the drums and tanks is made in the liability section of this decision and will not be repeated here. Such practices, including Respondent's failure to insure safe management of the contents of the drums and tanks, significantly increased the likelihood of the release of hazardous substances into the environment, thereby creating a major potential for harm to the health and welfare to the local community. Moreover, Respondent's failure to comply with these requirements seriously negated the primary objective of the RCRA program, i.e., to assure that hazardous waste management practices are conducted in a manner which reduces the need for corrective action at a future date RCRA § 1003(a)(4) and (5), 42 U.S.C. § 6902 (a)(4) and (5). This violation is considered to be serious in nature.

Count IX-Violation of 25 Pa Code § 267.11 (25 Pa. Code § 75.311)-Failure to Provide Financial Assurance for Closure of the Facility-An assessment of **$9,000**, is appropriate. The testimony at the hearing indicates that the failure to comply with the financial assurance requirements may result in a facility not having the resources to properly close the facility and prevent discharge of hazardous wastes (Tr. 273). Such a facility is potentially a Superfund site and imposes on limited public funds to respond to such threats to human health and the environment (CX-13 at 16). This constitutes a moderately serious violation given EPA's conclusion that Respondent's non-compliance created a moderate potential for harm to human health and the environment. Respondent has admitted that it completely failed to comply with this requirement by filing a bond with the PADEP.

2. Good Faith Efforts to Comply

With regard to the mitigating factor of good faith efforts to comply, the evidence demonstrates that Respondent did undertake, at least with respect to allegations pertaining to Counts II and VIII, some minimal efforts which provide a basis for adjusting the penalty determination downward. In so holding, the undersigned departs from the recommended penalty which allowed no adjustment for this statutory factor.

Having concluded that Drums 2-4 were not found to be in violation until April 9, 1996, the good faith efforts undertaken by Respondent to remedy the handling and storage of drums are deemed to have occurred prior to the agency detecting the violation, and thus were not in conflict with the RCRA penalty

policy (CX-13 at 33).

The evidence demonstrates that Respondent had taken steps to replace the tops on several of the drums sampled in April 1996. When asked about the condition of the seven drums he took samples from, Inspector Jones stated "....Some of the drums didn't have tops. I should say this, that when I came back the second time in April, these drums had plastic caps placed on them, which they did not have in the first inspection" (Tr. 78; CX-14 at para. 58-59). Photographs contained in CX-4, photos 19-24, further show that most of the sampled drums had metal tops, and despite the presence of rust, some were not in as poor condition as Jones indicated.

The evidence also indicates that some attempt was made by Respondent to rearrange and mark some drums for identification. At the onset of the April 1996 inspection, Respondent's chemical engineer, Mr. Sode, provided Inspector Jones with an inventory list for the drums (Tr. 71).[(11)] Although Inspector Jones could not identify the drums from the inventory sheet, he failed to ask for assistance. PADEP Inspector Bouch confirmed that there was "some sort" of marking system on some of the drums, which contained "chicken scratch" numbers (Tr. 139-142). Respondent asserted that the absence of a readable marking system was attributable to heavy rain and snow during the previous winter which resulted in a wearing off of previous markings. Mr. Sode, however, was able to demonstrate through photographs introduced at the hearing, how the marking system worked for at least a portion of the drums contained on the partial inventory list (Tr. 374-377; RX-13, photo-18).

The evidence further shows, and Inspector Jones confirmed, that some of the drums had been repacked and moved (Tr. 116-117). The evidence also illustrates that Respondent had sampled the drums in the summer of 1995 (Tr. 139, 159). In addition, interactions between base solutions and acid solutions were unlikely as drums containing these respective materials were stored in different locations at the facility (Tr. 211-212).

Respondent's willingness to come into compliance is noted in its letter of June 14, 1996, in response to the PADEP listing of numerous violations of the SWMA. In order to comply with the PADEP regulations, Respondent offered to remove all materials from the facility's previous paint production processes, repackage all materials from drums showing signs of wear, apply for and adhere to all permit regulations affecting its operations, develop or update pollution prevention, spill contingency and emergency action plans and empty and close the USTs on the property (RX-26). As of November 19, 1996, at a cost of $30,000, Bil-Dry had removed the material in the USTs and 150 drums had been removed and disposed of and a further 110 drums were awaiting analysis pending disposal (Tr. 37; RX-18, 19, 20, 21, 23, CX-19-b). By the end of November 1996, all of the drums which were the subject of the Complaint (Drums 2-5) had been disposed of (Tr. 426-429).[(12)]

Such evidence demonstrates that Respondent, with respect to the violations alleged for storage and handling of the drums, made a minimal good faith effort to comply with the statutory and regulatory requirements. Therefore, a minor downward adjustment of 10% of the assessed penalty is warranted, as applicable, for both Count II and Count VIII.

Summation of Penalty Assessment

_For the above-stated reasons, Respondent is assessed a total civil penalty of **$103,400** as calculated below:

Count I----- $20,000
Count II---- $13,500 ($15,000 less $1,500= 10% good faith adjustment)
Count III--- $15,000
Count IV--- $15,000
Count V---- $ 1,000

Count VI---	$15,000	
Count VII--	$ 1,400	
Count VIII-	$13,500	($15,000 less $1,500= 10% good faith adjustment)
Count IX---	$ 9,000	
	$103,400	TOTAL CIVIL PENALTY ASSESSMENT

In addition to application of the statutory criteria, this assessment is calculated having considered the factors set forth in the RCRA Penalty Policy. Any departure from the penalty policy is duly noted in the above-discussion.

VI. CONCLUSIONS OF LAW

1. The provisions and requirements of the authorized Pennsylvania Hazardous Waste Management Program, 25 Pa. Code § 72.259 et. seq., are directly enforceable by the Complainant in the action at bar pursuant to RCRA § 3008(a), 42 U.S.C. § 6928(a).

2. Respondent, Bil-Dry Corporation, is a "person" as defined by 25 Pa. Code § 75.260(a).

3. Respondent's facility located at 5525 Grays Avenue, Philadelphia, Pennsylvania, is a hazardous waste management (HWM) facility as defined by 25 Pa. Code § 75.260(a).

4. Respondent is the "owner" and "operator" of the HWM facility located at 5525 Grays Avenue, Philadelphia, Pennsylvania, since 1985, as defined by 25 Pa. Code § 75.260(a).

5. Tanks A-C and Drums 2-4 located at Respondent's facility and their contents were discarded and/or abandoned by Respondent, were not beneficially used, recycled or reclaimed by Respondent, and therefore, were "solid waste" as defined by 25 Pa. Code § 75.260(a).

6. The content of Tanks A-C and Drums 2-4 exhibited the characteristics of "hazardous waste" and, therefore, were "hazardous waste" as defined by 25 Pa. Code § 75.261(b)(1).

7. Respondent was the "generator" of the contents of Tanks A-C and Drums 2-4, as defined by 25 Pa. Code § 75.260(a) and 40 C.F.R. § 260.10.

8. The tanks and drums at issue and their contents were stored, managed, and disposed of by Respondent as its HWM facility from 1985 until 1996.

9. As the owner and operator of a HWM facility at which "hazardous wastes" were managed, stored and disposed of in Tanks A-C and Drums 2-4, Respondent was required to comply with the requirements of RCRA Subtitle C, 42 U.S.C. § 6921-6939e, and the federal HWM regulations, 40 C.F.R. Parts 260-271, and the authorized Pennsylvania HWM regulations, 25 Pa. Code § 75.259 et. seq.

10. Respondent violated 25 Pa. Code § 75.270(a) by accumulating hazardous waste on its HWM facility in the aforesaid tanks and drums without a permit or interim status, and without having satisfied the conditions for the 90 day accumulation generator exemption provided by 25 Pa. Code § 75.262(g). Respondent is therefore liable under Count I of the Complaint.

11. Respondent violated 25 Pa. Code § 75.262(b) by failing to perform hazardous waste determinations on the contents of the aforesaid tanks and drums on its HWM facility. Respondent is therefore liable under Count II of the Complaint.

12. Respondent violated 40 C.F.R. § 268.7(a) by failing to determine if the wastes contained in the aforesaid tanks and drums were Land Disposal Restricted (LDR) wastes. Respondent is therefore liable under Count III of the

Complaint.

13. Respondent violated 40 C.F.R. § 268.50(a)(1)and (2), 40 C.F.R. § 262.34(a)(1)(I)and (ii), 40 C.F.R. Sections §§ 265.171, 265.173, 265.193, and 265.197, by storing hazardous waste restricted from land disposal (LDR) wastes in the aforesaid tanks and drums for purposes other than the accumulation of such quantities as necessary to facilitate proper recovery, treatment or disposal, improperly managing the LDR wastes in the aforesaid tanks and drums, by not labeling and marking each drum and tank with its accumulation commencement date or description of its contents, not managing the contents of the drums in good condition, not insuring that the drums and tanks were closed except when necessary to add or remove waste, not labeling each drum or tank with the words "hazardous waste", not maintaining sufficient information as to the contents of the drums and tanks as part of the operating record of its facility, and not insuring that the drums and tanks had secondary containment systems. Respondent is therefore liable under Count IV of the Complaint.

14. Respondent violated 25 Pa. Code § 75.265(e)(2) by failing to develop a written schedule of inspections for and perform such inspections at its HWM facility. Respondent is therefore liable under Count V of the Complaint.

15. Respondent violated 25 Pa. Code § 75.265(o)(2) by not developing and maintaining a written closure plan for its HWM facility. Respondent is therefore liable under Count VI of the Complaint.

16. Respondent violated 25 Pa. Code § 75.265(p)(2), (3), and (4) by failing to have and adjusting a written cost estimate for closure of its HWM facility. Respondent is therefore liable under Count VII of the Complaint.

17. Respondent violated 25 Pa. Code § 75.265(q)(1), (3) and (10) by failing to manage the contents of the drums in containers in good condition, failing to keep the drums closed except during those times when wastes were added to or removed from the drums, and failing to have a containment system capable of collecting and holding spills, leaks, and precipitation. Respondent is therefore liable under Count VIII of the Complaint.

18. Respondent violated 25 Pa. Code §267.11 (25 Pa. Code § 75.311) by failing to file a bond payable to PADEP or file another form of evidence of financial responsibility for its HWM facility. Respondent is therefore liable under Count IX of the Complaint.

19. Respondent being found liable under Counts I through IX of the Complaint, RCRA § 3008(g), 42 U.S.C. § 6928(g), authorizes the assessment of a civil penalty against Respondent for its actions.

20. The recommended penalty of $231,800 was inappropriately calculated by the Agency in accordance with RCRA § 3008(a) (3) and the October 1990 RCRA Penalty Policy as EPA failed to meet its burden of proof under § 22.24 of the Consolidated Rules of Practice to show that all the violations at issue occurred as of the December 11, 1995, inspection. With respect to Drums 2-4, said violations are found to occur as of April 9, 1996, which repudiates the 120 day "multi-day" component of the penalty calculation. Having also concluded that Drum No. 5 contained material beneficially used by Respondent, and thus was not a solid waste, a downward adjustment is warranted.

21. The recommended penalty is therefore inappropriate in light of the nature, extent and magnitude of Respondent's violations. An appropriate penalty is therefore based on RCRA § 3008(a)(3), considering 1) the statutory criteria of seriousness of the violation; and 2) Respondent's good faith effort to comply, which result in a 10% downward adjustment for Counts II and VIII.

22. Respondent is determined to be able to pay a total penalty in the amount of $103,400, without suffering an undue financial hardship. Respondent's "inability to pay" argument is without merit and does not warrant a downward adjustment.

23. Assessment of a penalty of $103,400 is necessary to deter future non-compliance by Respondent and other members of the regulated community, and will further the goals and objectives of the Environmental Justice Initiative.

Accordingly, it is held that Bil-Dry corporation, violated each of the nine counts contained in the Complaint. A civil penalty totaling **$103,400** is therefore assessed.

Respondent shall pay the civil penalty within 60 days of the date of this order. Payment may be made by mailing, or presenting, a cashier's check or certified check made payable to the Treasurer of the United States of America, U.S. Environmental Protection Agency, Region 3 Regional Hearing Clerk, P.O. Box 360515, Pittsburgh, PA. 15251.[(13)] _____
Stephen J. McGuire
Administrative Law Judge

Date:_____

1. Hereinafter, references to the official record in this case shall be typically cited as follows: Official Hearing Transcript, page 114 (Tr. 114); Complainant's Exhibit 12 (CX-12); Respondent's Exhibit 2 (RX-2); Finding of Fact No. 10 (FOF 10).

2. Pennsylvania; Final Authorization of State Hazardous Waste Management Program, 51 Fed. Reg. 1791 (1986).

3. "...The Agency consequently views with skepticism situations where secondary materials are ostensibly used and reused but the generator or recycler is unable to document how, where, and in what volumes the materials are being used and reused. The absence of such records in these situations consequently is evidence of sham recycling....

....A final indication of sham use is if the secondary materials are not handled in a manner consistent with their use as raw materials....Thus, if secondary materials are stored or handled in a manner that does not guard against significant economic loss (i.e., the secondary materials are stored in leaking surface impoundments, or are lost through fires or explosions), there is a strong suggestion that the activity is not legitimate recycling."

50 Fed. Reg. 614 (January 4, 1985).

4. Mr. Rodgers testified that he had directed Mr. Sode to mark the drums in question sometime in June of 1995 (Tr. 445). However, during the subsequent December 1995 inspection, the facility manager, Mr. Mazza, clearly noted that Respondent had no documents or information concerning the drums or the identity of their contents (EX. C-3).

5. The testimony of Mr. Jones acknowledged that Mr. Mazza had told him that "some of the drums had been used," without specific reference to Drums 2-5 (Tr. 117). Similarly, Mr. Mazza informed PADEP Inspector Bouch that drums had been sampled by Respondent's chemical engineer during the summer of 1995, again without reference to Drums 2-5 (Tr. 139, 159).

6. A material must register a pH of less than or equal to 2 (acidic), or greater than or equal to 12.5 (caustic) in order to be considered "hazardous" for the characteristic of corrosivity.

7. Respondent does allege error in EPA's corrosivity analysis. Specifically, it questions the two pH tests conducted which in one instance demonstrates a non-hazardous pH reading of 11.8 (Tr. 196-197), and the unreliability of pH paper

(in lieu of electronic pH analysis), which Mr. Barron initially stated did not allow for the rounding of pH to the tenth of a point (Tr. 188). However, on redirect Mr. Barron testified that the 11.8 reading was performed using an initial pH paper test, but that for precise measurements, he subsequently used the electronic pH meter (Tr. 197), which demonstrated readings on each of two tests above the 12.5 corrosive limit (Tr. 201-203). Respondent's assertion of error is therefore unsubstantiated.

8. Respondent's test analysis as illustrated in photographs R-13, photos 24-27, were made in April 1997, a full year after the second EPA inspection. Such time variables certainly raise issues of potential degradation, as samples change over time, despite the fact that such impact is uncertain (Tr.175-176, 181).

9. In Rybond, the EAB noted that "none of the violations posed a risk of serious harm either to public health or the environment". 1996 RCRA LEXIS 6 at *55. Moreover, the instant case does not involve the allocation of liability as was the case in Rybond.

10. EPA, in calculating the proposed penalty, offered no explanation as to why the multi-day duration period of 120 days was closed as of April 10, 1996. Other then representing the date of the EPA's second inspection, it has no bearing on Respondent having abated the violations alleged. By EPA's own argument, Respondent had not mitigated any of the violations as a result of its good faith efforts to comply. As noted, it was not until November 1996, that Respondent had disposed of the drums at issue (FOF 31). The proposed penalty is thus of little assistance in determining an appropriate penalty in this case as the basis for the multi-day component is insufficiently explained and is without proper foundation.

11. Mr. Sode testified that the inventory list was only a partial listing of the drums located at Bil-Dry's facility and did not include all the materials stored at the plant (Tr. 371).

12. In Zalcon Incorporated, Docket No. RCRA-V-W-92-R-9 (Initial Decision on Remand, p. 20), June 30, 1998, the ALJ held "while the penalty policy precludes consideration of good faith efforts to achieve compliance after the violation is called to the violator's attention, § 3008(a)(3) of the Act contains no such limitation and, for the reason noted, I am not constrained by the penalty policy." Here, although the undersigned has considered Bil-Dry's post notification efforts to comply, any adjustment for good faith is primarily based on its pre-April 1996, efforts to improve storage and handling of the drums in issue.

13. Unless this decision is appealed to the Environmental Appeals Board in accordance with 40 C.F.R. § 22.30, or unless the Board elects to review this decision *sua sponte,* it will become the final order of the Board.