UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Morrison Brothers Company	)	**Docket No. VII-98-H-0012**
	)	
Respondent	)	

INITIAL DECISION

Pursuant to the Resource Conservation and Recovery Act §3008(g), 42 U.S.C. §6928(g), the Respondent, Morrison Brothers Company, is assessed a total civil penalty of $34,495 for failing to make hazardous waste determinations, in violation of the RCRA regulations at 40 CFR §262.11; failing to manifest hazardous wastes, a violation of 40 CFR §§262.20 and 262.40(a); failing to properly dispose of hazardous wastes, a violation of 40 CFR §262.12(c); and failing to clean up a spill of hazardous wastes as soon as practicable, a violation of 40 CFR §262.34(d)(5)(iv)(B).

By: Andrew S. Pearlstein, Administrative Law Judge
Dated: August 31, 2000

Appearances:

For Complainant: Gerhardt Braeckel, Esq.
Christopher B. Peak, Esq.
U.S. EPA Region 7
Kansas City, Kansas

For Respondent: Jane B. McAllister, Esq.
Ahers, Cooney, Dorweiler, Haynie, Smith & Allbee, P.C.
Des Moines, Iowa

Proceedings

The Region 7 Office of the United States Environmental Protection Agency (the "Complainant" or the "Region") filed a Complaint, Compliance Order and Notice of Opportunity for Hearing, dated September 29, 1998, against the Morrison Brothers Company of Dubuque, Iowa (the "Respondent" or "Morrison"). The Complaint charged that Morrison Brothers had committed a series of violations of the Resource Conservation and Recovery Act ("RCRA") and its implementing regulations at the Respondent's foundry in Dubuque. Specifically, the Complaint charged that Morrison Brothers committed the following violations:

> Count 1 - Respondent failed to make hazardous waste determinations for its pot liner waste and face mask/respirator wastes, in violation of 40 CFR §262.11;
>
> Count 2 - Morrison failed to prepare manifests for the pot liner and face mask wastes, in violation of 40 CFR §262.20; and failed to retain copies of its manifests for emission control dust at its facility, in violation of 40 CFR §262.40(a);
>
> Count 3 - Respondent improperly disposed of its hazardous pot liner and respirator wastes by releasing it to transporters who were not authorized to transport hazardous wastes, and allowing its disposal in a landfill not authorized to receive hazardous wastes, in violation of 40 CFR §262.12(c);
>
> Count 4 - Morrison failed to clean up a spill of hazardous waste from its baghouse as soon as practicable, in violation of 40 CFR §262.34(d)(5)(iv)(B).

The Region seeks assessment of a total civil penalty of $68,684 against Respondent for these alleged violations.[1]

The Respondent filed its Answer on November 4, 1998. In its Answer, Respondent denied it committed the violations alleged in the Complaint, and requested a hearing.

The hearing in this matter convened before Administrative Law Judge ("ALJ") Andrew S. Pearlstein on October 7, 1999, in Dubuque, Iowa. The Region produced three witnesses, and the Respondent produced one witness. The record of the hearing consists of the stenographic transcript of 158 pages, and 15 numbered exhibits received into evidence. Following the hearing, both parties submitted written closing briefs and reply briefs. The record of the hearing closed on February 11, 2000, upon the ALJ's receipt of the reply briefs.

Findings of Fact

1. The Respondent, Morrison Brothers Company, is an Iowa corporation. Morrison owns and operates a foundry located at 550

---

[1] The Complaint originally sought assessment of a larger penalty, $83,637, and issuance of a Compliance Order against Respondent. In two amendments to the Complaint, the proposed penalty was reduced. At the conclusion of the hearing, Complainant also withdrew its request for a Compliance Order.

East 7th Street, Dubuque, Iowa 52001 (the "facility" or "foundry"). Morrison has operated a foundry in Dubuque since 1920, and at the present location since 1968. Morrison has approximately 30 employees at the facility. Respondent's foundry produces aluminum and brass vents, valves, nozzles, and other fittings for use in the oil industry. (Ex. 1; Tr. 117).[2]

2. The Morrison foundry uses four induction furnaces to melt and form the metals. Two are dedicated to aluminum and two to brass. Brass is a metal alloy composed of copper, zinc, and lead The lead content in the brass produced by Morrison is 5.6%. (Tr. 38, 125; Ex. 2).

3. In order to melt the brass, Respondent places a clay and graphite crucible in the furnace, surrounded by a refractory backing. This crucible and backing has to be replaced when it erodes to an insufficient thickness to protect the molten metal. The crucible and backing is generally torn out and replaced approximately every 100 melts, or once every four to six weeks. Morrison then disposed of the combined spent crucible and refractory backing, referred to as "pot liner waste," with the general trash. Respondent has generated this pot liner waste since at least March 1991. (Tr. 126, 131; Exs. 1,2,9).

4. When it is removed from the furnace, the pot liner waste appears as a mixture of dark gray chunks and lighter colored fine powdery material. The chunks come from the crucible itself, while the fine powder comes from the refractory backing. The darker color is derived from the melting surface of the crucible, in contact with the molten brass alloy. (Tr. 35, 127; Ex. 4).

5. John Bosky and Dedriel Newsome, environmental engineers with the Region's Environmental Services Division, conducted a RCRA compliance inspection of the Morrison foundry on November 20, 1997. During that inspection, they examined various aspects of Respondent's waste generation processes, and took photographs and samples. Mr. Bosky and Ms. Newsome conferred with Morrison's floor supervisor, Larry Ties, and the foundry superintendent, George Doremus, during this inspection. At the conclusion of the inspection, Mr. Bosky left a Notice of Violation with Morrison, signed by both parties, which listed the apparent violations that resulted in the Complaint in this proceeding. (Exs. 2,3).

6. During the inspection, Mr. Bosky and Ms. Newsome were shown

---

[2] The references to the stenographic transcript ("Tr.") and numbered hearing exhibits ("Ex.") are representative only, and not intended to be complete or exhaustive.

a wheelbarrow that was temporarily storing the pot liner waste from the brass furnaces. Mr. Bosky took a grab sample of the pot liner waste by taking one chunk that appeared to include a cross-section of the material from the dark crucible layer to the light refractory powder. A split sample was provided to Morrison. The Region analyzed the sample for lead content using the Toxicity Characteristic Leaching Procedure ("TCLP"). The analysis yielded a lead concentration of 26.4 milligrams per liter (mg/l). Respondent had its split sample analyzed at a private laboratory. This analysis found a lead concentration of 38 mg/l. These levels are in excess of the TCLP regulatory standard for a hazardous waste which is 5 mg/l for lead. (Tr. 31-37, 57-59; Exs. 1,2).

7. Prior to the inspection, Morrison had not been aware that the pot liner waste contained hazardous levels of lead, and did not have it analyzed. Subsequently, Morrison's superintendent, George Doremus, took another sample of the pot liner waste and had it analyzed. That analysis also resulted in a TCLP lead level exceeding 5 mg/l. (Tr. 131-133, 149-151).

8. By discarding the pot liner waste approximately once per month to once every six weeks, Morrison generates an average of about 300 pounds of such waste per month. Prior to the inspection, Morrison disposed of the pot liner waste with the general trash. No manifests were prepared for its shipment. It was transported by Noel Trucking or BFI Waste Services, neither of which were authorized hazardous waste haulers. They disposed of the pot liner waste at the Dubuque Metro Landfill, which does not have a RCRA identification number, and which is not authorized to receive hazardous waste. After the Region's inspection in November 1997, Morrison stopped disposing of the pot liner waste with the general trash, and began treating it as a hazardous waste. From that time on, it has been manifested and sent with other hazardous wastes via an authorized transporter to an authorized hazardous waste disposal facility in Wisconsin. (Exs. 1,4,9).

9. During the inspection, Mr. Bosky also learned that Morrison disposed of used face masks and their air filters or respirators ("spent air filters") with the general trash. Respondent generates approximately 16 spent air filters per day, 20 days per month. Morrison had not tested these spent respirators for hazardous lead content. Respondent has generated the spent air filter waste since at least June 1993. (Exs. 1,4,9).

10. After the inspection, Respondent had a sample of two spent air filters analyzed for lead toxicity using the TCLP method. The results indicated that the lead level in the spent air filters was 5.4 mg/l. Morrison now manages the spent air filters as hazardous

waste. (Exs. 1,9).

11. Respondent generates emission control dust from a baghouse dust collector at the rear of its facility. Respondent had determined that the emission control dust was a hazardous waste. Morrison filed a Notification of Hazardous Waste Activity with EPA on April 24, 1995, indicating it was a small quantity generator. Respondent maintained copies of the manifests for this emission control dust at its administrative offices, located on Elm Street several blocks away from the facility in Dubuque. Morrison generates approximately 400 to 500 pounds per month of the emission control dust. (Exs. 1,9).

12. The emission control dust is collected at the bottom of the baghouse and passed through a rubber hose to a 55-gallon drum sitting beneath it. During his inspection on November 20, 1997, Mr. Bosky observed an accumulation of white dust on the ground around this drum, that appeared to be a spill of the emission control dust. The material covered an area about 7 feet square in a thin layer, over a rough gravelly soil. It extended to the edge of a storm drain grate down-gradient from the drum. (Tr. 43-45, 143; Ex. 4,7,8).

13. Mr. Bosky took samples of the dust under the baghouse, and of the soil beneath it. The dust samples had TCLP lead levels of 504 and 509 mg/l. This result, and visual comparison with stored emission control dust, confirmed that the material constituted a spill of emission control dust. The soil did not have a hazardous level of lead, but its lead content was several times greater than a background soil sample taken at a nearby park. (Tr. 45-48; Ex. 4).

14. Mr. Doremus, the foundry superintendent, was unaware of the emission control dust spill until Mr. Bosky informed him of it. The baghouse collection drum had been changed that morning. After the samples were taken, Respondent promptly cleaned up the spilled material. (Tr. 140-141).

15. If Respondent had tested the pot liner and face mask respirator wastes for toxicity before November 1997, it would have cost $1207. If Respondent had paid for those wastes to be transported by an authorized hazardous waste hauler to an authorized hazardous waste landfill, the cost would have been $153 per drum. The cost for preparing manifests from 1991 to 1997 for this waste would have been $295.

16. In 1992, shortly after Mr. Doremus started working at Morrison, he retained the Iowa Waste Reduction Center ("IWRC") to

conduct a review of Morrison’s waste management practices. The IWRC is affiliated with the University of Northern Iowa, and is supported by the State of Iowa and EPA. Representatives of the IWRC conducted an on-site inspection of the Morrison foundry and produced a 7-page report (not counting appendices) dated October 22, 1992, presenting its recommendations for managing the facility’s waste streams. (Tr. 119-124; Ex. 15).

17. The IWRC report included recommendations concerning Respondent’s core sand wastes, scrap metal, emission control dust, storm water, and other regulatory compliance issues. However, it did not address the pot liner waste, although such wastes were being generated at the facility at the time of the IWRC inspection. The pot liner waste was not visible at the time of the inspection, and Mr. Doremus, new to the job at Morrison, did not draw it to the attention of the IWRC representatives. The face masks that generate the spent air filter waste were not yet being used by Morrison at the time of the IWRC report. (Tr. 123-124, 146-148; Ex. 15).

<u>Discussion</u>

- <u>Liability - Count 1</u>

- <u>Pot Liner Waste</u>

Counts 1, 2, and 3 of the Complaint all stem from the allegation in Count 1 that Respondent failed to make a hazardous waste determination for the pot liner and face mask respirator wastes generated at its facility. Count 2, the failure to manifest the wastes, and Count 3, the failure to properly dispose of the wastes, are dependent on the alleged initial failure to determine that the wastes were in fact hazardous. The preponderance of the evidence received in this proceeding supports the allegations in the Complaint that Morrisson committed these violations.

Respondent asserts that it did make a hazardous waste determination for the pot liner wastes by engaging in an “engineering thought pattern.” (Tr. 131-133). The regulations require persons who generate solid wastes to determine whether or not the wastes are hazardous wastes, as defined in RCRA. 40 CFR §262.11. The rules, however, do not necessarily require that an approved analytical test be performed to determine toxicity. Alternatively, a generator may “[apply] knowledge of the hazard characteristic of the waste in light of the materials or the processes used.” 40 CFR §262.11(c)(2). In this case, however, the testimony of Mr. Doremus was somewhat vague and unconvincing concerning Morrison’s hazardous waste determination for the pot

liner waste. In addition, the toxicity analyses of the waste consistently showed that any such determination that the waste was not hazardous was erroneous.

Mr. Doremus was unable to pinpoint any specific time or place that he determined that the pot liner waste was not hazardous, and had no records to memorialize such a determination. (See Tr. 132-133, 148-149). Upon receiving the Notice of Violation from the Region, he did not protest that he had performed such a hazardous waste determination. (Tr. 149). While it may be conceded that at some conscious level, Morrison had concluded that the pot liner waste was not hazardous, there is no substantial evidence showing that Respondent performed a valid hazardous waste determination as required by 40 CFR §262.11(c)(2).

Even if Mr. Doremus had performed a cognizable hazardous waste determination, it would not have complied with the regulatory requirements if he erroneously determined that the waste was not hazardous. The provision to allow determinations that wastes are not hazardous without testing was intended to apply only in situations where "on the basis of his review of the materials or processes used, the generator is certain about the nature of the waste." 45 Fed. Reg. 12,727 (Feb. 26, 1980). Here, Mr. Doremus knew the brass alloy contained 5.6% lead, and conceded that the crucible portion of the pot liner would have a high lead concentration (Tr. 132). The Region's inspector, Mr. Bosky, immediately recognized that the pot liner waste, used for melting a lead-containing brass alloy, should be tested to determine whether it contained hazardous levels of lead (Tr. 22-23). In these circumstances, Mr. Doremus could not or should not have been "certain" that the pot liner waste was not hazardous. The hazardous nature of this waste was, of course, confirmed by the sampling and analysis, which showed that the TCLP lead level of the pot liner waste exceeded the hazardous waste threshold of 5 mg/l.

Morrison also contends that the analysis results should be disregarded because the samples taken were not representative of the entire pot liner waste. Morrison asserts that the relatively less contaminated refractory material was under-represented in Mr. Bosky's sample. However, when Mr. Doremus himself took a sample that included the refractory material, the results were virtually identical. (Tr. 149-151). Mr. Bosky, an environmental engineer highly experienced in proper sampling techniques, also explained that he believed he did take a representative sample. All samples taken and analyzed by both parties yielded the same result. The pot liner waste is a hazardous waste due to its lead toxicity level. Prior to the Region's inspection in November 1997, Morrison had failed to make an adequate waste determination for the pot

liner waste, in violation of 40 CFR §262.11.

It is not disputed that Morrison generated the pot liner waste since at least March 1991, and managed it as non-hazardous, disposing of it with the general trash, until the inspection in November 1997. Although Morrison does not have records indicating the actual generation rate over the years, the record indicates that, on average, the pot liner was replaced and the old one discarded about once every four to six weeks. (See Finding of Fact, "FF," #8). This information was provided by Mr. Doremus and his assistant, Mr. Ties, at the time of the inspection. The record further indicates that there have not been significant fluctuations in Morrison's brass production over the years that would have affected this average rate of pot liner waste generation. (Tr. 151-152). The general trash was picked up once per week from the Morrison foundry. Thus, it can be inferred that the pot liner waste went out with the trash to the Dubuque landfill about 10 times per year from 1991 to 1997.

- Face Mask Respirator Waste

Respondent has admitted it did not make a hazardous waste determination for its face mask respirator, or spent air filter, waste before the inspection. Morrison also argues that a representative sample of this waste was not taken. Only the spent air filters from two face masks, selected at random by Respondent, were sampled and analyzed after the inspection. The results showed a lead level of 5.4 mg/l, just over the threshold of 5 mg/l. Respondent asserts that the lead content in the respirators can vary greatly depending on which part of the plant the mask was worn in. However, Morrison has not provided any additional sampling or other evidence to show that the spent air filters could in fact not be classified as hazardous due to lead toxicity levels. The only testing we have on this record shows that this is a hazardous waste.

Morrison thus also failed to make a hazardous waste determination for the face mask respirator waste, in violation of 40 CFR §262.11, as alleged in the Complaint. This waste was generated daily, and therefore went out with the general trash once per week. (FF #5).

- Count 2

Count 2 of the Complaint alleges that Morrison failed to prepare manifests for the pot liner and face mask respirator wastes, as required by 40 CFR §262.20(a), for off-site shipment and disposal of hazardous wastes. Since Respondent was not aware that

those waste streams were hazardous, and treated them as general trash, Respondent did not manifest them until after the inspection of November 20, 1997. This violation is obviously completely dependent on the first violation for failure to make a hazardous waste determination for the pot liner and face mask wastes.

Count 2 also alleges that Morrison failed to retain copies of its emission control dust manifests at the facility for three years, as required by 40 CFR §262.40(a). Respondent did retain copies of those manifests for three years, but at its nearby Elm Street administrative offices, rather than in the foundry itself. The Region argues that a generator is required by the regulatory scheme to maintain manifests at its facility or site. In support of its contention, the Region cites the regulatory definition of "generator" in 40 CFR §260.10. That definition states that "Generator means any person, by site, whose act or process produces hazardous waste . . ."

However, there is nothing in the language of the specific manifest regulation that requires the generator to retain the manifests at the facility that generated the waste. The rule states: "This signed copy [of each manifest] must be retained as a record for at least three years from the date the waste was accepted by the initial transporter." If the intent of the rule was to require maintaining the records at the facility, that could easily have been specifically stated in the regulatory language. The definitions at §260.10 also include a definition of "facility." The mere mention of "site" in the definition of "generator" cannot be read, without additional authority, to require maintaining manifests at the generator's facility. Here, Morrison's records were readily available at a nearby office. Thus, Morrison's retention of the manifests at its Elm Street location satisfies this requirement. Respondent will be found not liable for this portion of Count 2 of the Complaint.

- <u>Count 3</u>

Count 3 of the Complaint alleges that Morrison offered the hazardous pot liner and face mask respirator wastes to transporters and to a disposal facility which were not authorized to receive such wastes. It is undisputed that these wastes were disposed of with the general trash until the Region's inspection of Respondent's facility in November 1997. Having found that the pot liner and respirator wastes are hazardous, Respondent must be found to have committed this violation of 40 CFR §262.12(c). This violation as well is fully dependent on the finding that Respondent failed to make proper hazardous waste determinations as alleged in Count 1 of the Complaint.

- Count 4

In Count 4 of the Complaint, the Region alleges that Morrison failed to clean up spilled hazardous waste "as soon as practicable" as required by 40 CFR §262.34(d)(5)(iv)(B). This count is based on Mr. Bosky's observation, during his inspection, of some spilled emission control dust in the vicinity of the baghouse collection drum. As a small quantity generator of hazardous waste, Respondent is subject to the requirements of §262.34(d)(5). That rule also requires that such a generator designate an emergency coordinator or his designee who is always available to respond to events such as spills of hazardous waste.

The facts here show that the spilled waste was discovered by Mr. Bosky, and Morrison had made no effort to clean it up until that time. Although it is uncertain exactly when the spill occurred, Mr. Doremus testified that it could only have occurred when the collection barrel was being changed. The last time the barrel was changed was some time earlier that morning. (Tr. 140, 153). Thus, the employees who changed the drum that morning either were aware, or should have been aware, that some of the emission control dust had spilled. Yet, it was not cleaned up until later that day, after Mr. Bosky drew it to Morrison's attention during his inspection.

In these circumstances, I must conclude that the spill was not cleaned up as soon as practicable. The emission control dust should have been cleaned up earlier, as soon as it spilled in the presence of the employees who were changing the collection barrel that morning. Hence, Respondent failed to clean up a spill of hazardous waste as soon as practicable, in violation of 40 CFR §262.34(d)(5)(iv)(B), as alleged in Count 4 of the Complaint.

- Civil Penalty

Under RCRA §3008(a)(3), 42 U.S.C. §6928(a)(3), any penalty assessed for violations of RCRA shall not exceed $25,000 per day of noncompliance. That statute also requires the Administrator, in assessing such a penalty, to "take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements."

The Region followed the guidelines set forth in the RCRA Civil Penalty Policy dated October 1990 (the "Penalty Policy") in determining the penalty it proposes to assess against Morrison in this case. "The purposes of the policy are to ensure that RCRA civil penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation

committed; that economic incentives for noncompliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained." (Penalty Policy, Ex. 11, p. 5).

The EPA Rules of Practice require the Administrative Law Judge to consider any civil penalty policy or guidelines issued under the relevant Act. The ALJ must further explain in the initial decision how the penalty to be assessed corresponds to the penalty criteria in the Act, in this case RCRA, and provide specific reasons for varying from the amount of the penalty proposed in the Complaint. 40 CFR §22.27(b). The ALJ "has the discretion either to adopt the rationale on an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant." *In re DIC Americas, Inc.*, 6 EAD 184, 189 (EAB, September 27, 1995). In this Initial Decision, I will use the Penalty Policy as the basic framework for calculating the civil penalty to be assessed against Respondent, although my method will differ somewhat from that used by the Complainant.

- Counts 1, 2, and 3

The Penalty Policy (Ex. 11, p. 21) permits the Region to combine counts when a respondent's failure to satisfy one requirement necessarily leads to the violation of other dependent requirements. Otherwise, the total penalty may well be disproportionately high. That is the situation here. Morrison's failure to make a proper hazardous waste determination for its pot liner and face mask wastes led directly to the violations alleged in Counts 2 and 3 for failure to manifest those wastes and to ship them to an authorized disposal facility. Hence the Region properly exercised its discretion to consider Counts I, II, and III together as a single violation for the purpose of calculating the penalty (Ex. 10, p. 4-5).

The heart of the RCRA Penalty Policy is a matrix for determining the gravity-based penalty amount for each violation. (Ex. 11, p. 19). The matrix consists of two axes: one for the violation's potential for harm, and one for its extent of deviation from the requirement. Each violation is then rated under each of those axes as "major, moderate, or minor."

The Region rated Respondent's violation of failing to make a valid hazardous waste determination as having a moderate potential for harm, and as comprising a moderate deviation from the requirement. I concur with these determinations. The Region considered the fact that Morrison had determined its emission dust

was hazardous, in determining that its overall deviation from this requirement was moderate, rather than major. The potential harm from improper disposal of the pot liner and face mask waste is substantial, but the record does not show that such risk is major. The Region selected the mid-point of the moderate-moderate range in the matrix, for the gravity-based penalty amount, or $7150.[3]

I will vary from this calculation in one respect. The Respondent actually failed to make two hazardous waste determinations: one regarding the pot liner waste, and one regarding the face mask waste. I will rate the potential for harm from the face mask waste as minor, since the record shows it has a lead level only slightly above the hazardous threshold of 5 mg/l. The midpoint of the minor-moderate box (plus 10%) is $1100. I will add this amount to the $7150 amount for the pot liner waste, for a total gravity-based penalty amount of $8250 for Morrison's failure to make these hazardous waste determinations.

The Region next followed the Penalty Policy by adding a multi-day penalty to the gravity-based amount. The Region determined that an additional daily penalty should be assessed for each improper shipment of hazardous waste by Respondent to an unauthorized facility, by an unauthorized transporter, without preparing a manifest, within the five-year statute of limitations period preceding the filing of the Complaint. The Region based this calculation on its belief that such shipments took place once per month, on average. The Region thus assessed an additional amount from the multi-day matrix (Ex. 11. P. 24), for each month, from the midpoint of the moderate-moderate range in that matrix. This resulted in an addition to the penalty of $46,162, based on 49 days of violation (not counting the initial one subject to the gravity-based penalty), times either $925 or $1018.[4]

I will vary from the Region's calculation in two respects. First, the record indicates that the pot liner waste was shipped from Morrison's facility once every four to six weeks, rather than

---

[3] This amount represents a 10% increase over the matrix amount in the Penalty Policy, in accord with the Monetary Penalty Inflation Rule, pursuant to the Debt Collection Improvement Act of 1996. Other references in this Initial Decision to a "10% increase" relate to this Act.

[4] The increased latter figure represents a 10% increase for the period after the effective date of the Debt Collection Improvement Act.

once per month (FF #8).[5] This would reduce the number of occurrences subject to the multi-day penalty from 49 to 41. The multi-day matrix range for moderate-moderate violations (with the 10% increase) is $275 to $1760. I will also reduce the multi-day penalty for Morrison's violations to an amount near the low end of that range – $300 per day of violation. This results in a total multi-day penalty amount of $12,300.

The wide range of penalties in the moderate-moderate box of the multi-day matrix allows the decision-maker to exercise considerable discretion. The effect of multiplying the amount chosen by a large number of days - 41 in this case - can distort the amount of the penalty inappropriately when the range within this single box can vary by a factor of more than six. Here, the Region's proposed multi-day penalty would represent a disproportionate amount, 86%, of the gravity-based penalty assessed for Counts 1, 2, and 3. In addition, Morrison promptly corrected the violation in full cooperation with the Region after the inspection. The Penalty Policy cites a respondent's remediation of the violation and cooperation as a factor to consider in determining the multi-day penalty (Ex. 11, p. 25). This reduction in the multi-day portion of the penalty will yield a more balanced penalty that will still be fully commensurate with the seriousness of the violation and sufficient to deter future violations in the regulated community.

The Region then decreased its gravity-based penalty for Counts 1, 2, and 3, by 10%, as an adjustment giving credit for Morrison's good faith efforts to comply with RCRA. This adjustment was based on Respondent's having obtained an audit by the Iowa Waste Reduction Center ("IWRC") in 1992 for the specific purpose of ensuring compliance with RCRA's waste management requirements. Unfortunately, the IWRC audit failed to address the pot liner wastes. Respondent did not yet generate face mask wastes at that time. Although the Penalty Policy provides for downward adjustments of up to 25% in ordinary circumstances, I will concur with the 10% decrease proposed by the Region for the Respondent's good faith efforts to comply. This adjustment, along with the decrease in the multi-day penalty amount, is sufficient to recognize Respondent's good faith efforts to comply both before and after the Region's inspection in November 1997.

The 10% adjustment is applied to the gravity-based penalty, including the multi-day penalty, of $8250 plus $12,300, a sum of

---

[5] Although the face mask respirator waste was generated daily and shipped more frequently, it is not subject to the multi-day penalty as a "minor-moderate" violation. See Penalty Policy, p. 23.

$20,550. Subtracting 10% yields a civil penalty of $18,495 for Respondent's violations of Counts 1, 2, and 3.

Finally, the Region added an amount to its proposed penalty to recoup Morrison's economic benefit from its noncompliance. The parties stipulated to the amounts for each component of such economic benefit. (See FF #15). Morrison avoided a cost of $295 by not preparing manifests for shipping the pot liner and face mask wastes from March 1991, when the requirement first became applicable, until November 1997, the date of the inspection. The avoided cost of not testing those wastes for toxicity is $1207. Thus far, Respondent realized an economic benefit of $1502.

The parties also stipulated that the avoided cost of shipping drums of pot liner waste as hazardous waste, as Morrison does currently, was $153 per drum. (FF #15). The Region calculated this economic benefit on the basis of assuming Respondent would have shipped one drum per month, or 79 drums from March 1991 to November 1997. However, the record shows that such shipments were made somewhat less frequently on average, once every four to six weeks. (FF #8). Applying this frequency, Respondent is found to have avoided the cost of the shipment of 66 drums of hazardous pot liner waste. This results in an economic benefit of $10,098, rather than the $12,087 calculated by the Region. The total economic benefit to be included in the penalty for Respondent's violations alleged in Counts 1, 2, and 3, is therefore $10,098 plus $1502, resulting in a sum of $11,600.

To summarize, this decision will assess a civil penalty against Morrison for its violations alleged in Counts 1, 2, and 3 of the Complaint, of $30,095, comprised of the gravity-based amount of $18,495 and the economic benefit of $11,600. The Region's proposed total penalty for Counts 1, 2, and 3 was $61,534. The amount assessed in this decision is also based on the Penalty Policy and results in a more appropriate amount that accounts for the seriousness of the violation and Respondent's good faith efforts to comply with the RCRA requirements.

- <u>Count 4</u>

The Region proposed a penalty of $7150 for Respondent's failure to immediately clean up a spill of hazardous waste, as alleged in Count 4 of the Complaint. This amount was based on the Region's determination that this violation had a moderate potential for harm and represented a moderate extent of deviation from the requirements. (Ex. 12, p.8). Complainant then selected the midpoint of the range in the "moderate-moderate" box in the gravity-based penalty matrix in the Penalty Policy (p. 19). The

emission control dust is a hazardous waste that spilled near a storm drain. I concur with the determination that this violation had a moderate potential for harm.

The extent of deviation from the requirement is dependent on the length of time the spill remained before it was cleaned up. The record indicates that the spill of the emission control dust had taken place some time earlier that day, and that it was cleaned up shortly after it was observed by Mr. Bosky during his inspection. (FF #14). The record does not, however, establish exactly how long the spill had remained. The Respondent did not clean it up "as soon as practicable" as required by 40 CFR §262.34(d)(5)(iv)(B), as explained above. It was, however, cleaned up within at most a few hours. In these circumstances, the extent of deviation will be deemed minor. The penalty assessed for Count 4 in this decision will therefore be the midpoint of the "moderate-minor" range in the gravity-based matrix (plus 10%), or $4400.

- Total Penalty

This Initial Decision therefore assesses a total civil penalty against Respondent of $34,495, apportioned as follows: $30,095 for Counts 1, 2, and 3 combined, and $4400 for Count 4. This amount is slightly more than half the total penalty proposed by the Region of $68,684. The applicable statute, RCRA §3008(a)(3) mentions only two factors to consider in determining an appropriate penalty: the seriousness of the violation and the respondent's good faith efforts to comply with applicable requirements. Morrison had a waste audit conducted at its facility by IWRC in 1992, and then immediately came into compliance after the Region's inspection called its attention to the hazardous nature of the pot liner and face mask waste. The amount assessed in this decision, reduced from that proposed in the Complaint, is based on greater recognition of Morrison's good faith efforts to comply with RCRA both before and after the Region's inspection in November 1997.

This penalty is commensurate with the gravity of the violations and is sufficient deter future violations. As explained in detail above, the penalty assessed here of $34,495 accounts for both the seriousness of Respondent's violations and Respondent's good faith efforts to comply, as required by RCRA §3008(a)(3).

Conclusions of Law

1. The Respondent, Morrison Brothers Company, failed to make a valid hazardous waste determination for its pot liner waste and face mask respirator waste, in violation of 40 CFR §262.11, as

alleged in Count 1 of the Complaint.

2. Respondent failed to prepare manifests for its pot liner and face mask wastes, in violation of 40 CFR §262.20, as alleged in Count 2 of the Complaint.

3. Respondent's maintenance of copies of manifests for its emission control dust waste at its nearby offices, rather than at its facility, did not violate 40 CFR §262.40(a), as alleged in Count 2 of the Complaint.

4. Respondent violated 40 CFR §262.12(c), as alleged in Count 3 of the Complaint, by releasing its hazardous pot liner and face mask respirator wastes to transporters who were not authorized to transport hazardous wastes, and by allowing their disposal in a landfill not authorized to receive hazardous wastes.

5. Respondent failed to clean up a spill of emission control dust from its baghouse as soon as practicable, in violation of 40 CFR §262.34(d)(5)(iv)(B), as alleged in Count 4 of the Complaint.

6. An appropriate total civil penalty for these violations $34,495. The penalty is apportioned as follows: $30,095 for Counts 1, 2, and 3 combined, and $4400 for Count 4.

Order

1. The Respondent, Morrison Brothers Company, is assessed a civil penalty of $34,495.

2. Pursuant to 40 CFR §22.27(c), this Initial Decision shall become the final order of the Agency 45 days after its service on the parties unless a party moves to reopen the hearing, a party appeals this decision to the Environmental Appeals Board, or the Environmental Appeals Board elects to review this decision on its own initiative.

3. Pursuant to 40 CFR §22.31, payment of the full amount of the civil penalty shall be made within 30 days after this decision becomes a final order by submitting a cashier's or certified check in the amount of $34,495, payable to the Treasurer, United States of America, and mailed to EPA - Region 7, P.O. Box 360748M, Pittsburgh, PA 15251.

Dated: August 31, 2000
Washington, D.C.

Andrew S. Pearlstein
Administrative Law Judge