UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	DOCKET NO. V-W-81-R-002
FISHER-CALO CHEMICALS AND SOLVENTS CORPORATION	)	
	)	
Respondent	)	

Appearances:

Carey S. Rosemarin, United States Environmental Protection Agency, Region V, Chicago, Illinois, for Complainant;

Paul T. Wangerin, and Sidney Margolis, Winston & Strawn, Chicago, Illinois, for Respondent.

INITIAL DECISION

This is a proceeding under The Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, (hereafter "RCRA"), Section 3008, 42 U.S.C. 6928 (Supp. IV 1980), for assessment of a civil penalty for alleged violations of the requirements of the Act, and for an order directing compliance with those requirements.[1/]

1/ Pertinent provisions of Section 3008 are:

Section 3008(a)(1): "[W]henever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subtitle [C] the Administrator may issue an order requiring compliance immediately or within a specified time. . . ."

Section 3008(g): "Any person who violates any requirement of this subtitle [C] 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."

Subtitle C of RCRA is codified in Subchapter III, 42 U.S.C. 6921-6931.

This proceeding was instituted by a Complaint and Compliance Order issued against Fisher-Calo Chemicals and Solvents Corporation by the United Stated Environmental Protection Agency (EPA) on November 25, 1980. Following the issuance of the original Complaint, a motion for default judgement was filed by the Complainant on the basis that the Respondent, Fisher-Calo, had failed to file an answer within the time period prescribed by regulation. Based upon advice from the Regional Counsel, the Regional Administrator of Region V declined to issue the default judgement and ordered the Respondent to file an answer. Following that chronology, the matter was assigned to the undersigned and a pre-hearing schedule of responses was established. In August of 1981, Complainant moved for leave to file an Amended Complaint, which following briefing on this motion by the parties, was granted by the Court and an answer to the Amended Complaint was subsequently filed by the Respondent.

The amended complaint alleged that the Respondent had violated the terms of the Act and the appropriate regulations in the following particulars:

1. That the Respondent failed to file a notification of its hazardous waste activities with the Administrator;

2. It did not apply for a permit for treatment or disposal of hazardous wastes at the facility;

3. It failed to develop and follow written waste analysis plans;

4. Failed to develop and follow a schedule for inspecting all equipment and devices necessary for the protection of human health hazards;

5. Failure to maintain written employee training and personnel records;

6. Failed to store reactive waste in a manner to protect them from sources of ignition or reaction;

7. Stored, in a close proximity, incompatible materials without separation by means of a dike, berm, wall, or other devices;

8. Stored hazardous waste in a manner that could have caused the rupture or leakage of the containers;

9. Failed to provide adequate and unobstructive aisle space between stored materials for purposes of inspection, fire prevention and spill control;

10. Maintained inadequate portable fire extinguishers;

11. Failed to implement, distribute and maintain a contingency plan of the specific content for the facility; and

12. Failed to maintain the hazardous waste in containers that are in good condition.

Pursuant to the regulatory scheme established by the Agency, the Respondent was ordered to take the following corrective actions, either immediately or at a time otherwise specified:

1. Respondent was ordered to inventory all hazardous waste stored in their facility, and package, label and mark, and placard it in accordance with 40 C.F.R. Part 262 and 263;

2. Remove all hazardous wastes, stored, treated, or disposed of at its facility at 600 West 41st Street, Chicago, Illinois;

3. All hazardous waste removed from the facility shall be manifested, packaged, placarded, and labeled by Respondent in accordance with 40 C.F.R. Parts 262 and 263;

4. All hazardous waste removed from the facility by Respondent must be transported only to a facility that has interim status under 40 C.F.R §122.22. Respondent shall not ship hazardous waste to a facility unless it has first made a reasonable effort to determine, and has determined, that such a facility is in compliance with 40 C.F.R. Part 265. Respondent shall notify the EPA of the facility to which it intends to ship the hazardous waste;

5. Respondent shall immediately stop receiving or accepting any additional hazardous waste at its facility; and

6. Respondent shall immediately notify EPA in writing upon achieving compliance with this Order.

A penalty of $36,000.00 was requested. The Respondent was ordered to correct all alleged violations.

Respondent answered and essentially denied the violations, and to the extent not denied, set forth affirmative defenses thereto. A hearing was then held in Chicago on May 25-26, 1982. Following the hearing, each party submitted proposed findings of facts and conclusions of law. On consideration of the entire record and the submissions of the parties, a penalty of $36,000.00 is assessed and a Compliance Order is issued. All proposed findings of facts inconsistent with this Decision are rejected.

Findings of Fact

1. Fisher-Calo owns and operates the building at 600 West 41st Street, Chicago, Illinois.

2. Fisher-Calo was in existence by November 19, 1980.

3. Fisher-Calo (Chicago) did not file a Notification per 42 U.S.C. §6930 as of August 18, 1980.

4. Fisher-Calo (Chicago) did not file an application for a Part A permit per 42 U.S.C. §6925 and 40 C.F.R. §122.22(a) by November 19, 1980.

5. The storage site used by Fisher-Calo on the east side of Wallace Street is contiguous to the building at 600 West 41st Street, divided by a public right of way, and the entrance and exit between the properties is at a crossroads intersection, and access is by crossing the right of way.

6. The building and open areas located at 600 West 41st Street, Chicago, Illinois are used to hold hazardous waste for a temporary period, after which the hazardous waste is treated, stored, or disposed of elsewhere.

7. Fisher-Calo is engaged in the offsite transportation of hazardous waste by highway, and at all times relevant to the Complaint, was a permitted Illinois Special Waste Hauler.

8. Fisher-Calo's acts and processes produce hazardous waste identified or listed in 40 C.F.R. Part 261.

9. The Fisher-Calo facility is located in an area of both residential and industrial land uses.

10. As of the time of EPA's inspection of Fisher-Calo on November 21, 1980, Fisher-Calo had not prepared a waste analysis plan per 40 C.F.R. §§264.13(b) and 265.13(b).

11. As of the time of EPA's inspection of Fisher-Calo on November 21, 1980, Fisher-Calo had not prepared a written schedule for inspecting all equipment and devices that are important to prevent, detect, or respond to environmental or human health hazards per 40 C.F.R. §§264.15(b) and 265.15(b).

12. As of the time of EPA's inspection of Fisher-Calo on November 21, 1980, Fisher-Calo had not prepared written employee training and personnel records per 40 C.F.R. §§264.16(d) and 265.16(d).

13. As of the time of EPA's inspection of Fisher-Calo on November 21, 1980, Fisher-Calo had not prepared a contingency plan per 40 C.F.R. §§264.51 through 264.55, and 265.51 through 265.55.

14. At the time of EPA's inspection of Fisher-Calo on November 21, 1980, Fisher-Calo held in storage the following hazardous wastes:

i) Spent halogenated solvents, including 1,1,1-trichloroethane and trichloroethylene, characterized by EPA hazardous waste No. F001;

ii) Spent non-halogenated solvents, including acetone and other hazardous wastes characterized by EPA hazardous waste No. F003; and

iii) Spent non-halogenated solvents, including methyl ethyl ketone, aromatic hydrocarbons, and other hazardous wastes characterized by EPA hazardous waste No. F005.

15. At the time of EPA's inspection of Fisher-Calo on November 21, 1980, Fisher-Calo held in storage hazardous waste comprised of sulfuric acid derived from a steel pickling process, characterized by EPA hazardous waste Nos. D002 and K062.

16. At the time of EPA's inspection of Fisher-Calo on November 21, 1980, Fisher-Calo held in storage hazardous waste comprised of kerosene, characterized by EPA hazardous waste No. D001.

17. At the time of EPA's inspection of Fisher-Calo on November 21, 1980, Fisher-Calo stored waste acids in close proximity to each of the following:

i) potassium cyanide;

ii) permanganate;

iii) peroxide; and

iv) cetyl alcohol.

18. Incompatible substances are those which, when mixed, are likely to cause fire, explosion, the generation of heat or pressure, or the generation of toxic or flammable gases or vapors.

19. Each of the substances listed in paragraph 17 above is incompatible with waste acid, and each is reactive with respect to waste acid.

20. The waste acid was not separated and protected from sources of ignition or reaction.

21. The waste acid was not separated from materials with which it was incompatible by means of a dike, berm, wall, or other device.

22. At the time of EPA's inspection of November 21, 1980, containers in the Fisher-Calo facility which held hazardous waste were dented, rusted, corroded, showed evidence of leakage, and were stacked unstably.

23. At the time of EPA's inspection of November 21, 1980, drum storage areas did not contain sufficient aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment to any area of the facility in an emergency.

24. At the time of EPA's inspection of November 21, 1980, Fisher-Calo facility contained one fire extinguisher, and no sprinkler system or other firefighting equipment.

25. Fisher-Calo received EPA's Complaint of November 25, 1980 on November 28, 1980.

26. On December 4, 1980, a meeting was held between EPA, represented by its counsel, and Fisher-Calo, represented by its counsel.

27. At all times relevant to the Complaint, Fisher-Calo understood that all hazardous waste had to be removed from storage within thirty days of receipt of the Order of November 25, 1980.

28. At all times relevant to the Complaint, Fisher-Calo understood that the violations alleged in the Complaint of November 25, 1980 were serious and that a civil penalty would be imposed if timely compliance with the November 25, 1980 Order was not forthcoming.

29. During and after the meeting of December 4, 1980 between Complainant and Respondent, Respondent exhibited an intent to comply with the EPA Order of November 25, 1980.

30. Fisher-Calo made a conscious decision to respond to the November 25, 1980 Complaint by moving hazardous wastes themselves, rather than hiring a qualified independent contractor.

31. By December 28, 1980, compliance with the November 25, 1980 Order had not been achieved.

32. At no time after December 4, 1980 did Fisher-Calo seek additional time from EPA in which to comply with the Order of November 25, 1980.

33. With respect to Paragraph 1 of the November 25, 1980 Order, Respondent represented to Complainant that all personnel had been "advised to cancel and cease all orders to deliver any spent material" to Fisher-Calo.

34. Fisher-Calo continued to accept hazardous wastes after the November 25, 1980 Order was issued, up to May 26, 1982, the date of the hearing, by accepting carboys with residues comprised of acids and metals.

35. Fisher-Calo continued to collect hazardous waste residues in a tank of approximately 1,000 gallons after the November 25, 1980 Order was issued.

36. With respect to Paragraph 2 of the Order, a certified statement by Fisher-Calo dated December 15, 1980 indicated that the hazardous waste inventory had been completed on December 14, 1980, and that labels and markings were attached in accordance with applicable regulations.

37. With respect to Paragraph 2 of the Order, Respondent's Exhibit 1 stated that an inventory of hazardous wastes was submitted to EPA.

38. Respondent's Exhibit 1, Progress Report, page 2, paragraph 2, dated December 26, 1980, refers to Complainant's Exhibit 5, dated December 17, 1980.

39. Respondent submitted two later inventories, dated January 15, 1981 and February 27, 1981, respectively.

40. The inventories contained in Complainant's Exhibit's 5, 6, and 7 all have different contents.

41. A follow-up inspection of the Fisher-Calo facility took place on January 26, 1981 with counsel for both Complainant and Respondent present.

42. This inspection revealed the presence of hazardous waste, comprised of forty drums of sulfuric acid.

43. The forty drums referred to in paragraph 42, above, were the same ones observed at the Fisher-Calo facility during the EPA inspection of November 21, 1980.

44. The forty drums referred to in paragraph 42 did not contain the Department of Transportation "corrosive" label.

45. The forty drums referred to in paragraph 42 were not marked with the following statement per 40 C.F.R. §262.32:

> HAZARDOUS WASTE - Federal Law Prohibits Improper Disposal.
> If found contact the nearest police or public safety
> authority or the U.S. Environmental Protection Agency.
> Generator's Name and Address _____.
> Manifest Document Number _____.

46. Only thirty-three (33) drums of the 361 removed from the Fisher-Calo facility pursuant to the November 25, 1980 Order were removed prior to the December 28, 1980 deadline contained in that Order.

47. With respect to Paragraph 3 of the Order of November 25, 1980 requiring removal of all hazardous waste from the Fisher-Calo facility by December 28, 1980, forty drums of hazardous waste comprised of sulfuric acid, referred to in paragraph 42, above, were not removed until February 2, 1981, thirty-six (36) days after December 28, 1980.

48. Fisher-Calo intended to transport its wastes to its Kingsbury facility.

49. Fisher-Calo did not ship the trichloroethylene and 1,1,1-trichloroethane from its facility until January 24 and 25, 1981.

50. Fisher-Calo shipped the trichloroethylene and 1,1,1-trichloroethane to the Fisher-Calo Kingsbury facility.

51. At the time that Fisher-Calo shipped the trichloroethylene and 1,1,1-trichloroethane, Fisher-Calo knew that it was not possible for the Fisher-Calo Kingsbury facility to have qualified for interim status for either of these substances since an application for same had not been made.

52. The forty drums of hazardous waste comprised of sulfuric acid, referred to in paragraph 42, above, were transported by Fisher-Calo to Fisher-Calo's facility in Kingsbury, Indiana.

53. Fisher-Calo's Kingsbury facility had not applied for interim status for sulfuric acid, which comprised the contents of the forty drums.

54. Fisher-Calo knew that its Kingsbury facility could not have qualified for interim status for sulfuric acid because of its failure to apply for same.

55. An Illinois Special Waste Disposal Application for sulfuric acid was not issued to Fisher-Calo until February 3, 1981, one day after Fisher-Calo shipped the sulfuric acid.

56. At the time Fisher-Calo received the EPA Complaint on November 28, 1980, it did not possess an Indiana Waste Hauler's Permit.

57. An Indiana Waste Hauler's Permit was issued to Fisher-Calo on January 16, 1981.

58. Fisher-Calo's Indiana Liquid Industrial Waste Hauler's Permit prohibited by "Special Condition" the transport of waste to its Kingsbury facility unless the Kingsbury site was "equipped with an operating treatment or disposal facility capable of processing the waste".

59. Fisher-Calo Kingsbury facility did not possess the capability referred to in paragraph 58, above, with respect to sulfuric acid at the time the sulfuric acid was shipped to that facility.

60. With respect to disposal of the sulfuric acid referred to in paragraph 36, above, Fisher-Calo made a conscious decision not to comply with the Order of November 25, 1980, and indicated so by stating, "We also had 40 drums of spent acid which we wanted to neutralize in our Illinois facility for disposal into the sewer rather than our EPA direction to take to a landfill".

61. Fisher-Calo's expressed reason for not removing the sulfuric acid from its facility was to save $3,000 to $4,000.

62. At the time of EPA's inspection of January 26, 1981, Fisher-Calo stored in its facility a group of drums which it referred to as "virgin unknowns".

63. Fisher-Calo's "virgin unknowns" were comprised of industrially produced substances that had served their intended use and were sometimes discarded per 40 C.F.R. §261.2(b)(2).

64. Some of the drums contained labels indicating their contents were flammable.

65. The drums designated as "virgin unknowns" were dented, rusty, and showed signs of leakage.

66. The drums designated as "virgin unknowns" were stored without sufficient aisle space to allow access by emergency equipment or emergency personnel, and there was improper stacking and inadequate aisle space in other areas.

67. Fisher-Calo knew on or about November 28, 1980 that propylene glycol was delisted as a hazardous waste and shipped it as a non-hazardous waste.

68. Fisher-Calo's Illinois Special Waste Disposal Applications for hazardous waste subject to the November 25, 1980 Order were not received by the Illinois Environmental Protection Agency (IEPA) before January 23, 1981.

69. Six (6) Illinois Special Waste Disposal Applications for hazardous waste subject to the November 25, 1980 Order were received by IEPA on January 23, 1981, and the corresponding permits were issued on the same date.

70. One (1) Illinois Special Waste Disposal Application for spent sulfuric acid, a hazardous waste subject to the November 25, 1980 Order, was received by IEPA on February 3, 1981, and the corresponding permit was issued on the same date.

71. The substance known as 1,1,1-trichloroethane (hereinafter trichloroethane) is a depressant of the central nervous system of the human body.

72. Trichloroethane can enter the human body by inhalation, ingestion, or by absorption through the skin.

73. Trichloroethylene is a carcinogen, and is used as a degreaser in metals prior to plating them.

74. Methyl ethyl ketone is a highly volatile ignitable solvent.

75. Aromatic hydrocarbons possess chemical structures based on benzene, a known carcinogen.

76. Many polycyclic aromatic hydrocarbons are carcinogens.

77. Acetone is a highly volatile and ignitable substance.

78. The substances listed in paragraphs 71 through 77, above, were stored by Fisher-Calo until the respective dates of removal shown in Complainant's Exhibit 7.

79. At the time of the inspection by IEPA personnel on December 1, 1980, an ignition source was present in the facility in the form of sparks generated by Fisher-Calo employees dragging a filled chlorine gas cylinder across the floor with a fork lift.

80. At the time of the inspection by Occupational Safety and Health personnel on December 8 and 9, 1980, an electrical box at Fisher-Calo was not covered and live wiring was exposed, thus providing a possible source of ignition.

81. The mixing of acids with alcohols potentially results in fire, explosion, or violent reaction.

82. An oxidizer is a material that supports combustion by releasing its oxygen when the oxidizer is heated.

83. Permanganates and peroxides are oxidizers.

84. At the time of the inspection of U.S. Food and Drug Administration personnel on December 8 and 9, 1980, Fisher-Calo was storing significant quantities of oxidizers in the form of food grade sodium nitrate.

85. The mixing of acids with oxidizers potentially results in fire, explosion, or violent chemical reaction.

86. At the time of the inspection of U.S. Food and Drum Administration personnel on December 8 and 9, 1980, Fisher-Calo was storing waste corrosive substances within one or two feet of oxidizers.

87. The mixing of acids with metallic cyanides generates hydrogen cyanide gas, which is often fatal when inhaled by humans.

88. Sodium cyanide and potassium cyanide are both metallic cyanides stored at the facility and will cause the production of hydrogen cyanide gas when either one is mixed with acid.

89. Incorrect labelling of chemicals is not a sound environmental practice.

90. Fisher-Calo was issued a Citation and Notification of Penalty on February 3, 1981 by the Occupational Safety and Health Administration (OSHA) as a result of an inspection of Fisher-Calo by OSHA personnel on December 8 through 10, 1980.

91. That citation included three serious violations classified as "serious".

92. A serious violation indicates the existence of a condition which could cause an employee to suffer death or serious physical harm, and of which the employees knew or could have known with the exercise of reasonable diligence.

93. Serious violation No. 1 in the February 3, 1981 Citation arose from Fisher-Calo's failure to adequately train employees in the handling of hazardous substances, procedures in the event of an emergency, and the proper use of respirators and other emergency equipment.

94. Additional violations in the February 3, 1981 Citation dealt with Fisher-Calo's failure to properly maintain and use respirators, maintenance of adequate aisle space, maintenance of electrical equipment, and other hazards.

95. Upon inquiry by OSHA personnel on or about December 9, 1980, respirators at Fisher-Calo were not readily available and could not be easily found.

96. The respirators shown to OSHA personnel were unserviceable, and the case holding them was almost rusted shut.

97. In 1978, the OSHA issued a Citation and Notification of Penalty that listed as a violation (classified as "serious") Fisher-Calo's failure to take action to prevent the intermixing of incompatable acids and other chemicals.

98. In 1978, OSHA issued a Citation and Notification of Penalty that listed as a violation (classified as "serious") Fisher-Calo's failure to provide emergency equipment to respond to injuries caused by hazardous waste.

99. Between 1978 and December 1980, there were approximately twenty accidents relating to chemical wastes and spills that resulted in injury to Fisher-Calo employees.

100. Fisher-Calo employs approximately fifteen persons in its warehouse area.

101. Among the injuries to Fisher-Calo employees were the following:

i) extreme chemical burn of the eye structure;

ii) second degree burns due to splashing of sulfuric acid;

iii) second and third degree burns occurring when a bottle of sulfuric acid fell off a skid brace, and splashed acid on the employee;

iv) caustic burn to eye; and

v) hydrochloric acid burns to leg.

102. At the time of the inspection of Fisher-Calo by OSHA personnel, many of Fisher-Calo employees were illiterate.

103. Fisher-Calo ships materials among its various facilities, including the Chicago and Kingsbury (LaPorte, Indiana) facilities.

104. Personnel of the Illinois Department of Public Health inspected Fisher-Calo on December 1, 1980 and December 9, 1980, and personnel of the U.S. Food and Drug Administration inspected Fisher-Calo on December 8 and 9, 1980.

105. "Food Grade" is a designation indicating that the substance to which that designation applies is suitable for use as an ingredient of food for human consumption.

106. "USP" or "United States Pharmacopeoia" is a designation referring to a list of drugs and their respective standards for preparation.

107. "Food Chemical Codex" is a designation referring to a list of substances and respective criteria they must meet in order to be acceptable as either food or drug additives.

108. "Drug Grade" is a designation indicating that the substance to which the designation applies is suitable for use as an ingredient of drugs for human consumption.

109. "NF" or "National Formulary" is a designation indicating that the substance to which the designation applies is intended to be used as a drug constituent.

110. At the time of the inspections by personnel of the Illinois Department of Public Health (IPH), U.S. Food and Drug Administration (FDA), and IEPA, between November 21, 1980 and February 18, 1981, Fisher-Calo held in storage substances bearing all of the labels listed in paragraph 105 through 109, above.

111. At the time of the inspections by personnel of IPH, FDA, and IEPA, conditions at Fisher-Calo were such that the roof leaked, liquids, debris, and a sludge-like material had collected on the floor, debris had collected on bags of food grade chemicals, and broken and wet bags of chemicals were being stored.

112. At the time of the inspections by FDA personnel of the Fisher-Calo facility, food grade material was stored under conditions indicating that they were, or easily could have been contaminated by hazardous waste.

113. At the time of the inspection of the Fisher-Calo facility by IEPA personnel on November 26, 1980, waste trichoroethylene was stored within fifteen to twenty feet of food grade materials consisting of sodium metabisulfite, sodium triphosphate, and citric acid.

114. The citric acid referred to in paragraph 113, above, was stored in bags that were ripped open, and which had spilled their contents on the floor.

115. Hazardous wastes consisting of waste acid, kerosene, and other substances were stored in the vicinity of food grade or drug grade products.

116. As a result of conditions observed, IPH personnel issued an embargo to Fisher-Calo on December 9, 1980.

117. The criterion for issuance of an embargo is the suspicion that food or drug additives may have been adulterated.

118. The embargo was signed by officials of IPH as well as by Mr. Anthony Sacco, of Fisher-Calo.

119. The issuance of an embargo prohibits the recipient from removing from its facility any substances listed in said embargo.

120. Products subject to the embargo of December 9, 1980 were shipped in commerce prior to the removal of the embargo, without prior approval of IPH.

121. On December 8, 1980, FDA personnel collected samples of debris from a bag of cetyl alcohol and from a bag of sodium metabisulfite in the Fisher-Calo facility.

122. Analyses of the samples referred to in paragraph 105, above, indicated the following results:

i) sample from bag of cetyl alcohol --

lead - 3183 ppm

cadmium - 15.1 ppm; and

ii) sample from bag of sodium metabisulfite --

lead - 981 ppm

cadmium - 7.9 ppm.

123. Cetyl alcohol is used in the manufacture of hair shampoo and in the manufacture of tablets.

124. If cetyl alcohol contaminated with lead and cadmium were used in the manufacture of hair shampoo, the lead and cadmium could be absorbed through the skin during use of the shampoo.

125. At the time of the visit by Mr. Richmond of the FDA, Fisher-Calo shipped cetyl alcohol to Alberto-Culver for use by the latter in the manufacture of hair shampoo.

126. At the time of the visit by Mr. Richmond of the FDA, drug companies among Fisher-Calo customers were the following:

i) Abbott Laboratories;

ii) American Drug Industries;

iii) G. D. Searle; and

iv) Alberto-Culver.

127. Sodium metabisulfite is used as an oxidizer on vegetables for the purposes of keeping them fresh, and on potatoes for the purpose of keeping them white.

128. Fisher-Calo customers also included a number of companies engaged in the manufacture of food for human consumption.

129. At the time of the visit by Mr. Richmond of the FDA, food companies among Fisher-Calo's customers were the following:

i) Standard Brands;

ii) Pick Fisheries;

iii) Newly-Wed Foods;

iv) Victory Spuds; and

v) Miller Prepared Potatoes.

130. At the time of the visit by Mr. Richmond of the FDA, the following substances were shipped to Fisher-Calo's food manufacturer customers:

i) ammonium bicarbonate - Standard Brands;

ii) sodium chloride - Pick Fisheries;

iii) sodium bicarbonate - Newly-Wed Foods;

iv) sodium acid - Victory Spuds; and

v) sodium acid - Miller Prepared Potatoes.

131. Hazardous wastes in debris on bags of food grade or drug grade products stored by Fisher-Calo could have been mixed into food or drug preparations by means of the common practice of food and drug manufacturers of dumping the contents of bags into holding bins without removing the dust from the outside surface of the bag.

132. Hazardous wastes in debris on bags of products stored by Fisher-Calo could have been mixed into food or drug preparations by means of error due to obliteration of the labeling of the product.

133. Obliteration of labeling by hazardous wastes stored by Fisher-Calo could have caused misuse of the products labeled "food grade" or "drug grade" or other products.

134. Fisher-Calo shipped food grade products in the same trucks used for the shipment of hazardous wastes.

135. By means of previous administrative notices of violation, and citations and monetary penalties assessed pursuant thereto, Fisher-Calo had been made aware of its environmental regulatory responsibilities.

136. In 1978, the Metropolitan Sanitary District of Greater Chicago (MSD) issued a Notice of Violation to FisherCalo for the discharge of effluent with excessive concentrations of oils or greases, zinc, copper, lead, iron, and mercury.

137. In response to the Notice of Violation referred to in paragraph 136, above, Fisher-Calo, by Mr. Anthony Sacco, agreed to refrain from accepting residual chemicals for neutralization and to come into compliance by October 1, 1978.

138. In 1979, MSD issued a Notice of Violation to Fisher-Calo for the discharge of oils or greases, copper, lead, iron, and mercury and effluent of low pH value (acidic).

139. In response to the Notice of Violation referred to in paragraph 138, above, Fisher-Calo, by Mr. Anthony Sacco, agreed to investigate for the presence of low pH effluent and come into compliance by May 7, 1979.

140. In 1980, MSD issued a Notice of Violation to Fisher-Calo for the discharge of oils or greases, zinc, copper, lead, iron, nickel, and effluent of low pH value (acidic).

141. In response to the Notice of Violation referred to in paragraph 140, above, Fisher-Calo, by Mr. Anthony Sacco, presented a written report of its plan for compliance, and was informed by MSD that failure to complete work pursuant to the plan within thirty days would constitute a breakdown of conciliation.

142. In 1980, MSD issued an additional Notice of Violation to Fisher-Calo for the discharge of xylene.

143. In response to the Notice of Violation referred to in paragraph 142, above, Fisher-Calo, by Mr. Richard McGrenera, represented that a spill of 500 gallons of xylene were spilled from a trailer and that Fisher-Calo had come into compliance.

144. In 1981, MSD issued a Notice of Show Cause Hearing to Fisher-Calo because it determined that Fisher-Calo continued to discharge excessive concentrations of oils or greases, zinc, copper, lead, iron, mercury, and effluent of low pH value (acidic), and because conciliation had broken down.

145. Pursuant to the Show Cause Hearing by MSD, Fisher-Calo was ordered to come into compliance by April 1, 1982.

146. Personnel of MSD inspected part of the FisherCalo facility on December 23 and 29, 1981, and another area controlled by Fisher-Calo on April 13, 1982.

147. On September 23, 1981, Fisher-Calo stored on the Wallace Street part of its facility, several drums of hazardous waste in the form of trichloroethylene sludge.

148. On April 13, 1982, Fisher-Calo stored on a site it controlled at 41st and Union Streets, hazardous waste in the form of formaldehyde.

149. The financial health of Fisher-Calo is not in jeopardy.

150. Pre-tax profits of Fisher-Calo were $104,000 in fiscal year 1980, and were between $140,000 and $148,000 in fiscal year 1981.

151. Fisher-Calo's financial statement did not include a "going concern qualification".

Discussion

Although the Original and Amended Complaint identified a large number of violations, the Complainant takes the position that it is the failure of the Respondent to conform to the terms of the Order upon which it bases its assessment of penalties. On May 19, 1980, EPA adopted regulations in furtherance of the statute (40 C.F.R. Part 260-265). The regulations were not effective until six months following their promulgation in order to give the regulated community adequate time to come into compliance with the regulations and to acquire interim status in lieu of a permit. The Complaint in this matter was initiated on the basis of conditions discovered by the Agency's inspectors on November 19, 1980. The Findings of Violation and Compliance Order were issued to Respondent on November 25, 1980.

Pursuant to the Complaint, a meeting was had between the Complainant and the Respondent in an effort to settle the matter. This meeting was held on December 4, 1980. In the course of the meeting, the Respondent expressed its unequivocal intent to comply with the Order and the possibility of an extension of time was discussed. The Agency's representative at the meeting took the position that inasmuch as the Respondent had not

yet attempted to comply, it would be premature to discuss extensions of time at this juncture. The Respondent, in its testimony at the hearing, took the position that that discouraging observation on the part of the EPA official foreclosed any possibility of the Respondent receiving an extension of time in which to comply. In any event, the record is clear that Respondent did not at any time request an extension. It would be conjecture to attempt to predict what EPA's response would have been had a request for extension of time been made, but my analysis of the testimony would lead me to believe that if the Agency were satisfied that if the Respondent had made a good faith effort to comply with the Order and that matters beyond their control were preventing such compliance that the Agency would have very likely looked with favor upon such a request. In any event, no request was made and, of course, none was granted.

A second inspection was conducted by EPA on January 26, 1981. That inspection revealed that very few of the hazardous wastes had been removed by December 28, 1980, and as of January 26, 1981 some quantity of hazardous waste remained in storage. Although the statute authorizes a penalty in the amount of $25,000 per day with every day constituting a separate offense, EPA took the position that they would assess a penalty of $1,000 per day and they chose to cease the accumulation of daily penalties as of February 2, 1981 - the day on which forty drums of hazardous waste in the form of sulfuric acid were finally removed from the facility.

The testimony of EPA witnesses was quite clear in that a number of the wastes being held in storage by the Respondent were highly dangerous in that they were carcinogens, depressants of the central nervous system,

flammable substances, and corrosive chemicals. Over the objection of the Respondent, testimony was allowed by other Federal and state agencies to the effect that they likewise had inspected Respondent's premises and found various and sundry violations of the particular statutes and regulations which they are authorized to enforce. Some of the violations testified to have their genesis in the violations alleged by EPA and some are entirely different, but in their totality seem to indicate a rather sloppy operation being conducted by the Respondent.

As indicated by the preceeding findings of fact, the Respondent failed to comply with the provisions of the Order issued by EPA. In its defense, Respondent states that they elected to transport the wastes themselves, rather than hiring an already licensed hauler, and that the permit application which they filed with the State of Illinois was somehow lost by that Agency and therefore this delay in the receipt of a State permit caused them to violate the terms of the Order. There are several problems with that defense. First of which being that they did not even apply to the State of Illinois for the required permit until some three weeks after they received the Order from EPA. In addition, when they ultimately did transport the hazardous waste, they did so in violation of several state and Federal requirements in that they were shipped to a destination that did not have interim status, which designation was a facility owned by the Respondent located in Kingsbury, Indiana. The forty drums of sulfuric acid which remained untransported on the Respondent's premises well beyond the deadline established by the Order were also shipped in violation of the Order, because they once again were shipped to Respondent's Kingsbury facility which did not have interim status for sulfuric acid.

Mr. McGrenera, Executive Officer with Fisher-Calo, testified at the hearing that one of the reasons his Company failed to transport the sulfuric acid was that they intended to neutralize it on their own facilities and dispose of it into they city sewer system. This choice would result in a savings of some $3,000 to $4,000. Although I have no problem with a corporation making a decision which results in saving corporate money, I feel that the Company's actions in this particular instance were ill conceived and certainly gave EPA cause to believe that Fisher-Calo did not take the terms of the Order seriously. Another defense proposed by Fisher-Calo was that it removed a great number of drums of propylene glycol. Their removal of some 800 drums of this material was cited by the Respondent as a demonstration of its compliance with the Order. The removal of this material from the premises, although probably laudatory, is completely irrelevant in this proceeding in that propoleneglycol was delisted as a hazardous waste on November 25, 1980, the same date the Order was issued, and this fact was known by Fisher-Calo. It occurs to me that the time, effort and money spent by Fisher-Calo in removing these 800 or so barrels of non-hazardous waste could have been better spent in complying with the terms of the Order.

Despite Fisher-Calo's protestations that they did everything they could and acted as quickly as possible to comply with the terms of the Order, the record in this case does not support that defense in that several corporate decisions were made by the Respondent which argue against such a defense.

On the fact of the violation in itself, there is no dispute. Fisher-Calo admits that it failed to comply with all of the terms of the Order particularly with regard to the presence of the 40-some barrels of sulfuric acid remaining on the premises until February 2, 1981. Fisher-Calo seems to depend in its dispute on the appropriateness of the suggested penalty that cognizance should be taken of its efforts to comply. It also cites the fact that no injuiry was done to any persons or to the environment as a result of its failure to comply with the statute and regulations. Section 3008(c) of the Act provides that the penalty assessed shall be one which is "reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements". The EPA stated that it felt that a penalty of $1,000 per day for each day Fisher-Calo failed to comply with the terms of the Order would be an appropriate penalty and one which would encourage the Respondent to comply with all appropriate regulations in the future.

Although not specifically relied upon by EPA in determining its suggested penalty in this case, I have read the draft penalty policy prepared for EPA by Policy Planning and Evaluation, Inc. of McClain, Virginia. Although this draft penalty policy has not been adopted by EPA, I find the rationale expressed therein to be helpful in my deliberations as to the appropriateness of the penalty proposed by EPA. In his opinion in regard to Cellofilm, Corp. dated August 5, 1982, Judge Harwood made such a concise review of the thrust of the draft penalty policy that I think it warrants repeating here in its entirety. Judge Harwood stated that:

"The draft penalty policy in general considers two factors in determining the seriousness of the violation for the purpose of assessing a penalty. The first is the potential for harm to human health and environment. That is, the penalty should not depend on whether actual harm has occurred, because it is stated, the existence or lack of harm may have been the result of good fortune on the part of the violator, and it should not be the policy of the EPA to reward lucky violators by assessing lower fines. The second is the conduct of the violator, i.e., whether there has been only a minor deviation from regulatory requirements or a general disregard of the requirement. In addition, as also bearing upon the size of the appropriate penalty, the draft penalty policy would consider such other factors as the efforts made by the noncomplying firm to comply with the goals of RCRA in general, the noncomplying firm's voluntary efforts to rectify the damage, the noncomplying firm's control or lack of control over the circumstances leading to the violation, the recalcitrance of the noncomplying firm in complying with the Act, the noncomplying firm's history of violation, whether the violation was willful, and the noncomplying firm's ability to pay.

"The above criteria seem sensible and reasonable enough in determining the appropriate penalty, and they will, in general, be followed in this proceeding, so far as they are applicable."

Having discussed the elements that go into determining the appropriateness of a penalty under the Act and regulations, one must carefully review Fisher-Calo's behavior during this whole episode. Apparently, Fisher-Calo's situation is not unique in that they unfortunately appear to be somewhat typical of a certain class of hazardous waste handlers in this country who took on the task of collecting, reclaiming, storing, and ultimately disposing of the vast quantities of solid wastes that this country has generated for decades and continues to generate at an alarming rate. I do not believe that they realized the size and complexity of the undertaking that they sought to accomplish and that their problems with the law and the regulations stemmed more from ignorance and sloppy business practices rather than an intentional flaunting of the law. The fact that no one was apparently injured by the failure of Fisher-Calo to abide by the regulations in no way serves as mitigation in the context of determining the appropriate amount of the penalty to be assessed. As was pointed out by Judge Harwood good luck is no criteria for assessing penalties. Pursuant to the rationale set forth in the draft penalty policy would include two general categories; that is, factors associated with a particular violation and factors associated with the violator, but only incidently related to a specific violation. Factors directly related to a particular violation include: the threat to human health or the environment; the extent of deviation from regulatory requirements; the period over which the violation has occurred; the extent of actual damage, if any; and economic benefits inuring to the noncomplying firm as a result of the noncompliance. Other factors used in penalty assessment

not related directly to the specific violation but are associated with the noncomplying firm would include: history of violation, ability to pay, evidence of expenditures for environmentally beneficial purposes, and recalcitrance.

Applying these criteria to the actions of Fisher-Calo in this case would result in the following analysis. The threat or potential threat to human health or the environment is probably rather high due to the extremely hazardous nature of some of the waste being handled by Fisher-Calo. The firm also admitted that it intended to save $3,000 to $4,000 by not transporting the sulfuric acid from its premises but rather treating them thereon and disposing of them in the municipal sewage system. As it turned out the firm ultimately removed the barrels rather than treating them on the premises. The cost associated with this transfer do not appear in the record and it may be more or less than $4,000. So the economic benefits accruing to Fisher-Calo as a result of noncompliance are not entirely known; although the record would indicate they do not appear to be great. As to the indirect results of the violations, the history of noncompliance is not readily known since the Act only took effect rather recently. However, one can surmise from the evidence presented in this case, both through oral and documentary evidence, that the premises upon which Fisher-Calo conducts its business certainly provide fertile ground for violations. The record does indicate, however, that Fisher-Calo has expended a sum of money in the neighborhood of $10,000 to make certain improvements at its facility and has expressed an intent to continue to upgrade the character of its processing operation.

In the area of recalcitrance, I suppose that would be as good as term as any, to describe Fisher-Calo's actions following the serving upon it of the Complaint and Order. As indicated earlier, the apparent recalcitrance was probably as much a matter of faulty judgement and careless business practices as it was by any other factor. In view of all of the above, I am of the opinion that the penalty proposed by the Agency of $36,000, which amounts to $1,000 for every day of continued violation past the deadline set forth in the Order, is appropriate. The testimony of Fisher-Calo's own witness would indicate that a fine in that amount would not adversely affect Fisher-Calo's ability to continue in business, but may cause some discomfort due to their current cash flow problem. One of the purposes of the imposition of a penalty in these cases is to deter future violations on the part of a noncomplying firm. Another is to serve notice on the regulated community that the Agency is serious about its responsibility to enforce the provisions of RCRA. For these and other reasons, I am of the opinion that the proposed penalty is appropriate in this case.

Conclusion

It is concluded on the basis of the record and on Fisher-Calo's own admissions as well, that Fisher-Calo has violated the above numerated provisions of the Act and the regulations promulgated pursuant thereto. It is further concluded, for the reasons above stated, that $36,000 is an appropriate penalty for said violations and that a compliance order in the form hereafter set forth should be issued.

Order

Pursuant to the Solid Waste Disposal Act, Section 3008, as amended, 42 U.S.C. 6928, the following order is entered against Respondent, Fisher-Calo Chemicals and Solvents Corporation:

1. A civil penalty of $36,000 is assessed against the Respondent for violations of the Solid Waste Disposal Act found herein.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America.

3. Immediately upon service of the final order upon Respondent, Respondent shall, conduct its activities at its facility in strict accordance with all the provisions of 40 C.F.R. Parts 262, 263, and 265.

Thomas B. Yost
Administrative Law Judge

DATED: October 8, 1982

Unless an appeal is taken pursuant to §22.30 of the rules of practice or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator (See 40 C.F.R. 22.27(c)).