UNITED STATED ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
AMSTED INDUSTRIES, INC.	)	
LITHO-STRIP DIVISION,	)	Docket No. RCRA-V-W-85-R-31
	)	
Respondent	)	
	)	

Resources Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. Respondent found in violation of Section 3005, 42 U.S.C. § 6925, for failure to timely submit Part A application.

Where respondent transports waste generated at one facility to another facility, located 10 miles away, for storage and disposal, it does not accumulate waste "on-site" and is not exempt from permitting requirements under 40 C.F.R. § 262.34 as it does not come within the definition of "on-site" as stated in 40 C.F.R. § 260.10.

APPEARANCES:

For Complainant:

Catherine Nichols, Esquire
Roger Field, Esquire
Assistant Regional Counsel
U. S.Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

For Respondent:

Edward J. Brosius, Esquire
Gerianne Kotas, Esquire
Amsted Industries, Inc.
3700 Prudential Plaza
Chicago, Illinois 60601

INITIAL DECISION

Introduction:

This matter originated in a complaint issued on June 28, 1985 pursuant to Section 3008 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928. The complaint assessed a total penalty of $9,500 against respondent, and contained a compliance order.*

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* Pertinent provisions of Section 3008 are:

Section 3008(a)(1): "Compliance orders. - . . . whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period or both . . . ."

Section 3008(g): "Civil penalty - Any person who violates any requirement of this subchapter shall be liable to the United States for 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."

The complaint alleged that respondent was in violation of Section 3005 of RCRA, 42 U.S.C. § 6925, in that it owned and operated an existing hazardous waste management facility, as defined by 40 C.F.R. § 260.10, but did not have a permit or interim status; and that respondent had not achieved interim status because it failed to submit a timely permit application pursuant to Section 3005(b) and 40 C.F.R. § 270.10, as required by Section 3005(e) of RCRA. The complaint alleged further that respondent filed a notification as a generator status on August 13, 1980; that it failed to submit Part A application by November 19, 1980, the date required under the appropriate section of RCRA; and that respondent did not file a Part A application until March 12, 1985.

The complaint also alleged that respondent was in violation of certain provisions of Illinois Environmental Protection Act and Regulations adopted by the Illinois Pollution Control Board. The complainant, U.S. Environmental Protection Agency (U.S. EPA), granted the State of Illinois interim authorization to administer a hazardous waste program pursuant to Section 3006(b) of RCRA on May 28, 1982. Section 3008(a)(2) provides that the complainant may enforce state regulations in

states authorized to administer a hazardous waste program under Section 3006(b). The complaint additionally stated that a representative of the Illinois Environmental Protection Agency (IEPA) conducted an inspection of respondent's facility on November 27, 1984 to determine its compliance with the Illinois Environmental Protection Act and its implementing regulations. Respondent was served with a notice concerning those violations on December 20, 1984. With particular reference to this proceeding, the complaint alleged that respondent was: (1) found to be storing and regenerating spent solvents and paint waste (hazardous waste code F005) for reshipment and disposal; and (2) treating and storing process wastewaters which were EP toxic for chronium; and that both of the waste streams were generated at respondent's plant located at 4800 S. Kilbourn Street, Chicago, Illinois. Approximately a dozen alleged violations uncovered during the inspection, which were in violation of the Illinois Administrative Code (IAC), were also recited in the complaint.

Respondent served its answer to the complaint on July 17, 1985, in which it admitted the violations of the IAC, but alleged these were corrected within the time period allotted by IEPA. (Resp. Answer, at 3, par 7).

Complainant does not seek an imposition of a penalty for the admitted violations of the IAC, but only for respondent's failure to file a Part A application. (Comp. Op Br. at 9).

In its answer, respondent claimed an exemption under 40 C.F.R. § 270.1(c)(2)(v) as the owner/operator of a wastewater treatment unit. Respondent also asserted that it was exempt from 40 C.F.R. § 262.34(a) for the reason that it stored hazardous waste on-site for less than 90 days. (Resp. Answer at 2 and 3, pars. 6 and 7).

The parties entered into Stipulation to Amend the Complaint (Joint Exhibit 1), prior to the commencement of the hearing. In the Stipulation the complainant withdrew the allegation concerning the treatment of wastes contained in paragraph "5" of the complaint, and amended the second sentence of paragraph "6" to read: "Respondent was found to be storing solvents and paint waste (hazardous waste code F005; See 35 Ill. Adm. Code) reshipment and disposal." The result of this amendment to the complaint was to remove the allegation concerning the treatment and storage of process wastewaters. Consequently the wastewater allegation is not an issue for resolution in this proceeding.

FINDINGS OF FACT

At the commencement of the hearing, parties entered into the following Stipulation of Fact: (Joint Exhibit 2).

1. The respondent, Amsted Industries, Inc., is also known as the Litho-Strip Company.

2. Respondent owns and operates business facilities at 4800 South Kilbourn in Chicago, Illinois and at 7247 South 78th Avenue, Bridgeview, Illinois.

3. The Ilinois Environmental Protection Agency (IEPA) inspected respondent's Chicago and Bridgeview facilities on August 19, 1983 and on November 27, 1984.

4. The IEPA informed the respondent of violations discovered during the August 19, 1983 inspections in a letter dated November 14, 1983.

5. Respondent filed notifications pursuant to Section 3010 of RCRA on August 4, 1980. These notifications stated that Amsted Industries, Inc., was a generator of hazardous wastes at both the Chicago and Bridgeview locations.

6. On and after November 19, 1980, two hazardous waste streams identified as as process waste water (D007) and scrap

paint and solvents (F005) were generated at respondent's Chicago facility; these wastes were then shipped to respondent's Bridgeview facility. Until September 1981, the Bridgeview facility generated the same wastes as the Chicago facility.

8. [sic] At the time of the November 27, 1984 inspection of respondent's Bridgeview facility, respondent did not have a Part A permit application on file or interim status to operate a treatment, storage or disposal facility at either location.

9. The IEPA informed the respondent of violations discovered during the November 27, 1984 inspections in a compliance inquiry letter dated December 20, 1984.

10. Respondent filed a Part A permit application with U.S. EPA on March 12, 1985 to operate a treatment and storage facility at the Bridgeview plant, located at 7247 South 78th Avenue in Bridgeview, Illinois.

11. U.S. EPA has provided notice of this action to the State of Illinois.

In amplification on the above Stipulation, the following findings are made: The Bridgeview plant was operating and generating hazardous waste compromising paints and solvents (and

process wastewater not in issue here) on November 19, 1980 when the initial Part A permits were required to be filed. The plant also received similar waste from the Chicago plant, but since September 1981 it has only received hazardous waste from the Chicago plant, as the Bridgeview facility by that date had ceased operation and the generation of waste. (Tr. at 8). Respondent's Bridgeview facility received two distinct waste streams from the Chicago plant. One was process wastewater (hazardous waste code number D007) and the other was spent solvents and paint waste. There was no commingling and the latter was not introduced into the wastewater treatment facilities, and, in fact, the wastes were kept in two separate parts of the plant. (Ex. C-3 at 00028; Tr. at 97).

Bonnie Eleder, (Eleder) during the time pertinent to this proceeding, was an Environmental Protection Specialist with the IEPA. She conducted inspections at respondent's Chicago and Bridgeview facilities. During Eleder's visit to the Chicago facility in August of 1983 she had a conversation with David Leligdon (Leligdon), Technical Director of respondent, who explained how wastes were generated at the Chicago

facility, and who admitted that solvents and scrap paints that were generated were hazardous wastes. Leligdon explained that this hazardous waste was sent to the Bridgeview facility for storage until disposal. This usually took the form of it either being sent out for reclaiming or incineration. The waste was transferred from the Chicago plant to the Bridgeview facility in 55 gallon drums by truck. The drums remained in storage at the Bridgeview facility as long as necessary to accumulate a truckload. The two facilities are non-contiguous; they are approximately 10 miles apart; and that public roads must be used to go from one facility to the other. (Ex. C-9; Tr. 11,15, 17-20, 74,91).

Eleder inspected the Bridgeview facility on August 19 and September 12, 1983. She determined that respondent had not filed a Part A application with U.S. EPA, and that it needed to file this document because it transported waste from Chicago to Bridgeview where it was held for a length of time prior to final removal. Subsequent to the September 1983 Bridgeview inspection respondent was advised in writing by IEPA, on November 14, 1983, of the violations of

the IAC uncovered during the inspection. Among the violations cited was respondent's failure to have a Part A application on file with the U.S. EPA for its facility. Respondent replied in writing on November 23, 1983 in which it outlined remedial actions taken at both its Chicago and Bridgeview facilities. However, respondent was of a view that Part A permit to store the respondent's waste at the Bridgeview facility was not necessary. Its stated reasoning was that respondent considered these two plants "as one" with regard to handling waste; and that no hazardous wastes are stored in excess of 90 days. (Exs. C-12 at 00131, C-15 at 00138, C-17).

On November 27, 1984, another inspection was conducted by Eleder of the Bridgeview facility. At that time respondent was still transporting hazardous waste from the Chicago plant to its Bridgeview facility. In addition to other violations, it was again determined that respondent had not filed its Part A application, and it was so notified of this in a written communication from IEPA on December 20, 1984. (Ex. C-1 at 00001, C-3 at 00028; Tr. at 28-31). On January 22, 1985, a Mr. Kostka, who was associated with respondent, telephoned the IEPA. In

pertinent part Mr. Kostka related that the respondent would file a Part A application, which was subsequently received on or about March 11, 1985. (Exs. C-6, C-8 at 00067-00076; Tr. at 41-42).

DISCUSSION AND CONCLUSIONS OF LAW

Put simply, the issue is whether or not respondent was required to file Part A application by the November 19, 1980 time frame stated in RCRA. If it were, the next issue for resolution is the amount of penalty that should be assessed against respondent for the violation. Any reliance by respondent upon 40 C.F.R. 270.1(e)(2)(v), dealing with the wastewater treatment unit, as a defense to the violation is misplaced. The amended complaint removed the allegation concerning the treatment and storage of wastewater (EPA hazardous waste number D007). The proceeding concerns solely the discrete waste of scrap paints and solvents (number F005) and that is the only and legitimate issue for the resolution here. The heart of respondent's defense is that it is exempt from Section 3005 of RCRA permitting requirements under the provisions of

40 C.F.R. § 262.34 because it stored hazardous wastes "on-site" for less than 90 days. The aforementioned Section reads:

> (a) A generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status . . . .

The term "on-site" is defined in 40 C.F.R. § 260.10.

> On-site means the same or geographically contiguous property which may be divided by public or private right-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along the right-of-way. Non-contiguous properties owned by the same person but connected by a right-of-way which he controls and to which the public does not have access, is also considered on-site property. (emphasis supplied).

It is of no legal consequence that respondent viewed the two facilities "as one" with regard to handling waste. The Chicago and Bridgeview facilities were approximately 10 miles apart; they were not geographically contiguous; and they do not come within the above definition of "on-site". It is concluded that respondent did not store the waste "on-site" and its claim for an exemption for the Bridgeview storage facility

under 40 C.F.R. § 262.34 is without legal merit. It is further concluded that respondent is in violation of Section 3005 of RCRA for failure to file timely a Part A application for its Bridgeview facility.

Appropriateness of Penalty

Complainant seeks a proposed civil penalty of $9,500, the amount stated in the complaint. Section 3008(a)(3) of RCRA provides, in pertinent part, that in assessing a penalty the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. As an additional aid in arriving at penalties, complainant issued a Final RCRA Civil Penalty Policy on May 8, 1984 (Penalty Policy). This document provides internal guidelines to assist complainant's compliance/enforcement personnel in assessing penalties. Using the matrix set out in the Penalty Policy, concerning the seriousness of the violation, complainant determined that the potential for harm was "moderate" and the extent of deviation to be "major", with a penalty range of $8,000 to $10,999. The complainant selected the midpoint of $9,500 for respondent's failure to submit the Part A application until March 1985. (Exs. C-4 at 00034, C-5; Tr. at 62).

Assuming, without necessarily concluding, that the complainant's selection of the "moderate/major" cell was correct concerning the seriousness of the violation, there are other factors to be weighed. The Penalty Policy provides that after determining the appropriate penalty based on gravity,the penalty may be adjusted upwards or downwards to reflect the particular circumstances surrounding the violation. The factors to be considered are:

1. Good faith efforts to comply or lack of good faith;
2. Degree or willfulness and/or negligence;
3. History of noncompliance;
4. Ability to pay; or
5. Other unique factors. (Ex. C-4 at 00034).

Good faith, of course, is also mandated for consideration by Section 3008(a)(3). The Penalty Policy provides, however, that no downward adjustment shall be made if good faith efforts to comply primarily consist of coming into compliance. (Ex. C-4 at 00047). However, good faith, or lack of bad faith, on respondent's part can be found to this extent. It did not engage in a contumacious refusal to submit the Part A application. Rather, it took remedial action when notified by IEPA concern-

ing violations of the IAC. More to the point, however, respondent was laboring under a genuine belief, however wrong, that for reasons mentioned above it did not have to submit the Part A application. This also goes to show a lack of willfulness or negligence on respondent's part for its failure in submitting the Part A application. Concerning respondent's history of compliance, the record is devoid of previous violations RCRA by respondent. There is no question concerning respondent's ability to pay the full penalty of $9,500, if such amount were deemed appropriate. There is a unique factor in this matter, brought out by respondent (Reply Br. at 2), that bears mentioning and evaluation inasmuch as it goes to the penalty issue. In the complaint, respondent was charged with failure to submit the Part A application regarding two waste streams. One of these involved spent solvents, the subject of the hearing and the other concerned storing process wastewaters. The total proposed penalty assessed was for $9,500. However, when the complaint was amended at the inception of the hearing, withdrawing the allegation concerning wastewater no change was made in the penalty sought. Logic and equity would dictate that if

complainant goes forward with one instead of two allegations, then the penalty should be something less then the proposed $9,500.

Taking into consideration the pertinent Section of RCRA, the Penalty Policy, and the facts of this case, a condign penalty in this matter would be the amount of $6,000.

ORDER *

Pursuant to Section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. §6928, the following order is entered against respondent Amsted Industries, Inc., Litho-Strip Division.

I. A civil penalty in the amount of $6,000 is assessed against the respondent Amsted Industries, Inc., Litho-Strip Division.

II. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days after receipt of

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* Unless an appeal is taken pursuant to 40 C.F.R. § 22.30, or the Administrator elects to review this decision sua sponte the initial decision shall become the final order of the Administrator. 40 C.F.R. § 22.27(c).

the final order, 40 C.F.R. § 22.31(b), by submitting a certified or cashier's check payable to the Treasurer, of the United States of America, and mailed to:

EPA - Region V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, Illinois 60673

III. The following compliance order is also entered against respondent. To the extent not already done, respondent shall:

A. Within 30 days of receipt of this Order, cease all treatment, storage or disposal of any hazardous waste, except such treatment and storage at the facility as shall be in complete compliance with the Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities, 35 Ill. Adm. Code Part 725, and

B. Within 30 days of receipt of this Order, cease all generation of hazardous wastes, except as shall be in complete compliance with the Standards Applicable to Owners and Operators of Hazardous Waste Generating Facilities, codified at 35 Ill. Adm. Code Part 722.

C. Within 30 days of the receipt of this Order, and to the

extent not already accomplished, respondent shall comply with the following requirements:

1. Establish a detailed written waste analysis plan, as required by 35 III. Adm. Code 725.113(b).

2. Establish and maintain inspection records and schedules for safety and emergency equipment and security devices, as required by 35 III. Adm. Code 725.115(b).

3. Establish and maintain personnel training records for personnel involved in hazardous waste management, as required by 35 III. Adm. Code 725.116.

4. Establish and maintain a contingency plan that describes arrangements with local emergency services and submit same to the emergency service organizations, as required by 35 III. Adm. Code 725.152 and 153.

5. Establish and maintain a written operating record at the facility, as required by 35 III. Adm. Code 725.173.

6. Establish and maintain a written closure plan that addresses the container storage area, as required by 35 III. Adm. Code 725.212.

7. Establish and maintain a written closure cost estimate, as required by 35 III. Adm. Code 725.242.

8. Establish and maintain financial assurance for closure of the facility, as required by 35 III. Adm. Code 725.243.

9. Demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden occurrences arising from operation of the facility, as required by 35 III. Adm. Code 725.247.

10. Maintain documentation on all inspections of hazardous waste storage containers on the facility grounds, as required by 35 III. Adm. Code 725.274.

11. Submit an annual report covering all activities involved with the generation of hazardous waste, as required by 35 III. Adm. Code 722.141.

D. Respondent shall fully comply with standards for the U.S. EPA administered hazardous waste permit program found at 40 C.F.R Part 270 and associated procedures for decision making at 40 C.F.R Part 124.

E. The Part A permit application submitted by respondent on March 12, 1985, shall be accepted as if timely filed, pur-

suant to 40 C.F.R. 270.10(e)(3).

Notwithstanding any other provisions of this Order, an enforcement action may be brought pursuant to Section 7003 of RCRA (42 U.S.C. § 6973) or other applicable statutory authority should U.S. EPA find that the handling, storage, treatment, transportation or disposal of solid waste or hazardous waste at the facility may present an imminent and substantial endangerment to human health and the environment.

Frank W. Vanderheyden
Administrative Law Judge

Dated: July 18, 1986
Washington, D.C.