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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY HEARING CLERK

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:		
Arizona Processing Inc.,	*	Docket No.: RCRA-09-88-0009
Respondent.	*	**INITIAL DECISION**

This matter is before me on a Motion for Summary Judgment filed by the Complainant and a later decision by the Court to address the issue of the proper amount of the civil penalty, if any, to be assessed based upon briefs and supporting affidavits.

The present case has its genesis in a previous decision by the undersigned involving the present Respondent, wherein the Court found that the Respondent has violated certain provisions of RCRA and levied a fine of $18,000.00 against the Respondent. This decision, which was signed on December 7, 1987, also contained an Order which required the Respondent to:

> 1. Submit a notification of Hazardous Waste activity as required by 3010 of RCRA within 15 days of a Final Order.
>
> 2. Submit a completed Part A Permit Application as required by 3005(e) of RCRA.
>
> 3. Submit within 30 days of the Final Order a Closure Plan pursuant to 40 CFR 265.112.
>
> 4. Immediately cease the disposal of Hazardous Waste on the site.

5. Initiate, within 10 days of EPA's approval thereof, the provisions of the above-mentioned Closure Plan.

6. Pay the assessed penalty within 60 days after receipt of the Final Order.

Since the above-mentioned Decision disposed of all issues in the matter, it constituted an Initial Decision and would become the Final Order within 45 days of its service upon the Parties unless appealed by any of the Parties. The time to file an appeal expired 20 days after such service. On December 17, 1987, the Agency filed a request for an extension of time to file its appeal. By Order dated December 17, 1987, the Judicial Office extended the appeal period until February 1, 1988. The Agency apparently elected not to pursue its appeal and did not notify the Respondent of that fact. Also the Respondent did not object to the Agency's Motion for an Extension of Time.

Understandably, the Respondent did not initiate any of the activities called for in the Court's Order since it felt that the Agency intended to appeal it. If such appeal had been taken, the Order portion of the Court's Decision would be stayed until the Administrator issued his Final Decision. Such Final Decision could have changed the Court's original Order thus placing new or different obligations on the Respondent.

The Respondent heard nothing further from the Agency until it filed its Complaint in this matter on March 12, 1988. In its new Complaint, the Agency states that the Respondent has not

complied with any of the tasks required by the Court's November 30, 1987, Decision. The Agency is seeking per-day penalties which it calculated to total $29,575.00. This is, of course, in addition to the $18,000.00 levied in the Court's earlier Decision. The $29,575.00 penalty was calculated with $100.00/day as a base amount to which was added:

1. A 25% increase for lack of good faith or $25.00.

2. A 25% increase for degree of negligence or $25.00.

3. A 25% increase for history of noncompliance or $25.00.

These adjustments added to the base amount of $100.00/day results in a total per-day penalty of $175.00. The number of days of violation was calculated to be 169 based upon counting from September 16, 1988, the date of the Court's ruling on the Complainant's Motion for Summary Determination which found that the Respondent had violated two (2) parts of the Court's November 30, 1987, Decision. That Order concluded by directing the Parties to meet and try to negotiate a fair settlement, keeping in mind the Court's position as to slight amount of gravity associated with the violations found. The language of that Order is incorporated herein.

By report dated November 23, 1988, the Respondent states that it sent three (3) letters to the Agency's counsel attempting to set up a meeting to discuss settlement as urged by the Court's September 18, 1988, Order, supra, but no response thereto was forthcoming from the Complainant. The report concluded by asking the Court to set the penalty. The Respondent's position on this entire matter is fully set forth in an affidavit made by counsel for the Respondent dated September 2, 1988. A copy of which is attached to and made a part of this Order.

As indicated in my Order of September 18, 1988, the Respondent was late in filing two (2) documents with the EPA, i.e., the Notification under 3010 of RCRA and the Closure Plan. As I indicated in that Order I do not feel that the late filing of the 3010 Notice was of much significance since the Agency already knew exactly what the Respondent was doing on its property and knew that it had in fact ceased all Hazardous Waste activities the previous year, before my Initial Decision was issued.

As to the late filing of the Closure Plan, that also was not of real concern since a Clean Closure had been made long before the Closure Plan was required to be filed. In any event, the Respondent hired a highly competent consulting firm to help it prepare the Plan which it filed with the EPA on August 24, 1988. Such filing was five (5) months late. The notification was filed

Such filing was five (5) months late. The notification was filed two (2) months late. Using the Agency's base figure of $100.00 per day for both violations, the late Closure Plan would add up to $100.00 x 150 days (5 months) or $15,000.00. The late filing of the notification would amount to $100.00 x 60 days (2 months) or $6,000.00, giving a total penalty of $21,000.00. Given the circumstances of this case *i.e.,* that the Agency decided to lump both violations together for purposes of the penalty calculation, the Respondent would, under the worst scenario, only be liable for the 150 day violation period. The best case scenario for the Respondent would be to charge it with 2 months of violation of $100.00 per day and 3 months of $50.00 per day resulting in a lower penalty. I do not agree with the Agency's notion that upward adjustments of the base penalty are justified in this case. The record is clear that the Respondent obeyed the Court's Order as soon as was humanly possible as soon as it knew that the Agency had decided not to appeal the Court's Initial Decision. It obviously spent a considerable amount of money to attempt to comply with the rather short time constraints set out in that Decision. I find no evidence of a lack of good faith or diligence on the Respondent's part. I also disagree with the Agency's calculation of the number of days the Respondent was in violation. My September 18, 1988, Order discussed the time

period during which the Respondent was in violation and I find no reason to alter those findings.

Having said all of that, my primary problem with the Agency's penalty calculation is that it has decided that the assessment of multi-day violations is appropriate in this case. As the Agency concedes in its calculations, the violations were considered to be in the minor category both as to potential for harm and extent of deviation. I agree with that assessment. The range for penalties in that situation are, according to the penalty matrix set out in the RCRA Penalty Policy, $100.00 to $499.00. The Agency chose the lowest figure in that range, i.e., $100.00. However, in order to elevate the final penalty figure, the Agency decided to assess a multi-day penalty, which, including the upward adjustment of the base number, resulted in a proposed penalty of $29,575.00. It should be remembered that the original penalty awarded by the Court for the same violations was $18,000.00, which the Respondent paid in a timely manner. To attempt to assess another penalty for the untimely accomplishment of the remedying of those violations in an amount over $11,000.00 higher is not in my judgment justified by the facts of this case.

Although the penalty policy authorizes the assessment of multi-day penalties, this is the first case in my experience that the Agency has sought them. In addressing the notion of assess-

ing multi-day penalties, the penalty policy advises, on page 12, that:

> "Multi-day penalties should generally be calculated in the case of continuing egregious violations." (emphasis supplied)

Under no interpretation could the violations cited herein be considered "egregious" On the contrary, as I noted above, the Respondent in this case, once being advised as to the Agency's decision not to appeal my previous decision, acted quickly and prudently.

Upon consideration of all of the facts in this case, I am of the opinion that a penalty at the highest range of the minor/ minor amount as shown in the matrix, rounded off to the nearest whole number, is appropriate. I therefore assess a penalty of $500.00 for each of the two violations found for a total of $1,000.00.

ORDER[1]

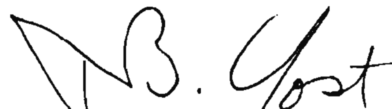
Pursuant to the Solid Waste Disposal Act, as amended, Section 3008, 42 USC 6928, the following order is entered against Respondent, Arizona Processing, Inc.:

1. A civil penalty of $1,000.00 is assessed against Respondent for violations of the 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 by submitting a certified or cashier's check payable to the United States of America and mailed to:

Treasurer of the United States
U.S. EPA Regional Hearing Clerk
P.O. Box 360863M
Pittsburgh, PA 15251

Date: 7/6/89



Thomas B. Yost
Administrative Law Judge

[1]Unless an appeal is taken pursuant to the Rules of Practice, 40 CFR 22.30, or the Administrator elects to review this Decision on this own Motion, this Initial Decision shall become the Final Order of the Administrator. See 40 CFR 22.27(c).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Decision issued by Administrative Law Judge Thomas B. Yost on July 6, 1989, was served on each of the parties, addressed as follows, by mailing certified mail, return receipt requested, in a U.S. Postal Mail Box, or by hand delivering, in the City and County of San Francisco, California, on the 9th day of August, 1989:

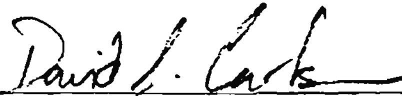
Robert H. Allen, Esq.
Allen Kimerer, & LaVelle
2715 North Third Street
Phoenix, AZ 85004-1190

Certified Mail
No. P765057013

David M. Jones, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 9,
215 Fremont Street
San Francisco, Ca. 94105

Hand Delivered

Dated at San Francisco, California, this 9th day of August, 1989.



David J. Carlson
Regional Hearing Clerk
EPA, Region 9