UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	
CYPRESS AVIATION, Inc. and THE CITY OF LAKELAND Lakeland, Florida,	[RCRA] Docket No. 89-04-R
Respondents	

1. Components of a waste mixture that has been generated in a paint stripping operation using a paint stripper containing more than 10% methylene chloride and so are restricted from land disposal under 40 CFR Part 268 as an F002 waste, and have not been analyzed to determine if they met treatment standards prior to being disposed of on land, are assumed to have all the potential for harm associated with an F002 waste in determining the appropriate penalty for disposing of the waste in an unpermitted landfill.

2. Since state authorization did not extend to enforcement of the land disposal restrictions and prohibitions imposed by HSWA, state consent order dealing with the failure to analyze waste and the release of hazardous waste upon land did not preclude EPA from bringing its own enforcement action for failure to comply with the HSWA waste analysis requirements and waste disposal prohibitions.

3. Land owner is liable for violations caused by lessee-operator but in determining appropriate penalty against owner there may be taken into account the owner's own good faith efforts to comply and lack of wilfulness or negligence.

Appearances:

Mary Ardiff, Esq., U.S. E.P.A., Region IV, 345 Courtland Street, N.E., Atlanta, GA 30365, for Complainant.

Phillip E. Kuhn, Esq., 3500 South Florida Ave., Suite 5, Lakeland, FL 33803, for Respondent Cypress Aviation, Inc.; and Mark Miller, Esq., Hahn, Breathitt, Watson & Miller, P. O. Box 38, Lakeland, FL 33802-0038, for Respondent the City of Lakeland.

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Lakeland, Florida,	)	
	)	
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Initial Decision

This is a proceeding under the Resource Conservation and Recovery Act ("RCRA"), Section 3008, 42 USC 6928, to assess a civil penalty and issue a compliance order against Respondents Cypress Aviation and the City of Lakeland, for alleged violations of the Act and the regulations thereunder.[1]

The complaint alleged that Cypress Aviation ("Cypress") operated a facility at which hazardous waste was generated and

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[1] RCRA, Section 3008 (also cited as the "Solid Waste Disposal Act, Section 3008") provides in pertinent part as follows:

> [Section 3008(a)(1)][W]henever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subtitle, 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....
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> [Section 3008(g)] Any person who violates any requirement of this subtitle shall be liable to the United States for a civil penalty in an amount not to exceed $25,000, for each violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

managed and that the City of Lakeland ("City") owned the facility. The violations charged and at issue in this proceeding are that Cypress had disposed of hazardous waste in an unpermitted landfill which is prohibited from such disposal, and that Cypress did not perform the required analysis of the waste it generated to determine if the waste was restricted from land disposal or met the required treatment standards. Cypress is charged as the operator of the facility and the City as the owner, and the penalty is proposed to be assessed against both jointly.

A hearing was held in Bartow, Florida on February 25-26, 1991. Thereafter, the parties submitted posthearing briefs. The following initial decision is being rendered on consideration of the entire record and the submissions of the parties.[2]

Decision

Cypress is an aircraft maintenance facility which does paint stripping and painting and mechanical work on various size aircraft. The property on which it operates is owned by the City of Lakeland.[3]

The complaint in this proceeding arises out of EPA's RCRA inspection of Cypress's facility in January 1989.

The alleged violations have to do with Cypress's paint stripping operation. The operation consists of spreading a chemical

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[2] The following abbreviations are used in this decision: "C" stands for Complainant EPA'S Exhibits; "R" for Respondent Cypress's exhibits; "Tr. V." for the transcript of the proceedings and the volume.

[3] C-1.

paint stripper on an aircraft or aircraft part, allowing time for the stripper to work and then rinsing the aircraft or aircraft part with water from a high pressure hose to remove the stripper and paint residue. The work is done on a circular concrete pad. At the time of the EPA's inspection, the pad sloped toward a trench on the edge of the concrete pad. Along part of the outside edge of this trench was a sheet metal wall about 2 feet high. The waste mixture from the stripping operation, consisting of wastewater, spent solvent, dissolved paint and paint chips, was intended to flow into the trench, through a sump in the trench to another sump outside the concrete pad where the liquid portion would then flow through a screen at the bottom of the sump. The screen would catch the paint chips and the residual solid material in the mixture. The paint chips would be placed on a screen on the concrete pad and sprayed with water and disposed of in a dumpster. The liquid collected off the concrete pad and draining into the trench and sump were pumped into metal tanks and reused.[4]

The EPA's inspection disclosed evidence of several violations of RCRA.[5] Because of the dual enforcement roles of the State and the EPA, the violations which are pertinent here and which are in dispute are those relating to the land disposal restrictions of 40 C.F.R Part 268.[6] These restrictions are applicable because the

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[4] Tr. V. II at 296-298; C-1.

[5] C-1.

[6] The State of Florida since February 25, 1985, has had final authorization to administer its own hazardous waste program, except that it is not authorized to administer and enforce the

information obtained from the inspection showed that the paint stripper used by Cypress contained 62% to 67% methylene chloride.[7] This made the waste mixture a hazardous waste (F002) subject to the land disposal restrictions of 40 C.F.R. 268.30.[8]

There is no dispute about the waste being F002 waste if the stripper did, in fact, contain over 10% methylene chloride.[9] Cypress contends, however, that the identification of the strippers and their methylene chloride content, is based on the assertedly unreliable hearsay testimony of the EPA's inspector, Mr. Himes.

The sources of Mr. Himes's information as to the paint stripper used by Cypress and its methylene chloride content were

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requirements and prohibitions imposed by the Hazardous and Solid Waste Act Amendments of 1984 ("HWSA"), 98 Stat. 3221 (Nov. 8, 1984). See Notice of Final Determination on Florida's Application for Final Authorization, 50 Fed. Reg. 3908 (Jan 29, 1985), a document of which I am taking official notice. The Part 268 regulations come out of the HWSA provisions. Tr. V. I at 102, 103-105.

[7] Tr. V. II at 296, 300, 319-320, 321-322, 341-342; C-1, C-18, C-19, C-33.

[8] See 40 C.F.R. 268.30(a). The listed F002 waste includes not only the spent solvent methylene chloride but also any mixture containing before use 10% or more of methylene chloride. 40 C.F.R. 261.31. Thus, the stripper was an F002 waste. Under 40 C.F.R. 261.3(a)(2)(iv), any mixture of a hazardous waste and another waste is also a hazardous waste. Since it is the addition of F002 waste that makes the mixture hazardous, it is assumed that the same hazards that caused the listing of the F002 waste are present in each component of the mixture.

[9] See Cypress's proposed findings of fact and memorandum of law (hereafter "Cypress's Main Br.") at 7, n.3; Lakeland's Brief at 5.

company employees and the supplier of the paint stripper.[10] There is no indication that these people would be giving inaccurate information. Mr. Himes was also experienced enough to be able to evaluate the reliability of his informants.[11] Other evidence confirms Cypress's use of the strippers.[12] Cypress, presumably, would have produced evidence that its strippers did not contain methylene chloride, if it had such evidence. The fact that it did not produce such evidence also indicates that the strippers used were correctly identified.[13] In short, Cypress's claim that the evidence identifying the chemical content of the stripper is unreliable hearsay is rejected.[14]

The EPA inspector found two violations of the land disposal regulations.

First, the inspector found evidence that the waste mixture of wastewater, spent solvent, paint chips and dissolved paint had been

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[10] C-1; Tr. V. II at 320-322. The information that the B&B supplier gave Mr. Himes over the telephone about the methylene chloride content of the paint strippers was subsequently confirmed in writing. C-19

[11] Tr. V. II at 321-322.

[12] See Tr. V. II at 300; C-4H, C-15(showing shipping invoices to Cypress for B&B 1717NP & 4411).

[13] Local 167, International Brotherhood of Teamsters v. United States, 291 U.S. 293, 298 (1934).

[14] Even though a statement is hearsay and the declarant is not available for cross-examination, the statement may be relied on for the truth of what is said, if the circumstances are such as to show that the information is likely to be reliable. Richardson v. Perales, 402 U.S. 398, 402 (1971); Gimbel v. Commodity Futures Trading Comm'n, 872 F. 2d 196, 199 (7th Cir. 1982).

deposited on the ground outside of the concrete pad.[15] Under the regulations, this was a land disposal of the waste.[16] Between November 8, 1986 and November 8, 1988, F002 waste could not be disposed of on land except under certain conditions, but Cypress does not claim that any of these conditions applied to the disposal of the waste from its stripping operation. After November 8, 1988, the conditions no longer applied and all land disposal of F002 waste was prohibited.[17]

Second, The inspector found that Cypress had not done the analysis or testing of the generated waste to determine if the waste was restricted from land disposal as required by 40 C.F.R. 268.7.

The deposit of the F002 waste on the ground and the failure to analyze the waste are supported by the record and are not really disputed. What is disputed is the appropriate penalty and Lakeland's liability for the violations.

The Appropriate Penalty

The penalty of $85,250 was calculated according to the EPA's enforcement response policy, the RCRA Civil Penalty Policy and the per day penalty policy for loss of interim status ("LOIS") cases.[18] Using the matrix in the RCRA Civil Penalty Policy, the EPA

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[15] Tr. V. II at 298-301, 305-307; C-1, C-4C, C-4D.

[16] 40 C.F.R. 268.2c; Tr. V. II at 220; V. IIB at 357-358.

[17] 40 C.F.R. 268.30(a) and (b).

[18] Tr. V. IIB at 360. See C-35(revised enforcement response policy); C-36(RCRA Civil Penalty Policy); C-37(application of RCRA penalty policy to LOIS cases.

determined that the violations had a major potential for harm and were a major deviation from the regulatory requirements. A penalty of $25,000, the maximum for this cell, was selected. This penalty was then increased by 25%, or $6250, because, in Mr. Himes's view, Cypress had been informed at a Florida inspection in June 1986,that it was illegal to place hazardous waste on the ground yet it still continued to do so.[19] The EPA further considered the deposits of F002 waste on the ground as continuing from November 8, 1986, when the land disposal of F002 waste was banned, until January 11, 1989, the date of the EPA's inspection.[20] In assessing the penalty for this period, the EPA followed the policy used in assessing penalties in LOIS cases, where a facility continues to operate without obtaining a permit. Excluding Saturdays and Sundays, the EPA calculated that there 540 days of violations for which it assessed a penalty of $100 per day, or a total of $54000.[21] These three amounts, $25000 for the initial deposit on the ground, increased by $6250, and $54000 for continuing deposits thereafter totalled $82500.[22]

Methylene chloride is a probable human carcinogen and has a

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[19] Tr. V. IIB at 366.

[20] Tr. V. IIB at 368.

[21] Tr. V. IIB at 367.

[22] C-21.The EPA appears to have calculated one penalty for both the failure to make a waste determination and for the illegal disposal.

great potential for environmental harm.[23] Lakeland argues that there is no evidence in the record that the waste mixture exceeded the allowable concentration of methylene chloride for land disposal of the waste.[24] The regulation places the obligation on the generator of the waste to determine by waste analysis or from its own knowledge of the waste whether the waste is restricted from land disposal. Cypress made no effort to make this determination.[25] The evidence that the stripper contained more than 10% methylene chloride, making the resulting waste mixture F002 waste, is sufficient to establish that each component of the mixture has the major potential for environmental harm associated with methylene chloride unless a respondent can show the contrary by a proper waste analysis or determination. It is reasonable to so construe the regulatory requirement that the waste be analyzed by the

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[23] Tr. V. II at 225, 231, 245. Lakeland seems to argue that the potential for harm is being judged on the basis of only a "drop" having been disposed of on land. Brief at 4. I do not agree. While the evidence does not permit a finding as to the exact quantity of F002 waste deposited on the land, it is sufficient to show that it was in all probability considerably more than a drop. Supra, n. 15.

[24] F002 waste containing less than .96 milligrams per liter when tested according to the EPA's toxicity characteristic leaching procedures may be land disposed. Tr. V. II at 226-227; 40 C.F.R. 268.41(a). The waste still has to be disposed of in a landfill or surface impoundment that meets the requirements of the regulations. Tr. V. II at 229.

[25] The analysis of its waste mixture done by Cypress after the State's inspection (C-23, C-24, C-25), was not the type of analysis required by 40 C.F.R. 268.7, to determine if the waste was restricted from land disposal. See Tr. V. IIB at 471-472, 474-475.

generator before being land disposed.[26] The alternative construction that a generator who does not analyze its waste can escape a penalty until the EPA does its own analysis would impose a heavy enforcement burden on the EPA and weaken the effectiveness of the testing requirement as a means for protecting against the land disposal of restricted wastes.

The evidence also supports a finding that the deposit of the waste on land, given the toxicity of the waste, was a major deviation from regulatory requirements. There are two reasons why this is so.

First, it would appear that any land disposal of a restricted waste, no matter how small a quantity, would constitute a major deviation from regulatory requirements, unless some exception applies.[27] There is no evidence in this record that the waste was excepted from the restriction against land disposal.

Second, it appears that the disposal was not a unique event that Cypress could not have reasonably foreseen but happened because Cypress had not adequately contained its waste.[28] Cypress points to its good faith efforts to correct the handling of the

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[26] Cf., Usery V. Turner Elkhorn Mining co., 428 U.S. 1, 28 (1975) (rebuttable presumption that coal miner with 10 years employment who dies from a respiratory disease died from pneumoconiosis upheld where there was rational connection between facts proved and presumption even though other relevant factors were excluded.)

[27] See Tr. V. II at 246.

[28] Tr. V. II at 298, 305, 306; V. IIB at 357.

waste following the state inspection in 1986.[29] The State questioned Cypress's disposing of the stripper waste in an unlined percolation pit and, prior thereto, into a gravel and sand pit.[30] Cypress, in response to the State's action, changed its waste handling system by installing the sump in use at the time of the EPA's inspection and the trough and sheet metal wall on the periphery of the concrete pad.[31] It thus did away with the unlined sump, This, however, was not the only form of land disposal Cypress needed to be concerned about. Cypress itself seems to have recognized this, for the installation of the sheet metal wall indicates that Cypress was aware of the need to protect against the waste overflowing onto the land. Nevertheless, this step obviously was not adequate to fully contain the waste. I find, accordingly, that this failure to prevent the waste from being deposited on the ground also made the violation a major deviation from regulatory requirements.

I do not agree, however, that Cypress's conduct was so willful or negligent as to justify a 25% upward adjustment in the penalty. The violator's knowledge, or lack thereof, of the legal requirement is a factor to be considered in determining whether the penalty should be adjusted upwards.[32] I find that the evidence supports Cypress's claim that it believed in good faith that the action it

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[29] Cypress's Main Br. at 7.

[30] C-5.

[31] Tr. V. II at 295; C-16.

[32] C-36, p. 18

was taking pursuant to the consent decree was all that was required of it. This is sufficient to show that an upward adjustment should not be made, although Cypress was mistaken in its belief.

The EPA's reason for assessing an additional penalty of $54,000 is that leaving the waste on the ground is a continuing violation.[33] This is a procrustean effort to harmonize the penalty with the EPA's penalty policy and I find it logically flawed. It is true that the failure to promptly clean up a disposal is apparently what makes the disposal a violation in the first place.[34] Possible continued environmental harm from an illegal land disposal, however, does not give rise to a separate "land disposal" as that term is defined in the Part 268 regulations, which is what the EPA claims to be enforcing.[35] There is, of course, authority under RCRA for compelling the clean-up of contaminated soils. It would appear, however, that the authority lies not under the land disposal restrictions but within the part of RCRA that Florida is authorized to enforce.[36] This seems to have been recognized by the EPA for the EPA's compliance order contains no provision for

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[33] Tr. V. IIB at 402.

[34] Tr. V. II at 231, 245.

[35] 40 C.F.R. 268.2(c). I also question whether the definition of disposal under 40 C.F.R. 260.10 supports the interpretation that a single disposal would create a continuing violation until it is cleaned up. See Tr. V. IIB at 414-415.

[36] See the consent order issued following the State's enforcement action. The order requires Cypress to determine whether the soil, sediment, surface water or ground water are contaminated, and if they are, to take corrective actions, including cleaning up the contaminated area. C-3(Par. 7 of the Ordered paragraphs).

cleaning up the soil. Yet implicit in the EPA's continuing violation theory is that Cypress was under a continuing obligation to clean up the site.[37] The State's consent order, however, only requires a clean-up if an assessment shows the need to do so.[38] Since the EPA is not claiming that this part of the consent order exceeded the State's authority, the EPA's penalty for a continuing violation seems to be inconsistent with the State's action and, thus, with the EPA's claim that its action is limited to violations of the land disposal restrictions.[39]

Although the $54,000 penalty is not supported under the EPA's reasoning of a continuing violation, the question remains whether it is still not appropriate for the violations of the land disposal restrictions found here. The evidence shows that the deposit on land, arising as it did from inadequate containment, probably happened on more than one occasion.[40] There is not sufficient evidence, however, to make any reasonable estimate as to how often during the period between November 8, 1986 and January 11, 1989, an illegal disposal such as an overspray or an overflowing of the trench may have occurred, or, to put in the EPA's words, how

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[37] That reasoning would seem to underlie the LOIS cases where there is a continuing obligation to obtain a permit.

[38] C-3 (ORDERED provisions of consent order).

[39] Of course, the clean-up may generate F002 waste, which waste would have to be managed in accordance with the Part 268 regulations.

[40] Supra, n. 28.

"routine and continuous" actually was the disposal.[41] Whether there was one or more deposits, the evidence indicates that they all came from the same cause, namely, inadequate containment of the waste. The EPA's RCRA penalty policy does discuss multi-day penalties for continuous noncompliance with a regulatory requirement, but recommends that such penalties be assessed for continuing egregious violations.[42] Although the violation is properly classified as major both in extent and potential for harm, I do not find it to be an egregious violation that would justify penalizing it as a continuing violation.

Accordingly, I find that $25,000 is the appropriate penalty for the violations found here. I further find that no adjustment in the penalty downward is warranted. Cypress's ignorance of the regulatory requirements is no defense. As the penalty policy persuasively points out, to accept lack of knowledge of the legal requirements as a basis for reducing the penalty would only encourage ignorance of the law.[43] Cypress also should have known enough about its operations to recognize that the waste from its

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[41] C-21(penalty calculation justification). At about the time of the EPA's investigation, Cypress was stripping an average of about three planes per month. Tr. V. IIB at 387; C-15. It is to be noted, however, that on the day of the EPA's inspection, an airplane wing was being stripped. C-1, C-4I; Tr. V. IIB at 389, 393. Mr. Himes did not report any impermissible land deposits from this operation. The record does not indicate how characteristic the operation was of Cypress's general stripping work.

[42] C-36, p.12.

[43] C-36, p.18.

operations was still not fully contained on the concrete pad.

Cypress's Estoppel Defense

Cypress's estoppel defense is based on a State RCRA investigation by the Florida Department of Environmental Regulation ("DER") in May, 1986, which terminated in a consent order issued on July 22, 1988.[44] Among the violations found by the DER were that Cypress was not analyzing its waste as required by 40 C.F.R. 262.11, and that it was not minimizing its releases of hazardous material as required by 40 C.F.R. 265.31. Singled out as a violation of 265.31 was that Cypress was disposing of its waste in an unlined percolation pit.[45] Under the consent order Cypress had to sample and analyze soil, sediment and wastewater at the facility for contaminants likely to pollute the groundwater and to take corrective action, including clean up of contaminated areas, in the event that groundwater pollution was found. Also, in response to the order, Cypress ceased using the unlined percolation pit and instituted its system of recycling the wastewater.[46]

Cypress argues that the EPA is estopped by the State action from bringing this enforcement action, because the State and the EPA were in privity with each other, sharing the same interest in the outcome of the state action, and the factual issue in the state proceeding and this proceeding are the same, namely, the improper disposal of F002 waste. According to Cypress, the EPA is

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[44] C-3.

[45] C-5; Tr. V. IIB at 393.

[46] C-3 (Exhibits I and II to the consent order.)

precluded from litigating any fact, violation or act which occurred prior to September 30, 1988, the date that the notice of the consent order was published in the newspaper for comment.[47] The argument is without merit.

Cypress's argument is totally inconsistent with the statutory scheme allocating the administration and enforcement of the RCRA program between the states and the EPA. Under this arrangement, responsibility for administering the RCRA program is transferred from the EPA to the authorized state on those parts of the program that lie within the grant of authority. Florida's authorization pursuant to statute and the EPA's grant of authority did not extend to carrying out the requirements and prohibitions imposed by HSWA, even though these provisions by statute took effect in authorized states at the same time that they took effect in unauthorized states.[48]

In those parts of the RCRA program which the state is authorized to administer and enforce, the EPA, if it disagrees with the state action such as a consent order, can bring its own enforcement action ("overfiling").[49] This statutory authority

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[47] R-3. The notice said that any comment on the consent order must be filed within 14 days of publication. The order itself was issued on August 25, 1988. C-3.

[48] 50 Fed. Reg. 3908 (Jan. 29, 1985); RCRA, Section 3006, 42 U.S.C. 6926.

[49] RCRA, Section 3008(a)(2); see, Southern Timber Products, Inc., RCRA (3008) appeal No. 89-2 (Final Decision, Nov. 13, 1990) at 8 (EPA enforcement action brought following EPA's disagreement with state action finding that a facility had been properly closed).

empowering the EPA to overfile when the state has acted on matters within its authority would be meaningless if the EPA was estopped from questioning the state action and barred from making its own determination of the facts and the appropriate remedy for the violation found.

Since the EPA is not estopped from bringing its own enforcement action with respect to matters on which the state has been authorized to act, there is even less merit to the estoppel argument when the state has no authority to act as is the case with the land disposal regulations. The state, of course, is not precluded from having its own standards for disposing of restricted wastes, but what is done under the state standards is not the equivalent of EPA action, having the same force and effect as though the EPA had acted, which would be the case with respect to standards the state was authorized to administer.

In short, the State's consent order insofar as it purported to settle violations found by the State under its standards with respect Cypress's land disposal of F002 waste clearly can have no preclusive or binding effect on this action. The land disposal of F002 waste is specifically covered by the HWSA land disposal restrictions and prohibitions and the Part 268 rules issued thereunder, the enforcement of which, including the appropriate penalty for violations, was outside the authority of the State and lay solely with the EPA.[50]

[50] Since the EPA's complaint is not an overfiling, the State's consent order has not been questioned with respect to the violations of 40 CFR Parts 262 and 265 found by the State, which

The Liability of Lakeland

The EPA argues that Lakeland as owner of the facility is liable as a matter of law for the violations and the payment of the penalty. Proof that Lakeland was involved in the actions that led to the violation, according to the EPA, is unnecessary. Also irrelevant is whether Lakeland had any control over Cypress's operation.[51]

The vicarious liability of an owner for violations committed by the operator-lessee has been established in Arrcom, et al., RCRA (3008) Appeal No. 86-6 (Final Decision, May 19, 1986) at 13. In that case the operators who leased the premises stored hazardous waste upon the premises without obtaining a permit. The owners had no involvement with the operation of the business. Nevertheless, they were held jointly liable with the operator for penalties for failing to obtain a RCRA permit and were also liable jointly for complying with the closure requirements.

Arrcom, however, does not settle the question of how the penalty against the owner is to be determined. The statute requires that in assessing a penalty, the Administrator shall take into

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violations of 40 C.F.R. 262.11 (failure to determine if waste meets the definition of hazardous waste) and of 40 C.F.R 265.31 (release of hazardous waste to unlined percolation pond) found by the State and the violations of 40 C.F.R. Part 268 charged in this proceeding can be explained by the fact that the State's action was based on violations found during the State's inspection on May 19, 1986. C-5. The Part 268 regulations became applicable to F002 waste later on November 18, 1986. 40 C.F.R. 268.30. They imposed more stringent requirements on the land disposal of F002 waste than the existing regulations. Tr. V. I at 103-106.

[51] EPA's brief in support of proposed findings, etc. (hereafter "EPA's Main Br.") at 23-24; EPA's reply brief at 18.

account any good faith efforts to comply with the applicable requirements.[52] The RCRA Civil Penalty Policy provides that in addition to a violator's good faith efforts to comply there may also be taken into account the degree of willfulness or negligence as determined by such factors as the violator's control, the foreseeability of the events constituting the violation, whether the violator took reasonable precaution against the events constituting the violation and whether the violator knew or should have known of the hazards associated with the conduct.[53]

If a person's good faith efforts to comply and the other factors listed in the penalty policy are relevant in assessing a penalty against the person whose acts caused the violation, they should be equally applicable to assessing the penalty against the person who is being held vicariously responsible for those acts. There is no indication in either the statute or the regulations that the owner and the operator are to be treated differently so as to preclude the owner from asserting in mitigation of the penalty factors that are peculiar to it, nor does Arrcom so hold.[54]

The record establishes that Lakeland did try to keep informed about how Cypress was handling its waste problems with the EPA and DEM after it learned of the State's inspection in 1986, and that

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[52] RCRA, Section 3008(a)(3), 42 U.S.C. 6928(a)(3).

[53] C-36, pp. 17-18.

[54] See Acro Plating Works, Inc., RCRA Docket No. V-W-84-R-071-P (Feb. 13, 1986)(owner penalized for failing to obtain a permit but not for violations in the management of the hazardous waste over which he had no control).

the State was questioning Cypress's compliance with RCRA.[55] Lakeland construed its lease, however, as precluding any intervention in Cypress's operations unless it had clearer evidence of wrongdoing than what was provided by DER and the EPA.[56] When Lakeland apparently did send a letter to Cypress at one point questioning Cypress's compliance with RCRA, it received in reply a "threatening" letter from Cypress's attorney advising that Cypress was doing everything it was supposed to be doing under the laws and regulations.[57] Apparently, Lakeland was unable to obtain either from the State or the EPA any definitive information about Cypress's compliance or lack of compliance.[58]

The EPA argues that Lakeland had sufficient control over Cypress to force Cypress into compliance. I find that under its lease Lakeland could not do more than it did do without risking a lawsuit with Cypress. What the EPA seems to assume is that findings by the State and EPA inspectors that there were violations should have been accepted by Lakeland as proof of such violations so as to justify taking some other action to stop further violations (although the EPA does not state precisely what that action should be). While the findings by the State and EPA inspectors, no doubt, were matters of concern, and Lakeland showed that it considered

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[55] Tr. V. IIB at 441, 443-444, 453, 458; C-27, C-28, C-30, C-32.

[56] Tr. V. IIB at 448-449, 451-452, 454-456.

[57] Tr. V. IIB at 462, 463-464.

[58] Tr. V. IIB at 456-457.

them as such, Lakeland can justifiably have assumed that it needed more specific evidence. Cypress did modify its waste handling procedures in response to the State's inspection by discontinuing the use of the unlined pit and installing a sheet metal containment wall. The new system was put into operation on October 16, 1986, before the land disposal restrictions went into effect.[59] Nor does it appear that the land disposal that was taking place after the modifications was readily observable except to the trained eye of the EPA inspector. As already noted, although there was an airplane part being stripped on the day of inspection, Mr. Himes did not notice any of the waste being placed on the ground.[60]

It is at once apparent that unlike the facts in Arreola, Lakeland did not stay aloof from Cypress's operations but did what it considered was appropriate under its lease to ensure that Cypress was complying. The fact remains, however, that Lakeland has not persuasively shown that it could do no more than what it did do with respect to ensuring that Cypress brought its operations into compliance. The threat of a lawsuit does not mean that one will take place and it is difficult to tell what is just posturing on the part of a party and what is meant in seriousness. Where violations of the land disposal restrictions are involved, an owner should be especially aggressive about stopping them. Indeed, it is to the owner's self interest that it be so, for it could well be faced with the ultimate task of cleaning up the property.

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[59] C-16.

[60] Supra note 41.

Accordingly, Lakeland cannot be completely exonerated of all liability for a penalty here.

In short, the question of the appropriate penalty against Lakeland does present a dilemma. On the one hand, if Lakeland is held strictly accountable for Cypress's actions regardless of whatever its own conduct was in the matter, than a property owner is held to a more stringent standard than the operator who causes the violation and can at least show that there are mitigating circumstances for reducing the penalty such as its good faith efforts to comply and its lack of control over preventing the violation. On the other hand, if the standard is not strict accountability, than the owner is confronted with the problem of what action must it take. Here, Lakeland knew that Cypress had been put on notice about its lack of compliance with RCRA and so far as this record is concerned, had no reason to believe that Cypress was not cooperating with the State in bringing itself into compliance. Technically, of course, Lakeland should have known that the State had no authority to administer the land disposal restrictions of Part 268, which went into effect after the State's inspection in 1986. At the same time, Lakeland could understandably believe that if Cypress was cooperating with the State, it was also doing whatever else was required to comply with RCRA. Even an inspection by Lakeland would not necessarily have disclosed that Cypress was still improperly disposing of its waste.[61] An examination of

[61] In Arrcom the violation involved the storage of waste at the facility, something which would appear to be readily observable. That cannot be said with respect to the continued land disposal of

Cypress's records, however, assuming it could have been done without a lawsuit, would have revealed whether Cypress was analyzing its waste as required by the regulations.

In sum, I conclude that an owner is not held strictly liable for whatever penalty may be assessed against the operator but may seek to mitigate the penalty against it by facts demonstrating its own good faith conduct under the circumstances and lack of wilfulness or negligence. Here, I find that a reduction in 50% of the penalty is warranted because Lakeland did act in good faith and was constrained by its lease as to what it could do, and that $12,500 is an appropriate penalty against Lakeland.

Although grounds have been found for mitigating the penalty against Lakeland, I find that the compliance order is properly entered against both Cypress and Lakeland. Holding Lakeland to joint responsibility with Cypress for compliance should provide Lakeland with adequate authority to obtain whatever information it deems necessary about Cypress's compliance, and if Cypress is delinquent, to either demand that Cypress bring itself into compliance, or, if necessary, take whatever action itself that is necessary for compliance.[62]

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the waste after the modifications put in by Cypress. While there were paint chips on the ground, this in itself would not show whether they had been deposited prior to or after the modifications.

[62] The lease between Lakeland and Cypress is not in the record, but enough is disclosed to indicate that it should not present any obstacle to Lakeland's being able to comply with the order. See Tr. V. IIB at 448-449. Lakeland can always bring any specific situation where the terms of the lease do interfere with Lakeland's ability to comply to the attention of the EPA and the State. They will then

In conclusion, then, a penalty of $25000 is assessed against Cypress and a penalty of $12500 is assessed against Lakeland. There is no evidence in the record indicating that Respondents are financially unable to pay their respective penalties.

ORDER[63]

Pursuant to RCRA, Section 3008(a), 42 U.S.C. 6928(a), the following order is entered against Respondents Cypress Aviation, Inc. and the City of Lakeland:

I. A civil penalty of $25,000 is assessed against Respondent Cypress Aviation, Inc.

A civil penalty of $12,500 is assessed against Respondent The City of Lakeland.

Each party shall pay the full amount of its respective penalty within thirty (30) days of the effective date of the final order. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America, at the following address:

EPA-Region 4
(Regional Hearing Clerk)
P. O. Box 100142
Atlanta, Georgia 30384

II. A. Respondents shall cease the placing of all hazardous waste in or on the land.

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be able to take this into account in determining how to deal with the problem.

[63] Unless an appeal is taken pursuant to the Rules of Practice, 40 C.F.R. 22.30, 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).

B. Respondents shall manifest all shipments of land disposal restricted waste to a hazardous waste treatment, storage or disposal facility, in compliance with all applicable RCRA requirements.

C. Respondents shall within thirty (30) days develop and implement a written plan for the management of the land disposal restricted wastes in accordance with the requirements of 40 C.F.R. Part 268. This plan shall include provisions for the following specific generator requirements:

1. Waste Analysis (40 C.F.R. § 268.7(a))

The Respondents will test the waste or an extract of the waste, or use knowledge of the waste, to determine if the waste is restricted from land disposal.

2. Notification/Certification (40 C.F.R. § 268.7)

(a) If the Respondents determine that they are managing a restricted waste and determine that the waste cannot be land disposed (i.e., the waste does not meet the treatment standards), with each shipment of waste, the Respondents must submit to the receiving treatment facility a written notice of the appropriate treatment standards for the waste. The notice must include:

(1) The EPA Hazardous Waste Number;

(2) The corresponding treatment standards;

(3) The manifest number associated with the shipment; and

(4) Waste analysis data, where available.

(b) If the Respondents determine that the waste may be land disposed without further treatment, with each shipment, the Respondents must submit to the receiving land disposal facility a written notice and certification stating that the waste meets the treatment standards. The notice must include:

(1) The EPA Hazardous Waste Number;

(2) The corresponding treatment standard;

(3) The manifest number associated with the shipment; and

(4) Waste analysis data, where available.

The certification must be signed by an authorized representative and state the following:

> I certify under penalty of law that I personally have examined and am familiar with the waste through analysis and testing or through knowledge of the waste to support this certification that the waste complies with the treatment standards specified in 40 C.F.R. Part 268 Subpart D and all applicable prohibitions set forth in 40 C.F.R. § 268.32 or Section 3004 (d) of RCRA. I believe that the information I submitted is true, accurate and complete. I am aware that there are significant penalties for submitting a false certification, including the possibility of a fine and imprisonment.

D. If Respondents determine that the waste is restricted from land disposal based solely on knowledge of the waste, then all supporting data used to make the determination must be maintained on-site in the Respondents' files. If Respondents make the determination based on testing of the waste, then all waste analysis data must be maintained on-site in the Respondents' files,

in compliance with 53 Fed. Reg. 31214 (August 17, 1988) (to be codified at 40 C.F.R. § 268.7(6)).

E. Respondents must retain an on-site copy of all notices, certifications, demonstrations, waste analysis data and other documentation produced pursuant to 40 C.F.R. § 268.7(a) for at least five (5) years from the date the waste was last sent to an on-site or off-site treatment, storage or disposal facility, in compliance with 53 Fed. Reg. 31214 (August 17, 1988) (to be codified at 40 C.F.R. § 268.7(6).

F. The Respondents must attach the above notifications and certifications to each outgoing hazardous waste manifest.

G. All supporting data used to make the determination that the hazardous waste is banned from land disposal, as indicated in paragraph (E), shall be sent to:

Mr. James H. Scarbrough, P.E., Chief
RCRA and Federal Facilities Branch
Waste Management Division
U.S. Environmental Protection Agency
345 Courtland Street, N.E.
Atlanta, GA 30365

Notwithstanding any other provision of this Order, an enforcement action may be brought pursuant to Section 7003 of RCRA, 42 U.S.C. Section 6973, or any other statutory authority, should

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 or the environment.

Gerald Harwood

Gerald Harwood
Senior Administrative Law Judge

Dated: SEP 24 1991

In the Matter of Cypress Aviation, Inc., & The City of Lakeland
Docket No. 89-04-R

I certify that I sent four copies of the Initial Decision in the above captioned matter to Julia P. Mooney, Regional Hearing Clerk on September 24, 1991 by Certified Mail.

Maria Whiting
Secretary

Dated: September 24, 1991