UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	**)**	
	)	
Federal Cartridge Company,	**)**	**Docket No. RCRA-05-2002-0003**
	)	
Respondent	**)**	

ORDER GRANTING IN PART, AND DENYING IN PART, EPA'S MOTION FOR ACCELERATED DECISION, AND DENYING FEDERAL'S CROSS-MOTION FOR ACCELERATED DECISION

This case arises under Section 3008(a) of the Solid Waste Disposal Act, more commonly referred to as the Resource Conservation and Recovery Act of 1976 ("RCRA"). 42 U.S.C. § 6928(a). The United States Environmental Protection Agency ("EPA") has filed a complaint charging Federal Cartridge Company ("Federal") with nine counts of violating Section 3005(a) of RCRA. 42 U.S.C. § 6925(a). Most of the nine counts involve multiple instances of violation. Each of the counts stems from respondent's manufacturing of munitions.[1] For these alleged violations, EPA seeks a civil penalty of $258,592.50. Of the nine counts listed in the complaint, Federal admits to three counts and to portions of three counts. It denies the allegations entirely in the remaining three counts.

EPA has filed a motion for accelerated decision seeking judgment as to both liability and civil penalty for each of the nine counts. 40 C.F.R. 22.20.[2] For the reasons set forth below, EPA's motion for accelerated decision is *granted* as to liability, but only as to paragraph 30(a) of

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[1] In opposing EPA's motion for accelerated decision, respondent states that it "manufactures munitions, including shotshell, centerfire, and rimfire ammunition and components." Respondent also states that it operates under a Hazardous Waste Storage, Treatment and Disposal Facility Permit for the purpose of "storing, treating and disposing of the hazardous waste generated at the Facility." Resp. Opp. at 1.

[2] Rule 22.20(a) in part provides:

> *General.* The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. 22.20(a).

Count II, paragraphs 35(c), 36(c), 36(d), 37(a), and 38(b) through 38(d) of Count III, paragraph 46, Item 1, of Count V, and Counts VII, VIII, and IX. In all other respects, EPA's motion is *denied*. In addition, to the extent that Federal seeks accelerated decision, its motion also is *denied*.

I. EPA is Entitled to Judgment on Liability as to Portions of Counts II, III and V, and as to Counts VII, VIII, and IX in Their Entirety.

Federal admits to committing some, but not all, of the violations alleged by EPA. The following are the RCRA Section 3005(a) violations to which respondent admits, and to which EPA is awarded judgment. 42 U.S.C. § 6928(a).

Count II

In Count II, EPA charges that Federal accumulated a hazardous waste material at its facility for more than 90 days in violation of Minn. Rule 7045.0292, Subpart (1)(A), and its permit. Specifically, paragraph 30(a) identifies a portion of the involved hazardous material as "two 55-gallon drums of scrap ammunition, located in the solid waste area of Building 127." Compl. ¶ 30(a).

Federal admits to committing the violation identified in paragraph 30(a), stating that "[t]he drums were not disposed of in a timely manner because of the unique nature of the mercury contaminated, loaded ammunition." Resp. Opp. at 7. In that regard, respondent takes issue only as to EPA's assigning for penalty purposes, "a 'moderate' rating for the potential harm/deviation." Resp. Opp. at 7-8. Given this admission by Federal, EPA is awarded judgment as to the allegations set forth in paragraph 30(a) of the complaint.

Count III

In Count III, EPA alleges that Federal failed to store hazardous waste in compliance with Part V (A)(2)(b)(1) of its Hazardous Waste Storage, Treatment and Disposal Facility Permit ("the Permit"). Federal admits to non-compliance as charged in paragraph 35(c), *i.e.*, that approximately 80 containers of propellant waste at Building 79 did not have labels attached identifying the contents of the containers as "Hazardous Waste," and identifying the date on which respondent initially accumulated the waste in the container. Resp. Opp. at 3 n.2.

Federal also admits to the allegations that it had containers of hazardous waste which did not have labels attached identifying the contents of the containers as "Hazardous Waste" with respect to "one satellite accumulation drum of primer at Building 20," and "one satellite accumulation drum of propellant at Building 20," as alleged in paragraphs 36(c) and 36(d) of the complaint, respectively. Resp. Opp. at 3 n.2. In addition, Federal admits to the allegation in paragraph 37(a) of not having a label attached to "one container of K406 waste at the Waste Water Treatment Plant," identifying the date on which respondent initially accumulated the hazardous waste. *Id.*

Finally, under Count III, Federal admits to the allegations contained in paragraphs 38(b) through 38(d) of the complaint. Resp. Opp. at 3 n.2. There, EPA has charged that respondent failed to keep the following containers of hazardous waste closed during storage: "(b) one satellite accumulation drum under the filter press at Building 133; (c) one satellite accumulation drum of primer at Building 20; (d) one satellite accumulation drum of propellant at Building 20."

Count V

Insofar as this count is concerned, Federal admits to the allegations set forth in paragraph 46, Item 1, of the complaint. Resp. Opp. at 3 n.2. There, EPA charges that respondent failed to conduct an evaluation of two drums of scrap ammunition, generated on or before May 12, 2000, in the Solid Waste Area of Building 127 to determine whether it was hazardous.

Count VII

Count VII involves Federal's failure to provide a required soil sample analysis. Part III (A) of respondent's Permit requires that it conduct annual soil sampling at the scrap propellant open burn pad units. The purpose of this sampling is to monitor and track the impact of lead on adjacent soils at the unit. In addition, respondent is required to submit a report summarizing the results of the sample analysis to the Minnesota Pollution Control Agency ("MPCA") not later than July 1 of each year. EPA alleges that, in violation of RCRA, Federal submitted its 1999 annual soil sample report to the MPCA on September 2, 1999, and that as of July 12, 2000, respondent had not yet provided the MPCA with its annual soil sample report for the year 2000. Compl. ¶¶ 54-56. Federal admits to this violation. Resp. Opp. at 3 n.2.

Count VIII

Count VIII involves Federal's failure to meet certain groundwater requirements. EPA alleges that respondent violated RCRA by failing to mark each monitoring well with an identification number, and also by failing to maintain protective posts at two of its wells, as required by Part IV (I)(11) of its Permit. Compl. ¶¶ 58-60. Federal admits to this violation. Resp. Opp. at 3 n.2.

Count IX

Count IX involves Federal's failure to report all Solid Waste Management Units ("SWMU"). EPA asserts that respondent discovered stained soil material containing 1700 "ppm" of barium outside Building 160, near it's dust collection area (*i.e.*, the baghouse). EPA further asserts that this area containing the barium was a SWMU not specifically identified in respondent's Facility Assessment and not reported to the MPCA within 15 days of its discovery. Thus, EPA charges that Federal violated RCRA by failing to comply with Part X (G)(1) of its Permit. Federal admits to this violation. Resp. Opp. at 3 n.2.

II. EPA is Not Entitled to Judgment as to Liability in Counts I, IV, and VI, and to the Remaining Portions of Counts II, III and V.

Count I

This count involves the unpermitted treatment of hazardous waste. Here, EPA alleges that in firing ammunition at its gunnery range for testing purposes, Federal shredded the shotshell wad waste, thereby reducing its volume. EPA further alleges that by shredding the shotshell wad waste Federal "treated" the hazardous waste within the meaning of Section 1004(34) of RCRA, 42 U.S.C. § 6903(34), 40 C.F.R. 260.10, and Minn. Rule 7045.0020, Subpart 97. Arguing that because its Permit does not provide for such "treatment," EPA submits that respondent thereby violated RCRA Section 3005(a). Compl. ¶¶ 21, 24 & 27.

The dispute here between EPA and Federal essentially is whether respondent unlawfully treated the shotshell wad waste, or whether respondent was engaged in lawfully "managing the shotshell wads as a useful product." In that regard, Federal maintains that "[t]he 'useful product' defense is a recognized defense to allegations that a company treated hazardous waste when in fact the company managed a material as nonwaste." Resp. Opp. at 8.

While each side seeks a holding in its favor as to Count I, the record is too incomplete to make such an award. For example, EPA cites to Complainant's Exhibits 3, 4, 5, and 7, but as yet these exhibits are not part of the record. Moreover, even if they were a part of the record, these exhibits alone do not paint a complete picture of the issue at stake here. In that regard, Federal's submission of the affidavit of Orrin Nyhus as to the historical recycling efforts of respondent is sufficient to raise questions of fact with respect to Count I. Accordingly, an evidentiary hearing as to the allegations of Count I is necessary.

Count II

This count involves the unpermitted accumulation of hazardous waste. Here, EPA charges that Federal violated Section 3005(a) of RCRA because it allegedly accumulated hazardous waste in violation of Minn. Rule 7045.0292, Subpart (1)(A), as well as in violation of its Permit. In that regard, EPA asserts that respondent stored in the solid waste area of Building 127, two 55-gallon drums of scrap ammunition, two 55-gallon drums of lead contaminated soil and shotshell wad waste, and one 55-gallon drum of lead contaminated soil. Compl. ¶¶ 30(a), (b) and (c) & 32.

Federal submits that the two 55-gallon drums allegedly containing lead contaminated soil and shotshell wad waste (¶ 30(b)) and the one 55-gallon drum allegedly containing lead contaminated soil (¶ 30(c)) actually did not contain hazardous waste at all. Resp. Opp. at 3. In support of this position, Federal cites the affidavits of Del Schmidt and Orrin Nyhus which discuss the recycling efforts relating to the waste material cited in paragraphs 30(b) and (c). In addition, citing 40 CFR 261.3(a) and 261.4(a)(13), respondent submits that the scrap lead shot is

excluded from the definition of solid waste and thus, it is not subject to RCRA regulation. Resp. Opp. at 6.

Given the arguments raised by Federal, it is held that there are questions of both fact and law regarding the allegations contained in paragraphs 30(b) and 30(c) which warrant a hearing.

Count III

As noted, *supra*, Federal admits to the allegations set forth in paragraphs 35(c), 36(c) and (d), 37(a), and 38(b) through (d) of the complaint. Each of these paragraphs appears under Count III. Respondent does, however, take issue with the remaining allegations of this count.

Paragraphs 35(a) and (b).

In paragraph 35 of Count III, EPA charges that Federal stored at its facility containers of hazardous waste which did not have labels attached identifying their contents as hazardous waste, or identifying the date on which respondent initially accumulated the waste in the container. Specifically, in paragraph (a) the hazardous waste was identified as "eight 55-gallon drums of lead contaminated shotshell wads, at Building 75" and in paragraph (b) as "one 55-gallon drum of lead contaminated shotshell wads, at Building 30a." Compl. ¶¶ 35(a) & (b). With respect to this allegation, Federal argues that the lead contaminated shotshell were "being managed as a product" and, therefore, not subject to RCRA regulation. Resp. Opp. at 15. Respondent's "managed product" defense raises an issue of law thus precluding the awarding of accelerated decision.

Paragraphs 36(a) and (b).

In paragraph 36 of Count III, EPA charges that respondent had at its facility containers of hazardous waste which did not have labels identifying their contents as hazardous waste. The disputed allegations of paragraph 36 are as follows: "(a) one ash bucket at Building 160; (b) one satellite accumulation drum of hazardous waste sludge under the filter press at Building 133." Compl. ¶¶ 36(a) & (b). Here, citing to the Dudgeon affidavit, Federal raises questions of fact that warrant a hearing. For example, as to the "ash bucket" cited in paragraph 36(a), Federal asserts that there was no RCRA labeling requirement because the container held only ground barium nitrate, a raw material used in the production of priming mix. Resp. Op. at 15. With respect to paragraph 36(b), respondent again raises a material issue of fact as to whether a photograph shows that the drum of hazardous waste had an appropriate label. *Id.*

Paragraph 37(b).

In paragraph 37 of Count III, EPA alleges that respondent had at its facility containers of hazardous waste which did not have labels identifying the date on which the waste was initially accumulated. Only paragraph (b) is in dispute. There, complainant cites "two 55-gallon drums of treated primer at Building 133." Compl. ¶ 37(b). Again, relying on the Dudgeon affidavit,

Federal submits that there could be no violation because the drum cited in paragraph 37(b) was empty. Resp. Opp. at 16. Respondent has shown that there exists a question of fact that cannot be resolved short of a hearing.

Paragraphs 38(a), (e) and (f).

Finally, in paragraph 38 of Count III, EPA charges that respondent had at its facility containers of hazardous waste which had not been kept closed during storage. There are three instances which are in dispute and they are as follows: "(a) one ash bucket at Building 160," "(e) one container of K046 waste at the [Waste Water Treatment Plant]," and "(f) eight 55-gallon drums of lead contaminated shotshell wads at Building 75." Compl. ¶¶ 38 (a), (e) & (f). As explained below, Federal raises questions of fact and issues of law which require a hearing on these allegations.

With respect to paragraph 38(a), Federal again argues that there is no violation because the "ash bucket" at Building 160 contained a raw material, *i.e.*, ground barium nitrate, and accordingly was not a hazardous waste. Resp. Opp. at 16. With respect to paragraph 38(e), citing the affidavit of Dudgeon, Federal explains that the container is too large and too heavy to be overturned (described by respondent as "a 25 cubic yard roll-off tote, the size of a semi-trailer"). Respondent also argues that, in any event, K046 does not release organic vapors. Resp. Opp. at 17. In addition, Federal submits that the affidavit shows that the container is protected while in the building and that when it is removed for transport, it is covered with a tarp. Finally, Federal appears to raise an estoppel argument in stating that a Minnesota Pollution Control Agency inspector had informed respondent that the company's decision not to cover the K046 container was not a violation of RCRA or of its Permit. *Id.*

Paragraph 38(f) involves eight 55-gallon drums of lead contaminated plastic shotshell wads at Building 75. Federal argues that the plastic shotshell wads are being managed as a product and, therefore, are not subject to RCRA regulation. Resp. Opp. at 17.

In sum, Federal raises sufficient questions of fact and issues of law requiring a hearing as to the allegations set forth in paragraphs 38(a), (e) and (f) of the complaint.

Count IV

This count involves Federal's alleged failure to minimize the possibility of a release of hazardous waste. Citing Part V (A)(1)(c) of the Permit, EPA states that respondent is required to maintain its facility "so as to minimize the possibility of a fire, explosion, or other event that might allow hazardous wastes to escape into the air, land, or water." Compl. ¶ 42. Alleging a violation of this Permit provision, EPA cites an accumulation of copper plating salts, nickel platting solids, waste propellant burn residues, and barium dust. Compl. ¶¶ 42(a)-(d).

Relying upon the affidavit of Dudgeon, Federal submits that the copper and nickel plating deposits "are routine in all plating operations." Resp. Opp. at 18. In addition, again

citing to the Dudgeon affidavit, respondent argues that it has taken steps to minimize the release of copper and nickel plating solids. In that regard, it submits that the concrete floor and containment curb "greatly minimize" the possibility of any release into the environment. *Id.* In addition, Federal relies upon the Dudgeon affidavit in arguing that the burn pad building is covered, that it has a concrete curb to contain any precipitation that infiltrates the building, and that annual soil tests conducted in this area have confirmed that "no improper release has occurred." Finally, as to the allegation involving the barium dust, Federal cites the Dudgeon affidavit for the proposition that the staining that concerns EPA "is more likely the result of antimony sulfide powder escaping the baghouse filter." Resp. Opp. at 19. Respondent further points out that under RCRA, antimony sulfide is not a hazardous waste.

Accordingly, based upon the affidavit of Dudgeon, respondent has raised questions of fact and law that cannot be resolved by summary judgment.

Count V

Here, EPA alleges a failure to comply with waste analysis requirements. In the complaint, EPA asserts that pursuant to Minn. Rule 7045.0214, Subpart 1, respondent was required to evaluate waste within 60 days of its generation to determine whether the waste was hazardous. Compl. ¶ 45. Of the three wastes that respondent allegedly failed to evaluate, the charges as to two of the wastes are still in dispute. They are the two drums of Lead Contaminated Soil and Wad Waste located in the Solid Waste Area of Building 127, and one drum of Lead Contaminated Soil located in the same area. Compl. ¶ 46.

Federal submits that these three contested drums contain lead shot and plastic shotshell wads generated during ballistic testing. Respondent further submits that this material is scrap metal that is recycled and is, therefore, exempted from the hazardous waste testing regulations. Resp. Opp. at 14-15. Federal has raised an issue of law that cannot be resolved without a hearing.

Count VI

This count involves alleged employee training violations. In that regard, EPA charges that Federal has no records that employees James Rogers, Orrin Nyhus, Diane Pedersen, and Dave Ahner received their required training. Compl. ¶¶ 51(a)-(d).

Federal places Count VI in issue as to each of the individuals listed. With respect to Rodgers (¶ 51(a)), Federal submits that although he is listed as an Emergency Coordinator in the company's contingency plan, his duties are limited to signing documents. Accordingly, Federal maintains that he does not fall under the "personnel," or "facility personnel," required to receive training by the Minnesota Rules. Resp. Opp. at 20.

Insofar as Nyhus is concerned (¶ 51(b)), Federal submits he did receive his required training as the Safety, Security & Environmental Manager. According to respondent, Nyhus was

called out of training to handle a security matter and thus failed to sign for his training. Resp. Opp. at 20-21.

Finally, Federal concedes that neither Pedersen, nor Ahner, (¶¶ 51(c) & (d)) received training to operate the "trommel unit." Federal submits, however, that Pedersen and Ahner were not required to receive any training because the trommel unit does not generate hazardous waste. Rather, respondent asserts that the trommel unit separates small metal material from recyclable and burnable material. Resp. Opp. at 21.

Respondent has established that questions of material fact exist as to the alleged training violations. Accordingly, accelerated decision is not appropriate.

III. EPA is not Entitled to Judgment on the Civil Penalty

Inasmuch as Federal has violated RCRA Section 3005(a) as alleged in Count II, paragraph 30(a), Count III, paragraphs 35(c), 36(c) and (d), 37(a) and 38(b) through (d), Count V, paragraph 46, Item 1, and Counts VII, VIII, and IX, a civil penalty must be assessed. EPA argues that there is no need for a hearing as to the penalty phase for these three counts (or, in fact, for any of the counts) and that the penalty that should be assessed is the penalty proposed in the complaint. Advancing that position, EPA submits that "the penalty amount for each violation is supported by an analysis of all relevant and probative evidence, in consideration of the applicable statutory criteria, as interpreted in the Administrator's adopted penalty policies and the calculation methodologies of those policies." Mot. at 2. For the reasons that follow, EPA's request to assess a civil penalty at this pre-hearing stage is denied.

First, as evidenced from the foregoing, EPA was awarded judgment on liability as to some, but not all, of the violations charged in this case. For the most part, those alleged violations that have not been resolved appear to be factually related to the violations that have been established. Accordingly, given the fact that EPA will have to put on a civil penalty case for the yet to be resolved violations, little is to be gained from deciding at this early stage what may turn out to be only a portion of the penalty issue.

Second, and more importantly, EPA has not shown that there exists no questions of material fact relating to the civil penalty issue. Indeed, absent a default situation where a respondent willingly relinquishes its right to its "day in court," it is a substantial challenge, to say the least, for the government to show that the facts of its case are so compelling that respondent is not entitled to a hearing on the civil penalty to be assessed against it. Given the fact that Federal requests a hearing on the civil penalty for the violations found in this case, this Tribunal is unwilling to tell the respondent that its fundamental right to be heard will be replaced by a pre-hearing paper review.

IV. Federal is Not Entitled to Judgment.

In opposing EPA's motion for accelerated decision, Federal has itself moved for judgment as to some of the violations charged. Specifically, Federal has sought judgment as to Count I, paragraphs (b) and (c) of Count II, paragraphs 35(a), 35(b), 36(a), 36(b), 37(b), 38(a), 38(e) and 38(f) of Count III, and Count V. Federal's arguments as to each of these counts has been discussed, *supra*, and while they have been found sufficient to raise questions of fact or law necessitating a hearing, they are not sufficient to support an award of accelerated decision in favor of respondent. Accordingly, Federal's cross-motion for accelerated decision is *denied.*

Carl C. Charneski
Administrative Law Judge

Issued: December 6, 2002
Washington, D.C.