UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Chemical Management, Inc.,	)	Docket No. RCRA-II-86-0209
	)	
Respondent	)	

Resource Conservation and Recovery Act - Rules of Practice - Evidence - Burden of Proof

Complainant held not to have sustained its burden of proving that Respondent was in violation of the New York State Environmental Conservation Law and applicable regulations (6 NYCRR § 373-3.3(f), identical to 40 CFR § 265.35) concerning required aisle space at the time of an inspection on January 8, 1986. Evidence held to establish that three drums of hazardous waste were not in good condition as required by 6 NYCRR § 373-3.9(b) (identical to 40 CFR § 265.171).

Resource Conservation and Recovery Act - Interpretation of Regulation - Incompatible Wastes

Regulation (6 NYCRR § 373-3.9(g)), identical to 40 CFR § 265.177(c)), requiring separation of incompatible wastes by means of a dike, berm, wall or other device, reasonably interpreted does not require separation of incompatible wastes under all possible circumstances and where evidence indicated commingling was unlikely to occur, unless a drum was knocked over the berm by a forklift or other unusual circumstance, a violation of the regulation was not shown.

Resource Conservation and Recovery Act - Interpretation of Regulation - Leaking Drums

A leaking drum of hazardous waste is not per se a violation of 6 NYCRR § 373-3.9(b), identical to 40 CFR § 265.171, requiring transfer of the contents of leaking containers or containers in poor condition to containers in good condition or of 6 NYCRR § 373-3.9(g)(3), identical to 40 CFR § 265.173 (b), providing that a drum holding hazardous waste must not be opened, handled or stored in a manner which may rupture the container or cause it to leak.

Appearance for Respondent: Paul G. Costello, Esq.
Kelly & Luglio
Deer Park, New York

Appearance for Complainant: Gary D. Cohen, Esq.
Assistant Regional Counsel
U.S. EPA, Region II
New York, New York

INITIAL DECISION

This is a proceeding under § 3008 of the Solid Waste Disposal Act, as amended (42 U.S.C. § 6298). The proceeding was initiated on June 13, 1986, by the issuance of a Complaint, Compliance Order And Notice Of Opportunity For Hearing by the Director, Air and Waste Management Division,

U.S. EPA Region II, charging Respondent, Chemical Management, Inc., with violations of the Act[1/] and applicable regulations promulgated under the New York State Environmental Conservation Law. Specifically, the complaint alleged that at the time of an inspection on January 8, 1986, Respondent did not have adequate aisle space in the drum storage area in violation of 6 NYCRR § 373-3.9(f), that at the time of the mentioned inspection numerous drums containing hazardous waste were rusted and corroded in violation of 6 NYCRR § 373-3.9(b), that a drum containing methyl chloride was leaking in violation of 6 NYCRR § 373-3.9(d)(2) and that incompatible wastes were not discretely segregated by a dike, berm or wall as required by 6 NYCRR § 373-3.9(g)(3). For these alleged violations, it was proposed to assess Respondent a penalty totaling $22,000.

Respondent answered, essentially denying the alleged violations and requesting a hearing.

1/ Section 3008 of the Act provides in pertinent part:

Sec. 3008(a) Compliance Orders.

(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subtitle, the Administrator may issue an order requiring compliance immediately or within a specified time period or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

* * * *

A hearing on this matter was held in New York City, New York on May 21 and June 24, 1987.2/

Based on the entire record including the proposed findings and conclusions and briefs of the parties, I make the following:

FINDINGS OF FACT

1. Respondent, Chemical Management, Inc., operates a facility for the treatment, storage and disposal of hazardous waste at 340 Eastern Parkway Farmingdale, New York (Notification of Hazardous Waste Activity, Complainant's Exh 1). Respondent submitted a Notification of Hazardous Waste Activity on August 8, 1980, and its Part A permit application under date of November 17, 1980 (Complainant's Exhs 1 & 2) and thus qualified for interim status.

Footnote 1/ continued

(3) Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subtitle and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subtitle. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

* * * *

(g) Civil Penalty -- 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 such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

2/ References to the transcript will be Tr.1 or Tr.2 followed by the page number.

2. Respondent's facility was inspected by a representative of the U.S. EPA on January 20, 1982. As a result of this inspection, a warning letter was issued to Respondent on May 26, 1982 (Complainant's Exh 3). The letter pointed out that at the time of the inspection Respondent did not have an operating record containing information required by 40 CFR § 265.73. It was further pointed out 40 CFR § 265.171 provides that, if containers holding hazardous waste are not in good condition or begin to leak, the waste must be transferred to containers in good condition and that, at the time of the mentioned inspection, the condition of containers at Respondent's facility did not comply with this requirement. Additionally, Respondent was informed that sufficient aisle space was not maintained as required by 40 CFR § 265.35.

3. Respondent's facility was next inspected by Mr. Randy White, an engineer for the New York State Department of Environmental Conservation (DEC), on September 26, 1984 (Tr.1 14, 17; Inspection Report, Complainant's Exh 4). Mr. White observed one drum containing cyanide overhanging the berm separating the cyanide from the acid storage area (Tr.1 20, 22, 24, 38; Complainant's Exh 4). The berm referred to is a 4" x 4" concrete curb (Exh 4, Figure D-1). This inspection resulted in a warning letter from the DEC,

dated February 13, 1985 (Complainant's Exh 5), which, in addition to the requirement that hazardous wastes be transferred from containers in poor condition to containers in good condition, pointed out that incompatible wastes must be separated from other materials or protected by means of a dike, berm, wall or other device and that facilities must be maintained and operated to minimize the possibility of sudden or non-sudden release of hazardous waste or constituents thereof to the environment. Respondent was allegedly not complying with these requirements at the time of the DEC inspection in September of 1984.3/

4. Respondent's facility was again inspected by Mr. White on July 1, 1985 (Tr.1 26; Inspection Form, Complainant's Exh 6). Among other things this inspection revealed that a drum containing caustics was overlying the berm in the caustic/cyanide storage area, leading to concern that, if the drum leaked, caustic would flow into the acid storage area (Tr.1 39, 59, 60; Exh 6). Aisle space and condition of containers were determined to be adequate (Tr.1 63, 64).

5. The inspection referred to in the preceding finding resulted in a warning letter from the DEC, dated November 8, 1985, similar to the previous one (Complainant's Exh 7).

3/ The DEC letter asked for a confirmation within 30 days that the violations had been corrected. Respondent's reply, if any, is not in the record.

Respondent replied to this letter under date of November 18, 1985, indicating corrective action taken (Complainant's Exh 8). By letter, dated January 2, 1986, the DEC informed Respondent that corrective measures taken were satisfactory, except for 6 NYCRR § 373-3.3(b) (minimization of the possibility of sudden or non-sudden release of hazardous waste to the environment), § 373-3.9(d) (containers holding hazardous waste must not be opened, handled or stored in a manner which may rupture the container or cause it to leak) and § 373-3.9(g) (containers holding hazardous wastes that are incompatible with other wastes or materials must be separated or protected by means of a dike, berm wall or other device).

6. On cross-examination, Mr. White acknowledged that whether a drum was in poor condition was a judgment call and that his judgment might differ from that of someone else (Tr.1 54). He described a severely corroded drum as one where there were "signs of metal actually flaking off" (Tr.1 75). In his opinion, two feet of clear aisle space without obstructions or protrusions would be adequate (Tr.1 58). Although he had not calculated a volume for the four-inch berm around the caustics or cyanide area, he was of the opinion that it was adequate [to contain materials stored therein] (Tr.1 60).

His concern in this regard was that in the September 1984 inspection, he observed a drum labeled as containing cyanide overhanging the berm by approximately three inches (Tr.1 61, 62, 67). He made a similar observation during his inspection in July 1985, but the distance this drum extended over the berm does not appear in the record.

7. Respondent's facility was inspected by Ms. Margaret Emile and Mr. Len Naphthali, environmental engineers for the U.S. EPA, on January 8, 1986 (Tr.1 89; Inspection Report, dated January 14, 1986, Complainant's Exh 9). Ms. Emile has been employed by EPA since May of 1985 (Tr.1 171). Prior to the mentioned inspection of Chemical Management, she had performed approximately 20 RCRA inspections (Tr.1 89, 172). At the time, there were approximately 75 55-gallon drums of hazardous waste in the storage area of the facility.4/ Ms. Emile testified that the storage area was congested, that she could not conduct an adequate inspection of the drums and that it would not have been possible for a forklift or emergency equipment to pass through the area (Tr.1 96-99, 101). On cross-examination, she acknowledged that she had not noted in her inspection report [the drums were so closely packed] it was impossible to inspect them (Tr.1 150-52). She considered the capacity of the facility to be 70 55-gallon drums

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4/ Tr.1 152-53; Exh 9. Ms. Emile testified, however, that she was not able to count all of the drums, because the aisle space was inadequate (Tr.1 216, 220).

or 3,850 gallons (Tr.1 153). The permit issued by the DEC on October 1, 1981, however, provides that a maximum of 150 drums of waste materials were to be stored on the premises at any one time (Respondent's Exh 1). Ms. Emile acknowledged that she did not know the dimensions of a forklift. Testifying with reference to the plot plan of the container storage area (Figure D-1, Exh 4), she stated that she saw "* * a cramped room with a lot of drums and little aisle space" (Tr.1 102). In further testimony, she stated that the drum storage area was completely packed with drums on the day of her inspection and that there was no aisle space (Tr.1 161-62). She did not recall seeing any yellow lines on the floor.

8. Ms. Emile testified that she observed three drums having corrosion (Tr.1 106, 164). In her opinion, the corrosion was serious, because the drums showed signs of flaking and pitting (Tr.1 107). She testified that one of the corroded drums contained cyanide, one contained Aceto aminobenzene5/ and the third was a corrosive drum (Tr.1 164). She described the drum containing cyanide as flaking, the drum containing Aceto aminobenzene as corroded throughout its surface and the third drum as rusted throughout the volume of the drum (Tr.1, 165, 168-69, 229). She did not know the depth of corrosion on the drum containing aminobenzene. She agreed with

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5/ Identified as "Acetly Amino Benzene" in the inspection report (Exh 9 at II-3).

Mr. White of the DEC that whether a drum was adequate under the regulations was a matter of judgment (Tr.1 171).

9. At the time of her inspection, Ms. Emile observed a leaking drum containing methyl chloride (Tr.1 107, 172; Exh 9). She described the source of the leak as a little "pinhole" and stated that when she tested it with a pencil, the pencil was wet (Tr.1 179, 231-32). She explained that this violation was not so much in the leaking drum, but in the failure to respond appropriately and promptly (Tr.1 175). In other testimony, however, she stated that, if a drum were leaking, it was not properly handled, because the contents of the drum should have been repackaged (Tr.1 224). She could not say that the drum had been leaking for a long time (Tr.1 132, 184). The contents of the drum were not transferred to a drum in good condition in her presence (Tr.1 163, 184, 233).

10. Ms. Emile estimated that the cyanide drums were located two feet from the concrete curb or berm separating the caustics cyanide area from the balance of the storage area (Tr.1 109-10, 147, 239). She remembered the berm was only two inches high (Tr.1 112, 141). Her concern was that the cyanide drums were stacked in two tiers or levels and that, if a cyanide drum had tilted, it would have fallen onto the acid drums or area (Tr.1 108, 112, 147). She indicated that this could happen, if, for example, a drum were struck by a forklift (Tr.1 108). On cross-examination, she acknowledged that she had not noted the existence of the berm in her inspection report (Tr.1 150).

11. Mr. Joseph De Mauro is Respondent's Plant Manager and was such on January 8, 1986, the date of Ms. Emile's inspection.[6/] Mr. De Mauro testified that the drum areas were inspected every day and that he personally inspected the drums at 8 a.m. on January 8, 1986 (Tr.2 59). He did not find any leaking drums (Tr.2 60). He was called to the location of the leaking drum discovered by Ms. Emile at approximately 11:30 on January 8 by Mr. Jack Leibel, Respondent's President. He confirmed that a drum was leaking and that it contained methylene chloride (Tr.2 61). He had inspected the precise area that morning and the drum was not leaking. He described the leaked area as a dried spot on the floor about four inches in diameter and stated it was obvious something had evaporated. He indicated methylene chloride would readily evaporate.

12. Mr. De Mauro informed two employees about the leak, waited for the inspectors and Mr. Leibel to clear the area for safety reasons and using a forklift, removed two pallets to reach the leaking drum and transferred the contents of the drum (Tr.2 62). According to Mr. De Mauro, they

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6/ Tr.2 58. Mr. De Mauro was not listed as a witness in Respondent's prehearing exchange and Complainant continues to insist that any consideration of his testimony is prejudicial (Brief at 25). The likelihood that Mr. De Mauro would be a witness for Respondent was broached in an off-the-record colloquy with counsel for the parties at the conclusion of the first day of hearing. While it would have been preferable if this addition to Respondent's witness list had been made by written motion, thus giving Complainant an opportunity to respond, Complainant is not in a position to claim surprise. Moreover, Complainant was given an opportunity to call additional witnesses or recall previous witnesses, if it desired to do so (Tr.2 56, 57, 72). Under these circumstances, Complainant's claim of prejudice is rejected.

had no problem reaching the leaking drum. He stated the drum was "substantially full," indicating that the leak must have "just occurred" (Tr.2 63). He estimated that the contents of the drum were within an inch and a-half to two inches from the top (Tr.2 74). Twenty-five minutes elapsed from the time Mr. De Mauro was notified of the leaking drum until its contents were transferred to another drum.

13. Mr. De Mauro confirmed that there were 75 drums in the storage area on the day of the inspection (Tr.2 63). He claimed to know this through a daily count (Tr.2 64). He described the storage area on the date of inspection as having a two-foot secondary aisle space, a set of pallets, another two-foot secondary aisle space, another set of pallets and then a large primary aisle space. He explained that "secondary aisle space," usually about two feet, was to allow movement between the pallets for inspection purposes and that "primary aisle space" was large enough to accommodate a forklift for the removal or addition of pallets [of drums] (Tr.2 65). There were yellow safety lines on the floor marking spaces where pallets should be placed. On cross-examination, he maintained that aisle space was adequate and that every drum could be inspected and, if necessary, replaced (Tr.2 73).

14. Mr. De Mauro testified that on the day of the inspection caustics were stored in what he referred to as the "berm area," about eight feet away [from the pallets of drums] (Tr.2 66). He described the berm area as having a five-inch berm and a sump for collection purposes. He denied that there were incompatible materials within the berm area and estimated that the nearest drum of incompatible substances in the storage area, a drum of sulphuric acid, was 12 feet away (Tr.2 67).

15. According to Mr. De Mauro, Respondent handles approximately 5,000 drums of hazardous waste a year (Tr.2 67). Although he indicated that most barrels have rust, he explained "you can actually tell when a drum is ready to go" and that Respondent made it a point not to accept such drums (Tr.2 68, 69).

16. Mr. Leibel accompanied Ms. Emile on the inspection of Respondent's facility on January 8, 1986 (Tr.2 82). He confirmed that Ms. Emile called his attention to a leaking drum and that he, in turn, brought it to the attention of Mr. De Mauro, asking him to remove the drum from the storage area and transfer its contents immediately. Regarding the berm area, which separated caustics from acid materials, he testified this area had been redesigned with the approval of DEC since the 1982 EPA inspection and that, in

addition, a new drum storage area had been designed, approved by DEC and built since Ms. Emile's inspection (Tr.2 83, 84). He asserted that there were yellow lines or stripes on the floor, showing where the pallets should be for the purpose of maintaining adequate aisle space and that it was very obvious whether the pallets were properly located (Tr.2 85, 86). He further testified that the acid drums were within the yellow lines at the time of Ms. Emile's inspection and that the distance between the caustics and acid storage areas was approximately ten feet (Tr.2 88). He estimated the distance of the nearest drum in the acid storage area to any drum in the berm area as eight feet. He acknowledged that hypothetically, there could be a violation of the rule against storing incompatibles so that they might commingle, notwithstanding the presence of a berm, if, because of an accident, the drums could come in contact (Tr.2 106).

17. Mr. Leibel related that he had a heated discussion with Ms. Emile concerning the condition of three drums she regarded as sufficiently rusted or corroded to be out of compliance with the requirement hazardous wastes be stored in drums in good condition (Tr.2 88, 89). He did not agree that the drums were in poor condition. He stated he offered to empty the drums or hit them with a hammer to determine their condition. Ms. Emile declined the offer. The

contents of these drums were not transferred to other drums (Tr.2 73, 102).

18. Mr. Leonard Naphthali, a recent EPA hiree at the time, accompanied Ms. Emile on her inspection of Respondent's facility on January 8, 1986 (Tr.2 117). He described the drums as stacked three layers high in some areas and the aisles between the drums as constrained and difficult to move in (Tr.2 118). On cross-examination, he estimated the space between the drums as two-to-three feet (Tr.2 121).

19. Ms. Emile calculated the penalty proposed in the complaint (Tr.1 124, 127; Penalty Computation Worksheet). For this purpose, she used the Final RCRA Civil Penalty Policy (Complainant's Exh 12). The policy contains a matrix, having a horizontal axis "Extent of Deviation from Requirement" and a vertical axis "Potential for Harm." Each axis is divided into components "Major, Moderate and Minor," resulting in cells with penalty ranges up to the statutory maximum of $25,000 per day. Ms. Emile regarded the violations of 6 NYCRR § 373-3.9(b) (failure to store hazardous waste in containers in good condition), 6 NYCRR § 373-3.9(g)(3) (separation of incompatible waste by means of a berm, dike or wall), and 6 NYCRR § 373-3.9(f) (inadequate aisle space) as being a moderate deviation from the requirements and having a moderate potential for harm (Tr.1 128-29, 131-133).

This resulted in a cell having a penalty range of $5,000 to $7,999. She selected the midpoint, resulting in a penalty of $6,500 for each of these three violations. Because there was only one leaking drum, she regarded the potential for harm as to this alleged violation of 6 NYCRR § 373-3.9(d)(2) as minor. She concluded, however, that the extent of deviation was major, resulting in a penalty range of from $1,500 to $2,999. Taking what she described as the midpoint, she arrived at a penalty for this violation of $2,500. The actual midpoint is, of course, $2,250. She did not make any adjustments to the penalty amounts so determined.

20. At the time of the second hearing, Mr. Stanley Siegel was Acting Chief of the Hazardous Waste Facilities Branch in EPA Region II, which is responsible for permitting activities under RCRA (Tr.2 4). Prior to June 1, 1987, he was Chief of the New York Compliance Section, responsible for RCRA enforcement activities in the State of New York. In the latter capacity, he was Ms. Emile's supervisor at the time of her inspection of Chemical Management (Tr.2 6). He consulted with his counterparts in DEC, who agreed that enforcement by EPA was appropriate (Tr.2 16, 21). He testified that he reviewed the penalty amounts determined by Ms. Emile and found them appropriate and acceptable (Tr.2 14, 15). He agreed that the violation for a

leaking container was failure to respond in an appropriate manner (Tr.2 26, 27, 30). In further testimony, he acknowledged that, if a drum were shown to have been leaking less than a week and it started to leak since the last inspection, no violation would have occurred (Tr.2 32, 33). Mistakenly, he testified that the deviation for the leaking drum was considered to be minor. As we have seen (finding 18), the deviation was considered to be major and the potential for harm minor.

21. Regarding the storage of incompatible wastes, Mr. Siegel stated his understanding was that the wastes were not sufficiently segregated to prevent potential commingling of incompatible waste (Tr.2 34). He was informed by Ms. Emile that there was not a proper barrier between incompatible wastes (Tr.2 36). He acknowledged that he would reconsider whether there was a violation, if there were a physical barrier between the incompatible wastes and only through extraordinary circumstances, such as wastes being pushed or knocked over, could the wastes commingle (Tr.2 37). He agreed with Mr. White and Ms. Emile that the determination whether a drum was in poor condition involved judgment (Tr.2 40).

CONCLUSIONS

1. Complainant has not shown by a preponderance of the evidence that Respondent had inadequate aisle space on January 8, 1986, and thus was in violation of 6 NYCRR § 373-3.9(f).
2. A preponderance of the evidence establishes that one 55-gallon drum containing cyanide, one 55-gallon drum containing Aceto aminobenzene and one 55-gallon drum containing corrosive were sufficiently rusted or corroded as to be in poor condition on January 8, 1986, and thus in violation of 6 NYCRR § 373-3.9(b).
3. Complainant has not established that the leaking drum of methyl chloride constituted a violation of NYCRR § 373-3.9 (d)(2) or of any other provision of the regulation.
4. The evidence establishes that incompatible wastes were segregated by a dike, berm or wall as required by 6 NYCRR § 373-3.9(g)(3) on January 8, 1986, and thus a violation of the cited section has not been shown.
5. For the violation of 6 NYCRR § 373-3.9(b), Respondent is liable for a penalty of $6,500.

DISCUSSION

The only evidence showing a violation of 6 NYCRR § 373-3.3(f) relating to required aisle space[7/] are the observations of Ms. Emile. While her testimony is to the effect that the drum storage area was completely packed with drums, having little or no aisle space (finding 7), these descriptive terms are not contained in her inspection report. Moreover, while she contended that she was unable to count all the drums, her tally of 75 is in agreement with that of Mr. De Mauro (finding 13). She was also able to place a pencil on the drum of methyl chloride she considered to be leaking. While it is possible, as Complainant contends, that the reason she did not recall the yellow lines on the floor, which were for the purpose of marking locations where pallets of drums were to be placed, is that pallets were out of place and the lines were covered by pallets or drums or both, it is also possible that her judgment that the aisle space was inadequate was influenced by the thought Respondent had more drums on hand than allowed by its permit. As we have seen, this is not the case. Mr. Leibel,

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7/ The cited regulation, 6 NYCRR § 373-3.3(f), identical to 40 CFR § 265.35, provides:

> (f) Required aisle space.
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> The owner or operator must maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment, and decontamination equipment to any area of facility operation in an emergency unless aisle space is not needed for any of these purposes.

whom I find to be a credible witness, testified that the drums were within the yellow lines at the time of Ms. Emile's inspection (finding 15).

Mr. White, who had determined aisle space to be adequate during his inspection on July 1, 1985 (finding 4), regarded two feet of unobstructed aisle space as sufficient (finding 6). It will be recalled that Mr. Naphthali, an EPA witness, estimated aisle space between the drums as two-to-three feet (finding 17). Under these circumstances, it is concluded that Complainant has not shown a violation of the aisle space requirement on the date of inspection, January 8, 1986. Accordingly, this charge of the complaint is dismissed.

A different result is required as to the charge of violating 6 NYCRR § 373-3.9(b),[8/] failure to transfer waste from drums in poor condition to drums in good condition. Mr. White defined a severely corroded drum as one where bits of metal were "flaking off" (finding 6). Ms. Emile regarded corrosion on the drums as serious, because the drums showed signs of pitting and flaking (finding 8). She described the drum containing cyanide as flaking,

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8/ This regulation, identical to 40 CFR § 265.171, provides:

(b) Condition of Containers.

If a container holding hazardous waste is not in good condition, or if it begins to leak, the owner or operator must transfer the hazardous waste from this container to a container that is in good condition or manage the waste in some other way that complies with the requirements of this Subpart.

the drum containing Aceto aminobenzene as corroded throughout its surface and the third drum as rusted throughout the volume of the drum. In contrast, the only evidence in opposition to this specific testimony as to the condition of these drums is that of Mr. Leibel, who disagreed that the drums were in poor condition. It is concluded that the charge of violating 6 NYCRR § 373-3.9(b) has been sustained.

The complaint alleges that the leaking drum of methyl chloride constitutes a violation of 6 NYCRR § 373-3.9(d)(2),9/ which provides that containers holding hazardous waste must not be opened, handled or stored in a manner which may rupture the container or cause it to leak. Because there is no evidence as to the cause of the leak in the drum of methyl chloride, the leak may not be attributed to handling or storage. The regulation, 6 NYCRR § 373-3.9(e),10/ provides that areas where containers [of hazardous waste] are stored must be inspected, at

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9/ The cited regulation, identical to 40 CFR § 265.173(b), provides:

> (2) A container holding hazardous waste must not be opened, handled, or stored in a manner which may rupture the container or cause it to leak.

10/ This regulation, identical to 40 CFR § 265.174, provides:

> (e) Inspections:
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> At least weekly, the owner or operator must inspect areas where containers are stored, looking for leaking containers and for deterioration of containers and the containment system caused by corrosion or other factors.
>
> (Note: See Subdivision 373-3.9(b) for remedial action required if deterioration or leaks are detected.)

least weekly, for leaks and for deterioration caused by corrosion or other factors. As we have seen (note 8, supra), 6 NYCRR § 373-3.9(b) provides that, if a container of hazardous waste is not in good condition, or if it begins to leak, the contents must be transferred to a container in good condition. Accordingly, it is clear that merely having a leaking drum is not per se a violation of the regulation. This was recognized by Mr. Siegel, who testified that the violation for the leaking drum was failure to respond in an appropriate manner (finding 19). The evidence establishes that the contents of the leaking drum were transferred to another drum within a half-hour of the time the leak was discovered (finding 12). There is no evidence the leaking drum was otherwise in poor condition and this charge is dismissed.

The regulation 6 NYCRR § 373-3.9(g)(3),[11/] provides essentially that containers of incompatible hazardous waste must be separated from other wastes or materials by means of a dike,

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11/ 6 NYCRR § 373-3.9(g)(3), identical to 40 CFR § 265.177(c), provides:

> (3) A storage container holding a hazardous waste that is incompatible with any waste or other materials stored nearby in other containers, piles, open tanks, or surface impoundments must be separated from the other materials or protected from them by means of a dike, berm, wall, or other device.
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> (Note: The purpose of this is to prevent fires explosions, gaseous emissions, leaching, or other discharge of hazardous waste or hazardous waste constituents which could result from the mixing of incompatible wastes or materials if containers break or leak.)

berm, wall or other device. It is clear that there was a four-inch concrete curb or berm separating the caustics cyanide container storage area of Respondent's facility from the storage area for acids and oils. The only question is whether the berm is adequate to comply with the intent of the regulation. Ms. Emile estimated that the cyanide drums were located two feet from the berm (finding 10). Although the cyanide drums were stacked in two tiers or levels, the evidence is that the drums were regularly inspected. Accordingly, even if the estimates of Messrs. De Mauro and Leibel as to the distance between the nearest drums of incompatible materials, eight and 12 feet (findings 13 and 15), are disregarded, it seems unlikely that a leak would suddenly develop of sufficient force or velocity as to cause cyanide to flow into the acid storage area.12/ Indeed, this was not Ms. Emile's concern. Her concern was that a cyanide drum in the second or upper tier could fall into or onto the acid storage area, if, for example, it were struck by a forklift (finding 10). While it is certainly possible for such an incident to occur, there is no indication the regulation was written so as to preclude commingling of incompatible wastes under any and all circumstances and that the rule of reason was being abandoned. Ms. Emile's inspection report (Exh 9) indicates the absence of a dike, berm or

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12/ The record shows that the drum storage areas were inspected daily as contrasted with the minimum of once a week required by 6 NYCRR § 373-3.9(e).

wall rather than its alleged inadequacy and Mr. Siegel acknowledged that he would have to reconsider whether there was a violation, if only through extraordinary circumstances, such as those which concerned Ms. Emile, could the wastes commingle (finding 20). This seems an eminently reasonable interpretation of the regulation and is adopted. It follows that Complainant has not established a violation of 6 NYCRR § 373-3.9(d)(2) and this charge is dismissed.

P E N A L T Y

As we have seen (finding 18), Ms. Emile regarded the extent of deviation from the requirement and the potential for harm as moderate in calculating the penalty for failing to transfer wastes from containers in poor condition to containers in good condition. She selected the midpoint of the penalty range $5,000-$7,999 to reach the proposed penalty of $6,500. This determination is accepted as reasonable. No adjustments for good faith efforts to comply or other factors were made in the amount so determined. While this may have been due in part to the erroneous perception that Respondent had failed to correct inadequate aisle space found in the 1982 EPA inspection, Respondent did not transfer the contents of the three drums which the evidence establishes were in poor condition to drums in good condition. Under all the circumstances, it is concluded that a penalty of $6,500 is appropriate for the violation herein found.

O R D E R[13/]

Respondent, Chemical Management, Inc., having been determined to have violated 6 NYCRR 373-3.9(b) as charged in the complaint, a penalty of $6,500 is assessed against it in accordance with § 3008 of the Solid Waste Disposal Act, as amended. Payment of the penalty shall be made by sending a cashiers or certified check in the amount of $6,500 payable to the Treasurer of the United States to the following address within 60 days of the service of this order:

Regional Hearing Clerk
U.S. EPA, Region II
P.O. Box 360188M
Pittsburgh, Pennsylvania 15251

The compliance order, insofar as it requires that hazardous waste be transferred from drums in poor condition to drums in good condition is affirmed.

Dated this 30th day of October 1987.

Spencer T. Nissen
Administrative Law Judge

13/ Unless appealed in accordance with Rule 22.30 (40 CFR Part 22), or unless the Administrator elects to review the same sua sponte as therein provided, this decision will become the final order of the Administrator in accordance with Rule 22.27(c).