

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations
of Article 27 of the Environmental
Conservation Law ("ECL") and Parts 372
and 373 of Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of New York
("6 NYCRR"),

ORDER

DEC Case No.
B9-0347-90-10

- by -

ACCENT STRIPE, INC.,

Respondent.

Pursuant to section 622.3(a) of title 6 of the Official
Compilation of Codes, Rules and Regulations of the State of New
York ("6 NYCRR"), staff of the New York State Department of
Environmental Conservation ("Department" or "DEC") commenced this
administrative enforcement proceeding against respondent Accent
Stripe, Inc. by personal service of a notice of hearing and
complaint on September 2, 2005.

The complaint alleged violations of article 27, title 9
of the Environmental Conservation Law ("ECL"), and 6 NYCRR parts
372 and 373, arising from respondent's ownership and operation of
a road pavement marking facility located at 3275 Benzing Road,
Orchard Park (Erie County), New York ("facility"). In the course
of its business of manufacturing and applying road pavement
markings, respondent generates and stores hazardous waste as
defined in 6 NYCRR part 371.

Based on the amount of hazardous waste produced by
respondent's activities, it is a "small quantity generator" under
6 NYCRR 370.2(b)(173).¹ As a small quantity generator,
respondent is required to comply with the applicable hazardous
waste regulations.

¹ A "small quantity generator" is defined to mean "a generator
who generates less than 1,000 kilograms of nonacute hazardous waste in
a month and stores less than 6,000 kilograms of this waste at any one
time; or a generator who generates less than one kilogram of acute
hazardous waste in a month and stores less than one kilogram of this
waste at one time" (6 NYCRR 370.2[b][173]).

According to the complaint, on September 17, 2003, a Department inspector performed an inspection of respondent's facility and identified certain deficiencies and violations relating to applicable hazardous waste regulations (see also DEC Exhibit 11). Department staff's complaint set forth various regulatory provisions contained in 6 NYCRR part 372 that apply to small quantity generators and which incorporate by reference various requirements of 6 NYCRR part 373, and alleged that respondent:

1. failed to label nine fifty-five gallon drums of waste with their respective accumulation dates, and eight of those drums with the words "Hazardous Waste," in violation of 6 NYCRR 373-1.1(d)(1)(iii) (c)(2) and 373-3.9(d)(3);
2. handled or stored five drums of hazardous waste with missing lids or rings or with open bungs and that at least two of them had spilled their contents, in violation of 6 NYCRR 373-3.9(d)(1) and (2);
3. failed to conduct weekly inspections of its hazardous waste storage area, in violation of 6 NYCRR 373-3.9(e); and
4. failed to maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment and spill control equipment within its hazardous waste storage area, in violation of 6 NYCRR 373-3.3(f).

Respondent, by its attorney, Robert G. Walsh, Esq., timely served an answer to staff's complaint on September 22, 2005. Respondent's answer denied the regulatory violations alleged in the complaint and asserted five affirmative defenses.

Upon staff's filing of a statement of readiness for adjudicatory hearing, the matter was assigned to Administrative Law Judge ("ALJ") Richard R. Wissler of the Department's Office of Hearings and Mediation Services. ALJ Wissler subsequently convened an adjudicatory hearing at the Department's Region 9 office in Buffalo, New York on February 15 and March 1, 2006. The ALJ prepared the attached hearing report on liability and recommended penalty ("Hearing Report"), which I adopt as my decision in this matter, subject to the following comments.

Based upon the record in this proceeding, respondent failed to operate the facility in accordance with the applicable

regulations cited by Department staff. Based on the hearing record, staff carried its burden of proof by a preponderance of the evidence on eight of the drums that it referenced in the first cause of action and four of the drums that it referenced in the second cause of action. Department staff otherwise carried its burden with respect to the third and fourth causes of action (see 6 NYCRR 622.11[b][1] and [c]). Respondent, moreover, failed to carry its burden on any of the affirmative defenses raised in its answer by a preponderance of the evidence (see 6 NYCRR 622.11[b][2]).

In the first cause of action, Department staff alleged, in part, that respondent failed to mark hazardous waste storage containers with the accumulation date (see 6 NYCRR 372.2[a][8][iii][d] & 373-1.1[d][1][iii][c][2]). The accumulation (start) date (that is, the date upon which each period of accumulation begins) for a hazardous waste storage area is the date when waste is first placed in the empty storage container (see 47 Fed Reg 1248, 1250 [1982]; RCRA Training Module, "Introduction to Generators," USEPA, Sept. 2005, at 7; "Environmental Compliance and Pollution Prevention Guide for Small Quantity Generators," March 2003, New York State Department of Environmental Conservation Pollution Prevention Unit, at 8 [accumulation date for small quantity generators that store hazardous waste is the date when the generator "first started collecting waste in that container"]; "Are You A Small Quantity Generator?," New York Department of Environmental Conservation, Spring 1995, at 11 [same]).

A storage container, therefore, must be marked with the date that the first waste is added to the container, and not the date when the container is full. Accordingly, I do not adopt Finding of Fact #16 (see Hearing Report, at 5; see also id. at 18, 20). Based on the record before me, the 55-gallon drum containing epoxy B waste (drum number 305) and the three other drums of methylene chloride waste that were partially full should have been marked with an accumulation date, in addition to the four drums that were identified in the Hearing Report (see id. at 20).²

² Although different requirements apply to hazardous waste stored in satellite accumulation areas of a facility, those requirements are not applicable here (see Hearing Transcript, February 15, 2006, at 118-119 [area at issue is a hazardous waste storage area, not a satellite accumulation area]). Based on this record, even if any of the waste drums had originated at a satellite accumulation area, the drums were to have been marked with an accumulation date by the time they were moved to the hazardous waste storage area.

In its closing brief, Department staff requested a civil penalty in the amount of \$93,750 and certain remedial actions to be undertaken by respondent at its facility. ALJ Wissler accepted staff's rationale as being justified under the circumstances and recommended that this amount be assessed against respondent. The penalty amount sought by staff, and recommended by ALJ Wissler, was assessed by utilizing the provisions of ECL 71-2705 and the U.S. Environmental Protection Agency's ("EPA") RCRA Civil Penalty Policy dated June 2003.³

Pursuant to ECL 71-2705, any person, which includes a corporation such as respondent (see ECL 1-0303[18]), "who violates any of the provisions of, or who fails to perform any duty imposed by titles 9, 11 and 13 of article 27 or any rule or regulation promulgated pursuant thereto . . . shall be liable in the case of a first violation, for a civil penalty not to exceed thirty-seven thousand five hundred dollars and an additional penalty of not more than thirty-seven thousand five hundred dollars for each day during which such violation continues" (see ECL 71-2705[1]).

As articulated by Department staff, taking into account the provisions of ECL 71-2705 and the RCRA Civil Penalty Policy, the \$93,750 penalty amount represents a total of two assessments:

- (i) the sum of \$75,000 for the violations alleged in the complaint; and
- (ii) the sum of \$18,750 as an upward adjustment due to respondent's history of non-compliance.

The sum of \$75,000 was determined by selecting a per violation penalty of \$15,000 for each of the five violations established at the hearing.⁴ The additional sum of \$18,750 represents 25

³ Because hazardous waste is managed in New York pursuant to a federally delegated program, the Department utilizes applicable EPA guidance and policy documents in the administration of that program.

⁴ Although staff maintained that six separate regulatory violations had been established at the hearing, it elected to combine the separate drum labeling and accumulation date violations into one violation for penalty assessment purposes (see Department Staff Closing Brief, May 5, 2006, Attachment "C"). Department staff could, however, have asserted several regulatory violations on a per container basis for each of the drums containing methylene chloride and epoxy waste in computing the penalty (see Hearing Report, at 33). Because the penalty was not computed on a per container basis, no penalty adjustment is required because of the failure to carry the

percent of \$75,000 as a RCRA Civil Penalty Policy authorized upward adjustment factor based upon respondent's history of violating environmental laws at its facility.⁵ Based upon my review, the civil penalty of \$93,750 which was sought by Department staff and recommended by the ALJ is justified by the circumstances of this case.

In addition, ECL 3-0301(1)(i) authorizes the Commissioner to "[p]rovide for prevention and abatement of all water, land and air pollution including, but not limited to, that related to hazardous substances." In that regard, the ALJ has made two recommendations:

(1) that respondent be directed to provide adequate training to its employees in the proper handling of the hazardous waste it generates and accumulates, both during normal operations and in emergency situations, as provided for in 6 NYCRR 372.2(a)(8)(iii)(e)(3); and

(2) that if respondent intends to continue to recycle or reuse spent methylene chloride in its operations, respondent be directed to make the appropriate application to the Department to do so in accordance with 6 NYCRR 371.1(c)(7).

Given the nature of the violations, combined with respondent's demonstrated pattern of non-compliance with hazardous waste regulations at its facility, I adopt both of these recommendations.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

I. Respondent violated 6 NYCRR 373-3.9(d)(3) at its facility on September 17, 2003 when it failed to properly label eight drums of waste. None of the seven drums containing methylene chloride waste were labeled with the words "Hazardous Waste" or with words to identify the contents of the drums. Although the one drum containing epoxy waste was labeled with the

burden of proof on one of the containers in the first and second causes of action.

⁵ Department staff had cited respondent in 1994, 2001, and 2002 for previous ECL violations at this facility, many of which violations were the same as those cited in this proceeding (see DEC Exhibits 2, 3, and 4). Similar ECL violations were the subject of an order on consent executed in 1993 (see DEC Exhibit 5).

words "Hazardous Waste," it was not otherwise labeled to indicate the contents of the drum.

II. Respondent violated 6 NYCRR 373-1.1(d)(1)(iii)(c)(2) at its facility on September 17, 2003 by failing to mark eight drums containing hazardous waste with their respective accumulation dates.

III. Respondent violated 6 NYCRR 373-3.9(d)(1) at its facility on September 17, 2003 when it stored methylene chloride waste in four drums that were not closed.

IV. Respondent violated 6 NYCRR 373-3.9(d)(2) at its facility on September 17, 2003 when it handled or stored four drums of methylene chloride waste in a manner that could cause them to rupture or leak.

V. Respondent violated 6 NYCRR 373-3.9(e) at its facility on September 17, 2003 when it failed to conduct weekly inspections of its hazardous waste storage area.

VI. Respondent violated 6 NYCRR 373-3.3(f) at its facility on September 17, 2003 when it failed to maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment and spill control equipment within its hazardous waste storage area.

VII. Respondent Accent Stripe, Inc. is hereby assessed a civil penalty in the amount of ninety-three thousand seven hundred fifty dollars (\$93,750), which is due and payable no later than thirty (30) days after receipt of this order. Such payment shall be made in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation," and delivered to the Department at the following address:

New York State Department of Environmental Conservation
Region 9, Division of Environmental Enforcement
Western Field Unit
270 Michigan Avenue
Buffalo, New York 14203-2999
ATTN: James Charles, Senior Attorney

VIII. Following receipt of this order and within the time periods set forth below, respondent is hereby directed to:

- A. Within thirty (30) days of receipt of this order, provide adequate training to its employees in the

proper handling of the hazardous waste that respondent generates and accumulates, both during normal operations and in emergency situations, as provided for in 6 NYCRR 372.2(a)(8)(iii)(e)(3); and

- B. Within fifteen (15) days of receipt of this order, to make written application to the Department if respondent intends to continue to recycle or reuse spent methylene chloride in its operations, in accordance with 6 NYCRR 371.1(c)(7).

IX. All communications from respondent to Department staff concerning this order shall be made to James Charles, Senior Attorney, New York State Department of Environmental Conservation, Region 9, Division of Environmental Enforcement, Western Field Unit, 270 Michigan Avenue, Buffalo, New York 14203-2999.

X. The provisions, terms and conditions of this order shall bind respondent Accent Stripe, Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____ /s/
Alexander B. Grannis
Commissioner

Dated: Albany, New York
January 25, 2008

To: Accent Stripe, Inc. (By certified mail)
3275 Benzing Road
Orchard Park, New York 14127

Robert G. Walsh, Esq. (By certified mail)
Law Offices of Robert G. Walsh, P.C.
3819 South Park Avenue
Blasdell, New York 14219

James Charles, Esq. (By regular mail)
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New York State Department of Environmental Conservation
Region 9, Division of Environmental Enforcement
Western Field Unit
270 Michigan Avenue
Buffalo, New York 14203-2999

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of the -

Alleged Violations of the Environmental
Conservation Law of the State of New York
and Title 6 of the Official Compilation
of Codes, Rules and Regulations of the
State of New York

- by -

ACCENT STRIPE, INC.,

Respondent.

DEC Case No. B9-0347-90-10

HEARING REPORT

- by -

/s/

Richard R. Wissler
Administrative Law Judge
May 22, 2007

SUMMARY

In this Administrative Enforcement Hearing Report, the assigned Administrative Law Judge (ALJ), Richard R. Wissler, finds that respondent, Accent Stripe, Inc., has violated Environmental Conservation Law (ECL) article 27 (Collection, Treatment and Disposal of Refuse and Other Solid Waste), title 9 (Industrial Hazardous Waste Management) and its implementing regulations promulgated under title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), particularly parts 372 and 373 thereof, by failing to (1) properly label containers containing hazardous waste, (2) handle or store containers of hazardous waste in a manner which will not cause the possible rupture or leakage of the containers, (3) properly perform weekly inspections of its hazardous waste containment area, and (4) maintain aisle space within its hazardous waste containment area in such a manner as to allow the unobstructed movement of personnel, fire protection equipment or spill control equipment. The ALJ recommends that the Commissioner find respondent in violation of the aforementioned regulatory provisions and be assessed a civil penalty in the amount of \$93,750. Moreover, the ALJ recommends that the Commissioner direct respondent to provide adequate training to its employees in the proper handling of the hazardous wastes it generates, both during normal operations and in emergencies. Finally, the ALJ recommends that if respondent intends to recycle or reuse any of the spent methylene chloride it generates, it make the appropriate application to the Department for permission to do so.

PROCEDURAL BACKGROUND

Notice of Hearing and Complaint

The present enforcement action was commenced by Department staff by the service of a notice of hearing and complaint, dated August 10, 2005, and served upon the respondent on September 2, 2005. The action arises under the hazardous waste manifest system and related standards for hazardous waste generators, transporters and facilities articulated in 6 NYCRR part 372. Section 372.2 of part 372 makes certain specific sections of 6 NYCRR part 373 applicable to small quantity hazardous waste generators, such as respondent. The complaint alleges four causes of action.

The first cause of action, set forth in paragraphs 10 and 14 of the complaint, alleges violations of 6 NYCRR sections 373-1.1(d)(1)(iii)(c)(2) and 373-3.9(d)(3) in that respondent failed

to label nine drums, seven containing methylene chloride wastes and two containing epoxy wastes, with their respective accumulation dates. Moreover, eight of the nine drums were not labeled with the words "Hazardous Waste."

The second cause of action, set forth in paragraphs 11 and 15 of the complaint, alleges violations of 6 NYCRR sections 373-3.9(d)(1) and (2) in that five of the aforementioned nine drums were missing lids or rings or had open bungs and two of them had spilled their contents and, thus, respondent handled or stored containers of hazardous waste in open containers or in a manner which caused them to leak.

The third cause of action, set forth in paragraphs 12 and 16 of the complaint, alleges a violation of 6 NYCRR section 373-3.9(e) in that respondent failed to conduct weekly inspections of its hazardous waste storage area.

The fourth cause of action, set forth in paragraphs 13 and 17 of the complaint, alleges a violation of 6 NYCRR section 373-3.3(f) in that respondent failed to maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment and spill control equipment within its hazardous waste storage area.

Answer and Affirmative Defenses

On September 22, 2005, respondent filed an answer to the complaint denying any of the regulatory violations alleged therein. Respondent also asserted five affirmative defenses.

As a first affirmative defense, alleged in paragraphs 13 and 14 of its answer, respondent asserted that it had "used reasonable and good faith efforts to comply with the dictates of 6 NYCRR."

As a second affirmative defense, alleged in paragraphs 15 and 16 of its answer, respondent asserted that "[w]ith respect to some or all of the materials allegedly observed by the inspector, a determination had not yet been made whether the materials could be reused and introduced into Accent's manufacturing or application process."

As a third affirmative defense, alleged in paragraphs 17 and 18 of its answer, respondent asserted that "[t]he inspection and the conclusions reached by the inspector were influenced by and were the product of personal animosity, bias and prejudice on the part of the inspector."

As a fourth affirmative defense, alleged in paragraphs 19 and 20 of its answer, respondent asserted that the complaint failed to state a cause of action.

As a fifth affirmative defense, alleged in paragraphs 21 and 22 of its answer, respondent asserted that the complaint is time-barred due to laches.

Site Visit and Adjudicatory Hearing

A site visit at respondent's facility was conducted on February 14, 2006, attended by the ALJ and representatives for both respondent and Department staff.

An adjudicatory hearing to consider the allegations of the complaint and the affirmative defenses raised was convened before ALJ Wissler, of the Department's Office of Hearings and Mediation Services, on February 15, 2006, in the Department's Region 9 Headquarters, 270 Michigan Avenue, Buffalo, New York, and was continued on March 1, 2006. Department staff was represented by James D. Charles, Esq., Senior Attorney with the Region 9 Division of Environmental Enforcement. Respondent was represented by Robert G. Walsh, Esq., of the Law Offices of Robert G. Walsh, P.C., 3819 South Park Avenue, Blasdell, New York.

Department staff called one witness, Thomas Corbett, an Environmental Chemist with the Department's Region 9 Division of Solid and Hazardous Materials. Respondent called one witness, Edward W. Spiesz, Vice President of respondent Accent Stripe, Inc.

In all, 26 exhibits (Ex.) were received in evidence.

As directed by the ALJ, both Department staff and respondent submitted post-hearing closing briefs which were received on May 9, 2006. A post-hearing reply brief was received from respondent on May 22, 2006, and from Department staff on May 24, 2006, upon which date the hearing record closed.

FINDINGS OF FACT

1. Respondent, Accent Stripe, Inc., is a corporation duly organized under the laws of the State of New York with its corporate office located at 3275 Benzing Road, Orchard Park, Erie County, New York 14127 (hereinafter the "facility").

2. The facility is located in an industrial area of Orchard Park which runs north and south between U.S. Route 219 on the east and Benzing Road on the west. The facility site is predominated by two main structures, an office and vehicle maintenance building on the western half of the site, and a material storage building on the eastern half of the site. All open areas of the site are paved. At the southwest corner of the material storage building is an area approximately 20 feet by 30 feet enclosed on the north, west and south by a 6 foot chainlink fence, and on the east by the wall of the material storage building. Access to this fenced area is by a gate on its western side. It is within this fenced area that hazardous wastes generated by respondent's business activities are stored.

3. Respondent engages in the business of applying highway pavement markings utilizing trucks fitted with spray equipment of its own design and manufacture. These trucks are dispatched from the facility to various contracted project sites located predominantly throughout the northeast, particularly New York and Pennsylvania.

4. Various products are used by respondent in the road marking process, including paint, epoxy, polyesters and preformed thermoplastics.

5. Since dry conditions and an air temperature above 50 degrees Fahrenheit are conditions necessary for the proper application of the highway marking products, respondent's business is seasonal, extending usually from May to October.

6. Some of the marking material applied to highway pavement is an epoxy paint consisting of two parts, A and B, which must be combined before application. Part A is an epoxy resin and part B is a hardener. Pumps on the trucks, developing a pressure of 1500 pounds per square inch (psi), direct the epoxy parts A and B, each in the correct proportion, through pipes to a tube called a static mixer where they are combined and then sprayed through nozzles onto the road surface.

7. Methylene chloride, a solvent, is flushed through the static mixer and the spray nozzles to clean them. At a job site, this cleaning process is repeated throughout the day whenever the spray equipment, filled with the epoxy marking mixture, will be idle for more than 10 minutes, since the epoxy mixture in the spray equipment will otherwise harden.

8. Once flushed through the spray equipment, a sludge mixture of methylene chloride and epoxy paint is produced. This

sludge mixture is accumulated in drums located on the back of each truck. These drums are brought back to the facility and placed in the fenced hazardous waste storage area adjacent to the material storage building at the facility, noted in Finding of Fact 2.

9. Epoxy waste is flammable. As it thus exhibits the characteristic of ignitability, it is a hazardous waste and has been assigned the United States Environmental Protection (USEPA) hazardous waste identification number of D001 (see 6 NYCRR 371.3[b][2]).

10. Once used to flush and clean the spraying equipment, the spent methylene chloride now contaminated by the epoxy mixture cannot be reused for this cleaning purpose without further processing to remove the epoxy mixture contamination.

11. Spent methylene chloride is a hazardous waste and has been assigned the USEPA hazardous waste identification number of F002 (see 6 NYCRR 371.4[b][1]).

12. Spent methylene chloride and epoxy wastes are stored in 55-gallon open-head drums which are covered by a top fitted with a gasket. To close the drum, the lid is secured in place by a bolted lock ring.

13. Methylene chloride has a distinctive and characteristic odor.

14. Unless secured by a bolted lock ring, a 55-gallon drum containing spent methylene chloride, even if the lid is placed thereon, will still permit volatilized methylene chloride to escape, resulting in the detectible presence of its distinctive and characteristic odor.

15. Respondent generates 10 to 15 55-gallon drums of methylene chloride waste per year.

16. When a 55-gallon drum containing hazardous waste is full, it must be marked with the date upon which this occurs, also known as the accumulation date or accumulation start date.

17. Periodically, respondent ships drums of hazardous waste, including methylene chloride and epoxy wastes, off the site of its facility for disposal.

18. The USEPA has assigned respondent's facility the following Resource Conservation and Recovery Act (RCRA)

identification number: NYD986909026. This number is used by respondent on all documents and manifests relating to the off-site shipment of the hazardous wastes it generates.

19. On September 17, 2003, Thomas Corbett, an Environmental Chemist with the Compliance Section of the Division of Solid and Hazardous Materials of the Department's Region 9 Office in Buffalo, New York, inspected the facility.

20. In the northeast corner of the fenced hazardous waste storage area noted in Finding of Fact 2, Mr. Corbett observed a number of 55-gallon drums along the exterior wall of the materials storage building. Upon further investigation and confirmed by Edward Spiesz, Vice President of respondent, it was determined that seven of the drums contained spent methylene chloride, generated as a result of cleaning the spray painting equipment on respondent's trucks, and one of the drums contained epoxy waste.

21. Lying on the ground to the immediate west and next to and in front of the drums containing the spent methylene chloride and the epoxy waste were two wood pallets. One pallet supported eleven 5-gallon pails of adhesive, one of the pails stacked upon another. These pails bore labels indicating that their contents were flammable. This pallet was closest to the seven 55-gallon drums containing spent methylene chloride. Draped about this pallet and lying on the ground in front of the seven methylene chloride drums was plastic shrink wrap. The second pallet had five 5-gallon pails of adhesive on it. These pails also bore labels indicating that their contents were flammable. A garden hose was also coiled and lying on top of these pails. This second pallet was closest to the 55-gallon drum containing epoxy waste.

22. In order to allow access for the purpose of the inspection of each of the eight 55-gallon hazardous waste drums, the two pallets and their respective pails, hose and shrink wrap had to be moved by respondent's employees.

23. None of the seven 55-gallon drums containing spent methylene chloride were marked with the words "Hazardous Waste," nor were they marked with other words identifying their contents.

24. None of the seven 55-gallon drums containing spent methylene chloride were marked with an accumulation start date.

25. While all of the seven 55-gallon drums of spent methylene chloride had lids on them, only three had bolted lock

rings in place.

26. Thomas Corbett holds a bachelor's degree in chemistry and has attended numerous training seminars, both as participant and a presenter, including seminars dealing with the identification and management of hazardous wastes. During his education and training he has worked with methylene chloride and can identify it by sight and smell. As of the date of the present adjudicatory hearing, he had participated in approximately ten facility inspections on behalf of the Department during which methylene chloride was encountered.

27. Inspector Corbett could smell methylene chloride emanating from the four drums which were not secured by a bolted lock ring at respondent's facility, notwithstanding that they had tops placed upon them.

28. The four drums of spent methylene chloride whose tops were not secured by a bolted lock ring were opened. Each drum was filled to the top with a yellow sludge which smelled of methylene chloride.

29. One of the four drums of spent methylene chloride which was opened for inspection showed dried yellow streaking on its side as well as a dried yellow stain on the pavement beside it. Inspector Corbett opined that this drum of spent methylene chloride had spilled some of its contents.

30. The 55-gallon drum of epoxy waste bore a label with the words "Hazardous Waste" thereon, but the label was otherwise illegible and did not indicate an accumulation start date. This label also had the number "305" painted upon it. An inventory log maintained by respondent indicated that drum number 305 contained 35 gallons of "part B epoxy" as of April 4, 2003.

31. The 55 gallon drum of epoxy waste was not opened during the inspection.

32. Respondent's employees are in the hazardous waste area approximately twice per week during which time they are able to observe the condition of any hazardous waste drums stored therein.

33. Respondent does not maintain a log of weekly inspections of the facility's hazardous waste area.

34. The facility's hazardous waste storage area is also used to store other items besides hazardous wastes. In addition

to the wood pallets, pails of adhesives and other items noted in Finding of Fact 21, the area also contains numerous empty 55-gallon drums stacked on pallets at its southern end, a group of approximately twelve empty propane tanks and six 5-gallon pails located in its northwest corner, as well as a group of approximately six other 5-gallon pails surrounding a 55-gallon drum with its top third cut off allowing it to collect rainwater.

35. The Department has no record of any request by respondent to exempt or conditionally exempt from regulation any of the hazardous wastes it generates based on respondent's intent to reclaim, recycle or reuse any of them.

36. If allowed to stand for a period time, a drum containing the sludge mixture of methylene chloride and epoxy paint will separate out somewhat, the methylene chloride rising to the top. While not pure enough to flush spraying equipment again, such spent methylene chloride can be skimmed off the top of the drum by hand with a bucket and used as a solvent for cleaning parts, such as when the pumps on respondent's trucks are rebuilt. The quantity of such methylene chloride reused in this manner annually by respondent is not known.

37. On December 5, 1995, in the County Court, Erie County, under Indictment No. 1990-1796, respondent entered a plea of guilty to one count of a violation of ECL 17-0803, discharge of a pollutant to the waters of the State without a State Pollutant Discharge Elimination System (SPDES) permit, as a Class A misdemeanor, pursuant to ECL 71-1933(3)(a)(i). Respondent was sentenced that same day to a fine of \$25,000.00, which amount was paid in full. The charge arose out of an investigation of respondent's facility on July 25, 1990, by a New York State police officer. The officer observed a drain/receiver in the truck pad of respondent's facility which was connected to a discharge pipe leading to a drainage ditch. Subsequent testing revealed that the aqueous solution discharging from the drain to the ditch had a pH of 12, in contravention of State water quality standards.

38. Pursuant to established Department protocol, RCRA designated facilities, like that of respondent, are inspected on an annual basis. As appropriate, such inspections may be followed up in a subsequent letter from the Department advising the facility owner or operator of various regulatory violations observed during the course of the inspection which require corrective action by the facility owner or operator. Respondent received two such letters, one dated February 21, 2001, as a result of an inspection of February 6, 2001; and one dated March

4, 2002, as a result of an inspection of February 21, 2002. The letters generally alleged various labeling and maintenance violations of 6 NYCRR parts 372 and 373, some similar to those articulated in the complaint in this matter.

39. On December 3, 1993, respondent signed Order on Consent C9-9026-93-04.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

6 NYCRR 370.2

This section provides certain definitions of general applicability for the Department's hazardous waste regulations, including the definitions of generator and small quantity generator at 6 NYCRR 370.2(b)(83) and (173), respectively, and states:

"(83) *Generator* means any person, by site, whose act or process produces hazardous waste as defined in Part 371 of this Title, or whose act first causes a hazardous waste to become subject to regulation.

"(173) *Small quantity generator* means a generator who generates less than 1,000 kilograms of nonacute hazardous waste in a month and stores less than 6,000 kilograms of this waste at any one time; or a generator who generates less than one kilogram of acute hazardous waste in a month and stores less than one kilogram of this waste at one time."

6 NYCRR 372.2

This section is part of the Department's regulations establishing a hazardous waste manifest system and, among other requirements, establishes certain standards applicable to small quantity generators of hazardous waste. In particular, 6 NYCRR 372.2(a)(8)(iii) provides:

"The following requirements are applicable to generators of hazardous waste unless specifically exempted or modified elsewhere in this Part.

(a) *General requirements...*

(8) Accumulation time...

(iii) A generator who generates more than 100 kilograms but less than 1,000 kilograms of hazardous waste in a calendar month may accumulate nonacute hazardous waste onsite for 180 days or less without being subject to the permitting provisions of Part 373 of this Title, provided that:

(a) the quantity of waste accumulated onsite never exceeds 6,000 kilograms;

(b) the generator complies with the requirements of section 373-3.9 of this Title except for section 373-3.9(f) and (h);

(c) the generator complies with the requirements of section 373-3.10(1) of this Title;

(d) the generator complies with the requirements of sections 373-1.1(d)(1)(iii)(c)(2)-(3), 373-3.3, and 376.1(g)(1)(v) of this Title; and

(e) the generator complies with the following requirements:

(1) at all times there must be at least one employee either on the premises or on call (*i.e.*, available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures specified in subclause (4) of this clause. This employee is the emergency coordinator;

(2) the generator must post the following information next to the telephone:

(i) the name and telephone number of the emergency coordinator;

(ii) location of fire extinguishers and spill-control material, and if present, fire alarm; and

(iii) the telephone number of the fire department, unless the facility has a direct alarm;

(3) the generator must ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures, relevant to their responsibilities during normal facility operations and emergencies;

(4) the emergency coordinator or a designee must respond to any emergencies that arise. The applicable responses are as follows:

(i) in the event of a fire, call the fire department or attempt to extinguish it using a fire extinguisher;

(ii) in the event of a spill, contain the flow of hazardous waste to the extent possible, and as soon as is practicable, clean up the hazardous waste and any contaminated materials or soil;

(iii) in the event of a fire, explosion or other release which could threaten human health outside the facility or when the generator has knowledge that a spill has reached surface water, the generator must immediately notify the National Response Center (using their 24-hour toll free number 800-424-8802 and the department 518-457-7362). The report must include the following information:

(A) the name, address and U.S. EPA identification number of the generator;

(B) date, time and type of incident (e.g., spill or fire);

(C) quantity and type of hazardous waste involved in the incident;

(D) extent of injuries, if any; and

(E) estimated quantity and disposition of recovered materials, if any;...."

6 NYCRR 373-3.9

Part 373-3 of 6 NYCRR provides minimum statewide standards for the acceptable management of hazardous wastes. As to the management of containers used to store hazardous wastes, 6 NYCRR 373-3.9 provides, in part:

"Section 373-3.9 Use and management of containers.

(a) *Applicability.* The regulations in this section apply to owners and operators of all hazardous waste facilities that store containers of hazardous waste, except as section 373-3.1 of this Subpart provides otherwise.

(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.

(c) *Compatibility of waste with container.* The owner or operator must use a container made of or lined with materials which will not react with, and are otherwise compatible with, the hazardous waste to be stored, so that the ability of the container to contain the waste is not impaired.

(d) *Management of containers.*

(1) A container holding hazardous waste must always be closed during storage, except when it is necessary to add or remove waste.

(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.

Comment: Reuse of containers in transportation is

governed by U.S. Department of Transportation regulations, including those set forth in 49 CFR 173.28 (see 6 NYCRR 370.1[e]).

(3) Containers holding hazardous waste must be marked with the words "Hazardous Waste" and with other words identifying their contents.

(e) *Inspections*. 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 (b) of this section for remedial action required if deterioration or leaks are detected."

6 NYCRR 373-1.1(d)

This subdivision provides certain exemptions to the permitting requirements of 6 NYCRR subpart 373-1. As applicable to this matter, subclauses (2) and (3) of 6 NYCRR 373-1.1(d)(1)(iii)(c) mandate that, as to containers holding hazardous waste, the following requirements must be met:

"(2) the date on which each period of accumulation begins is clearly marked and visible for inspection on each container;

(3) a label or sign stating "Hazardous Waste" must identify all areas, tanks and containers used to accumulate hazardous waste. In addition, tanks and containers must be marked with other words to identify their contents."

6 NYCRR 373-3.3

This section articulates certain standards for preparedness and prevention applicable to owners and operators of all hazardous waste facilities and, as applicable to this matter, provides:

"Section 373-3.3 Preparedness and prevention.

(a) *Applicability.* The regulations in this section apply to owners and operators of all hazardous waste facilities, except as section 373-3.1(a) provides otherwise.

(b) *Maintenance and operation of facility.* Facilities must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water which could threaten human health or the environment.

* * *

(f) *Required aisle space.* 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."

6 NYCRR 371.1

Part 371 of 6 NYCRR comprises the Department's regulatory provisions identifying and listing hazardous wastes. Section 371.1 provides variously as follows:

"(a) *Purpose and scope.* This Part establishes the procedures for identifying those solid wastes which are subject to regulation as hazardous wastes under Parts 370 through 373, and 376 of this Title.... For the purposes of subdivisions (c) and (g) of this section:

* * *

(4) A material is *recycled* if it is used, reused or reclaimed.

* * *

(7) A *spent material* is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.

* * *

(c) *Definition of solid waste.*

(1) A *solid waste* is any discarded material that is not excluded under paragraph (e)(1) of this section or that is not excluded by variance granted under section 370.3(d) and (e) of this Title....

(d) *Definition of hazardous waste.*

(1) A solid waste, as defined in subdivision (c) of this section, is a hazardous waste if: ...

(ii) it meets any of the following criteria:

(a) it exhibits any of the characteristics of hazardous waste identified in section 371.3 of this Part...

(b) It is listed in section 371.4 of this Part...."

6 NYCRR 371.3

Section 371.3 of 6 NYCRR delineates those hazardous wastes which are defined as such by their respective physical characteristics. As 6 NYCRR 371.3 provides:

"(a) *General.*

(1) A solid waste, as defined in section 371.1(c) of this Part, which is not excluded from regulation as a hazardous waste under section 371.1(e), is a hazardous waste if it exhibits any of the characteristics identified in this section.

* * *

(b) *Characteristic of ignitability...*

(2) A solid waste that exhibits the characteristic of ignitability has the EPA hazardous waste number of D001."

6 NYCRR 371.4

Section 371.4 of 6 NYCRR comprises a listing of recognized hazardous wastes and provides:

"(a) *General.*

(1) A solid waste is a hazardous waste if it is listed in this section...

* * *

(b) *Hazardous waste from nonspecific sources.*

(1) The following solid wastes are listed hazardous wastes from nonspecific sources...

Industry and EPA hazardous waste number Generic ...F002
The following spent halogenated solvents:... methylene chloride,...."

ECL 71-2705(1)

Subdivision 1 of ECL 71-2705 provides for civil liability for a violation of the provisions of titles 9, 11 and 13 of ECL article 27, or any of their respective implementing regulations, and states:

"1. Civil and administrative sanctions. Any person who violates any of the provisions of, or who fails to perform any duty imposed by titles 9, 11 and 13 of article 27 or any rule or regulation promulgated pursuant thereto, or any term or condition of any certificate or permit issued pursuant thereto, or any final determination or order of the commissioner made pursuant to this title shall be liable in the case of a first violation, for a civil penalty not to exceed thirty-seven thousand five hundred dollars and an additional penalty of not more than thirty-seven thousand five hundred dollars for each day during which such violation continues, to be assessed by the commissioner after an opportunity to be heard pursuant to the provisions of section 71-1709 of this article, or by the court in any action or proceeding pursuant to section 71-2727 of this title, and, in addition thereto, such person may by similar process be enjoined from continuing such violation and any permit or certificate issued to such person may be revoked or suspended or a pending renewal application denied. In the case of a second and any further violation, the liability shall be for a civil penalty not to exceed seventy-five thousand dollars for each such violation and an additional penalty not to exceed seventy-five thousand dollars for each day during which such

violation continues."

RCRA Civil Penalty Policy

Inasmuch as the hazardous waste management program the Department administers is federally delegated, in calculating and proposing civil penalties to be imposed in a particular matter the Department is guided by the "RCRA Civil Penalty Policy" dated June 2003 and promulgated by the USEPA. This policy can be found on the USEPA's website at the following universal resource locator (URL):
<http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf>.

DISCUSSION

Proof of the Allegations of the Complaint

First Cause of Action

The first cause of action is set forth in Paragraphs 10 and 14 of the complaint. Paragraph 10 alleges the following facts:

"10. On September 17, 2003 an authorized Department inspector reviewed the fenced 'Hazardous Waste Storage Area' located adjacent to the Storage Building of Respondent's 3275 Benzing Road facility and observed nine fifty-five gallon drums stored along the wall of the Storage Building seven of which were completely filled with a yellow sludge emanating a pungent sweet solvent odor typical of methylene chloride which is used in Respondent's business to clean painting equipment. An eighth drum contained epoxy waste and ninth drum contained a mixture of epoxy waste and yellow sludge. None of these drums were marked with their accumulation dates and eight of them were not marked with the word, 'Hazardous Wastes.'"

Paragraph 14 alleges the regulatory violations supported by the factual allegations of Paragraph 10. Paragraph 14 states:

"14. With respect to Paragraph 10, Respondent has violated 6 NYCRR Parts 373-1.1(d)(1)(iii)(c)(2) and 373-3.9(d)(3) in that Respondent failed to mark the drums noted in Paragraph 10 with their accumulation dates and the words, 'Hazardous Waste.'"

Depicted in the midground of Photo dcs00442.jpg (part of DEC Ex. 14), are seven 55-gallon drums of methylene chloride waste, their contents confirmed by Department staff witness Thomas Corbett by the characteristic odor of the substance, the visual inspection of the contents of four of them (Transcript of February 15, 2006, page 90; hereinafter abbreviated T 2/15/06 and page number), as well as the un-controverted admission by respondent's employee, Edward Spiesz, to this effect (T 2/15/06 p. 88). None of the seven drums had labels on them bearing the words "Hazardous Waste" nor were any of them labeled to indicate their contents.

However, that all seven of these drums of methylene chloride waste should have been marked with their respective accumulation dates, is not apparent from this record. For the purposes of this matter, the accumulation date, also known as the accumulation start date, is the date upon which a drum of hazardous waste becomes full. Commencing at that date, a small quantity generator, such as respondent, would have 180 days to transport that hazardous waste off its site for treatment or disposal. (T 2/15/06 pp. 109-110; see 6 NYCRR 372.2[a][8][iii]) While all of the methylene chloride drums were tapped and "sounded full," this was confirmed in only those four instances where the top of the drum was actually removed. (T 2/15/06 pp. 89-90) The four drums that were opened were full, "within inches of the top," according to inspector Corbett. (T 2/15/06 p. 96) Accordingly, the record supports a finding that these four drums which were opened and observed to be full should have been labeled with their respective accumulation start dates and were not so labeled.

The record does not, however, support a finding that all seven drums of spent methylene chloride observed on September 17, 2003, should have been marked with accumulation start dates. Although DEC Ex. 8 shows that eight 55-gallon drums of spent methylene chloride were marked with an accumulation start date of September 22, 2003, and, according to manifests filed as part of DEC Ex. 16, shipped off the site of the facility on October 8, 2003, it is unknown whether some of these full drums were also present in the hazardous waste storage area at the time of the

inspection on September 17, 2003. At page 2 of the letter from respondent's attorney, with attachments, constituting DEC Ex. 16, it is noted that some of the contents of the drums shipped on October 8, 2003, included "materials that were brought 'in off the road' between the inspection date of 9/17/03 and the ship-out date of 10/08/03." This statement is not controverted by this record.

With respect to epoxy wastes, the record supports a finding that one 55-gallon drum held such wastes. In the foreground of aforementioned Photo dsc00442.jpg (DEC Ex. 14), four 55-gallon drums are depicted. During the hearing, these drums were marked, on the photo, as "E1, E2, E3 and E4." None of these drums were opened during the inspection on September 17, 2003. Moreover, it is clear that other items, in addition to hazardous wastes, were stored in the same fenced storage area. (T 3/1/06 p. 108) While these included used items such as empty propane tanks and drums, they also included useable product, such as pails of adhesive. (Id.) While stating that all four drums contained an epoxy substance, respondent asserted that only one of the four drums contained epoxy waste, and that the remaining three drums contained useable product. (T 3/1/06 pp. 278-279) The drum containing epoxy waste bore a label with the words "Hazardous Waste" printed thereon, as well as the number "305." (Id.) The label is depicted in Photo dsc00441.jpg. (DEC Ex. 14) As can be seen from the photograph, any entries on the label are illegible as to the contents of the drum and, with respect to the place provided on the label for the entry entitled "Accumulation Start Date," completely blank. Respondent's assertion that only this drum held epoxy wastes is corroborated by DEC Ex. 8, which is an inventory log of hazardous wastes in the storage area and maintained by respondent. This log shows various entries for drum "305" on various dates, beginning with an entry on March 22, 2002, showing the drum as containing 25 gallons of "Part B Epoxy Waste" and a final entry on April 4, 2003, indicating a total of 35 gallons.

Photograph dcs00459.jpg in DEC Ex. 14 depicts a 55-gallon drum with its top third cut off. While the record indicates that this open drum emanated the odor of methylene chloride and appeared to have "paint sludge" in it, it also contained rainwater. (T 3/1/06 pp. 175-181) Moreover, inspector Corbett was not able to identify the nature of the paint sludge. (Id.) The photo suggests that the drum has been exposed to the elements and allowed to collect rainwater and debris, and is not intended as a container for the storage of hazardous waste.

From the foregoing, the following has been proven by a preponderance of the evidence adduced:

1. None of the seven drums containing methylene chloride wastes bore a label with the words "Hazardous Waste" printed thereon.

2. None of the seven drums containing methylene chloride wastes bore a label indicating their respective contents.

3. Four of the seven spent methylene chloride drums were observed to be full when the lids were removed. None of these four drums bore a label indicating the date upon which accumulation of such methylene chloride waste began.

4. An eighth drum contained Part B epoxy waste. While this drum bore a label with the words "Hazardous Waste" printed thereon, it bore no label indicating the nature of its contents.

5. An inventory log shows that the 55-gallon drum containing epoxy Part B wastes, drum number 305, contained only 35 gallons of such waste as of April 4, 2003. The record does not support a finding that this drum was full as of the date of the Department's inspection on September 17, 2003, and should have thus been marked with an accumulation start date.

As noted above, 6 NYCRR 373-3.9(d)(3) provides: "Containers holding hazardous waste must be marked with the words 'Hazardous Waste' and with other words identifying their contents." Accordingly, as to the first cause of action, the failure of the seven drums of spent methylene chloride to bear any label with the words "Hazardous Waste" imprinted thereon nor other words identifying each drum's contents and the failure of the label on the drum of epoxy waste to indicate its contents constitute eight separate violations of 6 NYCRR 373-3.9(d)(3).

In addition, none of the four spent methylene chloride drums determined to be full bore an accumulation start date and therefore constitute four separate violations of 6 NYCRR 373-1.1(d)(1)(iii)(c)(2).

Second Cause of Action

The second cause of action is set forth in Paragraphs 11 and 15 of the complaint. Paragraph 11 alleges the following facts:

"11. The Department inspector also observed that five of the above drums [noted in Paragraph 10] were variously missing lids or rings or had open bungs and that at least two of them has spilled their contents."

Paragraph 15 alleges the regulatory violations supported by the factual allegations of Paragraph 11. Paragraph 15 states:

"15. With respect to Paragraph 11, Respondent has also violated 6 NYCRR Parts 373-3.9(d)(1) and (2) in that Respondent handled or stored containers of hazardous waste in open containers or in a manner which caused them to leak."

With respect to the methylene chloride and epoxy wastes at issue in this matter, the record indicates that the containers used by respondent for the storage of such hazardous wastes at the facility consisted of 55-gallon drums with steel tops, each top fitted with a gasket and secured by a bolted lock ring. (DEC Ex. 14, Photo dcs00442.jpg; T 3/1/06 pp. 279-281) Respondent's vice president, Edward Spiesz maintained that mere placement of the top on a drum created an airtight seal and that the drum lock rings needed to be secured in place only for transportation of the drums. (T 3/1/06 p. 280) However, at the time of the inspection on September 17, 2003, inspector Corbett noted that he could detect the odor of spent methylene chloride emanating from those drums which were covered with a top but which did not have a lock ring secured in place. (T 3/1/06 p. 102) The record further indicates that there were four such drums of spent methylene chloride with tops in place but without secured locking rings, the same four drums opened for inspection. (T 2/15/06 pp. 94-95) Based upon the inspector's observations and his professional experience, it is apparent that, at the time of the inspection, volatile emissions of spent methylene were being released to the environment from these drums. Thus, these four drums were actually leaking hazardous waste at the time of the inspection. As noted above, however, the record does not support a finding that the cut-off drum depicted in Photograph dcs00459.jpg in DEC Ex. 14, was intended and used as a container

for the storage of hazardous waste.

In the upper right corner of Photo dcs00448.jpg, part of DEC Ex. 14, a 55-gallon drum is depicted showing yellow streaking down its side and yellow staining on the pavement adjacent to it. This same barrel, marked "M6" and also with the letter "C", is depicted in Photo dcs00442.jpg of DEC Ex. 14. In the Department inspector's opinion, this was evidence of a prior spill of spent methylene chloride over the top rim of that barrel. (T 3/1/06 pp. 164-170) The inspector testified that four of the spent methylene chloride barrels were "open" in his opinion since they were not secured by bolt lock rings. (T 3/15/06 p. 166) These four were marked on Photo dcs00442.jpg as "M1", "M2", "M4" and "M6". Again, as noted, the record indicates that these are the four drums of spent methylene chloride which were opened at the time of the inspection and observed to be full. (T 2/15/06 pp. 95-96) Accordingly, the record supports a finding that one of the aforementioned drums emanating volatile spent methylene chloride was, in fact, drum M6 upon which waste methylene chloride streaking was also observed.

As noted above, 6 NYCRR 373-3.9(d)(1) requires that "[a] container holding hazardous waste must always be closed during storage, except when it is necessary to add or remove waste." Moreover, 6 NYCRR 373-3.9(d)(2) requires that "[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." Finally, 6 NYCRR 373-3.3(b) requires that facilities, such as respondent's, "must be maintained and operated to minimize the possibility of ... any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air ... which could threaten human health or the environment...."

It is evident from this record that the identifiable odor of spent methylene chloride emanating from the four drums on the day of the inspection indicates that such hazardous waste was being released to the environment, in contravention of the aforementioned regulatory authority. The container system used by respondent to store hazardous wastes at its facility consists of three parts, (1) a 55-gallon drum, (2) covered by a top, (3) which is secured by a bolted lock ring. As the regulations make clear, except when opened for the purpose of adding or removing hazardous waste, a 55-gallon container holding such waste, of the type in use here, must be covered with a top and that top must be secured by a lock ring. Unless the lock ring is secured in place, the drum container is not closed within the meaning of the

law. Without the lock ring secured in place, leakage in the form of identifiable volatile emissions of spent methylene chloride will occur, as in this case. Accordingly, these four drums were not always "closed during storage, except when it is necessary to add or remove waste," in violation of 6 NYCRR 373-3.9(d)(1) resulting in the very hazardous waste emissions to the air prohibited by 6 NYCRR 373-3.3(b). Moreover, these four drums, without their respective lock rings secured in place and as further demonstrated by the spillage observed on one of them, were being "handled or stored in a manner which may rupture the container[s] or cause [them] to leak," in violation of 6 NYCRR 373-3.9(d)(2). Thus, with respect to the four drums of methylene chloride, the cause of action articulated in Paragraphs 11 and 15 of the complaint has been proven by a preponderance of the evidence.

Third Cause of Action

The third cause of action is set forth in Paragraphs 12 and 16 of the complaint. Paragraph 12 alleges the following:

"12. The Department inspector asked for a weekly inspection log for the 'Hazardous Waste Storage Area' and Respondent's representative could not produce such a record."

Paragraph 16 alleges the regulatory violations supported by the factual allegations of Paragraph 12. Paragraph 16 states:

"16. With respect to Paragraph 12, Respondent has also violated 6 NYCRR Part 373-3.9(e) in that Respondent failed to conduct weekly inspections of its 'Hazardous Waste Storage Area.'"

While it may be the better operational practice, 6 NYCRR 373-3.9 does not actually require that a small quantity generator such as respondent keep a log of weekly inspections of its hazardous waste storage area. Thus, Paragraph 12 of the complaint does not state facts sufficient to support a cause of action for a violation of 6 NYCRR 373-3.9(e). However, the proof adduced during the adjudicatory hearing does support such a violation, and the pleadings will accordingly be amended to conform thereto.

The photographs of the storage area comprising part of DEC Ex. 14, indicate that the area is actively used by respondent in the course of its business. As noted, within this fenced area are stored useable products as well as hazardous wastes. Respondent's employees move these usable products in and out of the fenced area "a couple of times a week," and Edward Spiesz inspects the area with the same frequency, performing what he referred to as "a walk-by inspection." (T 3/1/06 pp. 324 -325) During these times, Mr. Spiesz asserted he did not observe leaking drums. (Id. p. 325) That weekly observations of the storage area were made is also suggested by DEC Ex. 8, the inventory of drums and containers held within the storage area. But the mere act of making weekly observations of the containers in the storage area does not satisfy the purpose and obligation imposed by 6 NYCRR 373-3.9(e). The purpose of the section is to require that hazardous waste containers be sufficiently scrutinized on a weekly basis in order to reveal any condition of their storage which may require corrective action. If such a condition is revealed, the regulations require that appropriate corrective action be taken. It is for this reason that the inspection required under subdivision (e) may, if appropriate, entail corrective measures pursuant to subdivision (b), hence, the explanatory note contained within subdivision (e). As 6 NYCRR 373-3.9(e) states:

"(e) *Inspections.* 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 (b) of this section for remedial action required if deterioration or leaks are detected."

And as 6 NYCRR 373-3.9(b) mandates:

"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."

Thus, where corrective action is needed, the inspection

obligation of subdivision (e) is only satisfied with the completion of two steps: first, observation of the hazardous waste container reveals some compromise to the integrity of the container and, second, that compromise is corrected.

In this matter, it is clear that the tops of four of the drums storing spent methylene chloride were not secured by their respective bolt lock rings allowing volatile methylene chloride to leak into the environment. This condition was readily observable by respondent's employees whenever they accessed the storage area and during any "walk-by" inspection. But the condition, though observed, was not corrected. Thus, the inspections, such as they were, were not completed within the meaning of 6 NYCRR 373-3.9(e). This is because, in failing to secure the lock rings in place on the spent methylene chloride drums, respondent permitted the drums to leak and, therefore, did not "manage the waste in [a] way that complies with the requirements of this Subpart," in accordance with 6 NYCRR 373-3.9, subdivision (b), as required by the inspection provisions of subdivision (e). Accordingly, respondent has violated the weekly inspection mandate of 6 NYCRR 373-3.9(e).

Fourth Cause of Action

The fourth cause of action is set forth in Paragraphs 13 and 17 of the complaint. Paragraph 13 alleges the following facts:

"13. The Department inspector also observed that access to the above drums was blocked by five pallets variously containing five gallon pails of epoxy and empty grey fifty-five gallon drums."

Paragraph 17 alleges the regulatory violations supported by the factual allegations of Paragraph 13. Paragraph 17 states:

"17. With respect to Paragraph 13, Respondent has also violated 6 NYCRR Part 373-3.3(f) in that Respondent failed to maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment in its 'Hazardous Waste Storage Area.'"

Photographs dcs00446.jpg and dcs00448.jpg of DEC Ex. 14

depict pallets stacked with 5-gallon pails of adhesive as well as a length of hose. They are photographed in the hazardous waste storage area in the respective locations where they were found upon the Department inspector's arrival at the site on September 17, 2003. (T 2/15/06 p. 129) As is apparent from the photos, the pallets are immediately in front of the drums of spent methylene chloride and the drums of epoxy, including the drum of epoxy waste. Photograph dcs00442.jpg of DEC Ex. 14 and the layout of the fenced storage area, DEC Ex. 6, show that the methylene chloride and epoxy drums are in the northeast corner of the storage area formed by the fence to the north and the wall of the storage building to the east. Thus, the only access to the drums by respondent's personnel or the Department inspector was blocked by the pallets. Indeed, the record indicates that on the day of the inspection, the pallets had to be moved by respondent's employees using a forklift before the inspection of the drums could begin and that this process took an hour to complete. (Id.)

As noted, 6 NYCRR 373-3.3(f) provides that an owner or operator, such as respondent, "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." Thus, as inspector Corbett pointed out, the purpose of this regulatory requirement is not only to facilitate Departmental inspections, but to maintain adequate aisle space for emergency response. (T 2/15/06 p. 128) It is clear by a preponderance of the evidence adduced at the hearing that respondent violated this regulatory mandate.

Affirmative Defenses

First Affirmative Defense

As a first affirmative defense, alleged in Paragraphs 13 and 14 of its answer, respondent asserted that it had "used reasonable and good faith efforts to comply with the dictates of 6 NYCRR."

In support of this defense and by way of explanation, respondent first pointed out that the inspection of September 17, 2003, occurred "right after the Labor Day weekend," a hectic time

for respondent's business toward the end of its season. (T 3/1/06 pp. 247-249) According to Mr. Spiesz, "crews will come back into town at that time, and the construction workers, out of town for a while, want to get home so they hurry up, they unload their trucks, and they - - they go home and try to spend holiday weekend." (Id. at 249)

Further, respondent asserted that it corrected all the violations observed during the inspection of September 17, 2003, and that this was confirmed by the Department's reinspection of the facility on September 23, 2003. (T 3/1/03 p. 191) Moreover, during prior Department inspections of the facility, in particular on February 6, 2001, and February 21, 2002, respondent had corrected any violations observed by the inspectors and implemented any recommendations made by them. (T 3/1/06 pp. 306-308) In addition, respondent asserted that among the drums it shipped off site subsequent to the Department's inspection of September 17, 2003, were drums of "good material" which it nevertheless disposed of, said Edward Spiesz, "in good faith of housekeeping for our facility." (Respondent's Ex. E; T 3/1/06 p. 374)

This affirmative defense is not availing. Full compliance with appropriate regulatory authority is assumed and expected at all times from any entity which engages in the generation or handling of hazardous wastes. A sudden increase in activity at a facility, even on the eve of a holiday weekend, does not excuse non-compliance. In this regard, however, it should be noted that Labor Day 2003 occurred on Monday, September 1, 2003, sixteen days before the inspection of respondent's facility on September 17, 2003.

The assumption of compliance with appropriate regulatory authority is also reflected in the RCRA Civil Penalty Policy, dated June 2003 (RCRA Policy). The gravity-based penalty component matrix of the RCRA Policy, discussed hereinafter, "assumes good faith efforts by a respondent to comply" when a violation is discovered and asserts: "No downward adjustment [of a civil penalty] should be made if the good faith efforts to comply primarily consist of coming into compliance." (Id. at 36) Thus, respondent's correction of violations observed and its willingness to follow Staff's recommendations made during and after this and prior inspections is not a defense to these matters.

Finally, the proof of a regulatory violation, such as those alleged in this matter, does not require the proof of a culpable mental state on the part of respondent. Reasonable and good faith efforts to comply with the law do not excuse a failure to do so.

Second Affirmative Defense

As a second affirmative defense, alleged in Paragraphs 15 and 16 of its answer, respondent asserted that "with respect to some or all of the materials allegedly observed by the inspector, a determination had not yet been made whether the materials could be reused and introduced into Accent's manufacturing or application process."

The record indicates that some of the spent methylene chloride is used to wash parts. (T 3/1/06 p. 253) To collect spent methylene chloride for this purpose, drums of the spent material mixed with epoxy paint wastes brought in from road striping operations are allowed to stand to allow the epoxy wastes to settle to the bottom of the drum. (T 3/1/06 p. 255) A bucket is then used to scoop spent methylene chloride off the top of the drum. (Id.) According to respondent, all of the drums of spent methylene chloride and epoxy wastes can be thus allowed to settle and separate, the purer of the spent methylene chloride being skimmed off the top for further use. (T 3/1/06 p. 254) After this skimming process is completed, the remaining contents of the drums are consolidated and transported for off-site disposal. (Id.) Thus, in respondent's view, until this skimming and consolidation process occurs, the spent methylene chloride mixed with epoxy paint sludge brought in off the road by its work crews in drums is not yet considered hazardous waste. (T 3/1/06 pp. 253-254)

Subdivision (b) of 6 NYCRR 371.4, entitled "Hazardous waste from nonspecific sources," provides that certain solid wastes are hazardous wastes unless excluded pursuant to 6 NYCRR 370.3(a) and (c). Assigned a generic hazardous waste code by the USEPA of F002, the regulation provides at 6 NYCRR 371.4(b)(1):

"F002 The following spent halogenated solvents: ... methylene chloride, [other compounds] ... all spent solvent mixtures/blends containing, before use, a total of 10 percent or more (by volume) of one or more of the

above halogenated solvents ... and still bottoms from the recovery of these spent solvents and spent solvent mixtures...."

The provisions of 6 NYCRR 370.3(a) allow a person to petition the Commissioner for certain variances and exclusions from the hazardous waste regulations, including 6 NYCRR 370.3(c) which provides for a variance from classifying a hazardous waste as such although it may be so defined in 6 NYCRR 371.4. However, as noted, the variance process is only initiated by petition.

Moreover, a person may claim that a certain material is either not a hazardous waste or is exempt or conditionally exempt from regulation because of the person's intent to recycle that material. However, as 6 NYCRR 371.1(c)(7) provides:

"(7) Parties who raise a claim that a certain material is not a solid or hazardous waste, or is exempt or conditionally exempt from regulation, based on the intent to reclaim, recycle or reuse, must notify the department, in writing, before utilizing the exemption or exclusion...."

With respect to the spent methylene chloride generated by respondent, the record in this matter does not establish that respondent has ever filed a petition with the Department for a variance pursuant to 6 NYCRR 370.3(c), or for a determination pursuant to 6 NYCRR 371.1(c)(7). This fact was confirmed by a search of the Department's records by inspector Corbett. (T 3/1/06 p. 390) Accordingly, to the extent that respondent's activity in scooping spent methylene chloride off the tops of drums whose contents have been permitted to settle and to use the same in washing parts is a recycling process, it has not been recognized and approved by the Department pursuant to the aforementioned regulations. (See T 3/1/06 pp. 224-226) Thus, at whatever level it may have been contaminated by epoxy paint wastes, the spent methylene chloride at issue in this matter is, by definition, a hazardous waste and is not excluded or exempt from regulation. For these reasons, respondent's second affirmative defense is not supported by a preponderance of the credible evidence.

Third Affirmative Defense

As a third affirmative defense, alleged in paragraphs 17 and 18 of its answer, respondent asserted that "the inspection and the conclusions reached by the inspector were influenced by and were the product of personal animosity, bias and prejudice on the part of the inspector."

The allegations of this affirmative defense are not supported by the record. The record shows that at the time of the adjudicatory hearing, Thomas Corbett had been employed by the Department as a hazardous waste facility inspector for fifteen years. (T 3/1/06 p. 31) During this time, he had performed "hundreds" of inspections. (Id.) Moreover, he had testified at two previous hearings in separate matters. (T 3/1/06 p.34) In preparation for the inspection of respondent's facility on September 17, 2003, which was also his first visit to the facility, he reviewed the Department's files concerning that facility, including any prior correspondence, inspection reports, notices of violations issued, enforcement actions and consent orders. (T 3/1/06 pp. 40-56) Asked if he were biased by this prior knowledge, Mr. Corbett responded, "Not at all," and further asserted "Every inspection is a clean slate with me." (T 3/1/06 p. 57) The record indicates that inspector Corbett had learned from other inspectors who had been to the facility that respondent's employees could seek to delay his access to the facility and seek to postpone the inspection to another time. (T 3/1/06 p. 62) Upon his arrival at the facility on September 17, 2003, he found this to be the case, advised Mr. Spiesz that he wanted to inspect the facility that day, and was detained for half an hour before being allowed to do so. (Id.) Edward Spiesz testified that any delay was occasioned by his need to call the facility's owner and its attorney prior to any inspection. (T 3/1/06 pp. 302-303) The record generally indicates that this was the sum and substance of any confrontation between the inspector and the facility's employees and that the inspection proceeded thereafter in a cooperative and orderly manner.

With respect to the September 17, 2003, inspection of respondent's facility, this record clearly shows that Thomas Corbett comported himself at all times in a forthright, courteous and professional manner. He prepared for the inspection, quite properly, by reviewing the Department's files concerning the facility. In a firm but completely civil manner, he insisted that the inspection he intended to make would be accomplished at the time of his arrival at the facility. He was simply doing his

job and trying his best to conscientiously fulfill his duty to the Department and to the people of this State. His actions were clearly not motivated by any bias or animosity toward respondent. Indeed, this is clear from the proofs adduced during the adjudicatory hearing. In particular, DEC Ex. 14 consists of photographs depicting the very violations Thomas Corbett observed and which are articulated in the complaint. The photographs are factual, accurate and objective. They are obviously not the product of any bias, prejudice or animosity. They are what they are, and they show what they show. Any suggestion that "the inspection and the conclusions reached by the inspector were influenced by and were the product of personal animosity, bias and prejudice on the part of the inspector," is simply not supported by the evidence. The third affirmative defense is without merit.

Fourth Affirmative Defense

As a fourth affirmative defense, alleged in paragraphs 19 and 20 of its answer, respondent asserted that the complaint failed to state a cause of action. This affirmative defense is not supported by a preponderance of the evidence adduced at the adjudicatory hearing.

With respect to the first, second and fourth causes of action articulated in the complaint, it is apparent that they do allege facts sufficient to state a cause of action.

The third cause of action alleges a violation of the inspection requirement of 6 NYCRR 373-3.9(e) based upon respondent's failure to produce a weekly inspection log. Arguably, this fact standing alone does not support a finding that the inspection subdivision was violated. However, as discussed above, and as relevant to this matter, the inspection mandate of 6 NYCRR 373-3.9(e) comprises more than just the ministerial act of looking at the hazardous waste containers on a weekly basis. The subdivision imposes a duty to take appropriate remedial action pursuant to subdivision (b) "if deterioration or leaks are detected...." It is clear from the evidence adduced at the adjudicatory hearing that respondent's failure to take appropriate corrective action to secure the tops of certain drums of spent methylene chloride to prevent the volatile release of that hazardous waste to the air constitutes a failure to fulfill its obligation imposed by 6 NYCRR 373-3.9(e) and thus constitutes a violation of that subdivision. Accordingly, as discussed

above, with respect to the third cause of action, the pleadings in this matter are conformed to the proof adduced at the hearing.

Fifth Affirmative Defense

As a fifth affirmative defense, alleged in paragraphs 21 and 22 of its answer, respondent asserted that "the complaint is time-barred due to laches." The doctrine of laches is not applicable in this matter.

The law in New York is well settled that "laches may not be interposed as a defense against the State when acting in a governmental capacity to enforce a public right or protect a public interest." Matter of Cortlandt Nursing Home v Axelrod, 66 NY2d 169, 178 (1985). Clearly, acting in such "governmental capacity" includes the Department's authority to enforce the provisions of the hazardous waste laws and implementing regulations, including 6 NYCRR 373-3.9.

But in any event, in addition to this legal bar, before the doctrine of laches can be invoked, a party must show that it has suffered substantial prejudice by reason of the delay in the commencement of an administrative proceeding. Cortlandt, 66 NY2d at 180. The party must show that the delay has "significantly and irreparably" handicapped its ability to defend in the administrative enforcement proceeding. Id. Respondent has made no showing in this regard. Accordingly, the doctrine of laches does not provide a basis for dismissal of this administrative proceeding.

DEPARTMENT STAFF'S RECOMMENDATION AS TO THE APPROPRIATE PENALTY TO BE ASSESSED

Department staff seeks the imposition of a civil penalty in this matter in the amount of \$93,750. (Closing Brief of Department Staff, dated May 5, 2006, Attachment "C", Civil Penalty Calculation) Department Staff's calculation is based upon the guidelines provided in the USEPA's RCRA Civil Penalty Policy and comports with the provisions of ECL 71-2705. The proposed penalty is the total of two assessments, \$75,000 for the violations alleged in the complaint plus \$18,750, an upward augmentation of twenty-five percent due to respondent's history of non-compliance. The penalty requested is justified under the

circumstances.

In determining the \$75,000 amount, Staff asserted that while violations of six regulatory provisions had been proven, it had chosen to combine "the separate drum labeling and dating violations into one violation for penalty assessment purposes." (Id. at 1) Accordingly, for each of these five violations, Staff argued, a penalty of \$15,000 should be assessed. (Id.) By way of explanation, while the complaint alleges four causes of action, causes of action one and three each allege two separate regulatory violations, for a total of six separate regulatory sections violated as a result of respondent's conduct. Combining the labeling violations of the first cause of action yields a total of five violations, as asserted by Staff.¹

On page 18 of the RCRA Civil Penalty Policy, dated June 2003, (RCRA Policy) is a diagram of the gravity-based penalty component matrix comparing a regulatory violation's "Potential for Harm" (Potential) along the matrix's y-axis versus its "Extent of Deviation from Requirement" (Extent) along the matrix's x-axis. Each of these matrix comparison axes is further sub-divided into categories of significance ranging from Major to Moderate to Minor. Thus, for each axis of the matrix, a determination must be made as to the significance of the violation. (See, RCRA Policy pp. 15-17) The process will yield two arguments, a Potential argument of either Major, Moderate or Minor significance, and an Extent argument of either Major, Moderate or Minor significance. Once determined, the arguments are entered into the matrix to find an appropriate penalty range for the violation at issue. The federal RCRA Policy matrix assumes a maximum penalty of \$27,500, since this is the maximum per violation penalty currently allowable under federal law. However, since pursuant to ECL 71-2705(1), the New York State maximum civil penalty is \$37,500 per violation, the federal matrix ranges in the RCRA Policy must be proportionally increased to reflect this higher amount, when the matrix is used in this State. I concur with staff's assessment that, under the RCRA Policy guidelines, respondent's actions constitute a Moderate potential for harm and a Major deviation from the regulatory

¹ While Staff, in an appropriate and reasonable exercise of its prosecutorial discretion, chose to assert that five regulatory violations had been proven, it could have viewed the proof on a per container basis and asserted several regulatory violations with respect to each of the seven drums containing spent methylene chloride and the drum containing epoxy waste.

requirement. Since the federal matrix suggests a penalty range of \$8,800 to \$12,099 for a violation so classified, this would mean a penalty range of \$12,099 to \$16,499 for the same violation so classified in New York State. Hence, a penalty of \$15,000 for each of the five violations asserted by Staff comports with the federal RCRA Policy as adjusted to reflect New York's higher maximum penalty per violation amount. Accordingly, the total gravity-based civil penalty Staff seeks is \$75,000 and is justified.

As authorized by the RCRA Policy, Staff further seeks to adjust the gravity-based penalty amount of \$75,000 upward by a factor of twenty-five percent, to a total of \$93,750, in light of respondent's history of non-compliance. This upward augmentation of the penalty is also justified.

In reviewing respondent's history of non-compliance, it should be first noted that the SPDES violation discussed in Finding of Fact 37 arose out of an investigation that occurred on July 25, 1990, and did not involve any violation of the hazardous waste regulations. A single, unrelated incident, it occurred more than thirteen years before the present enforcement action arose. While a "previous violation" within the meaning of the RCRA Policy guidelines, it provides little justification for upward augmentation of the penalty in this matter. (RCRA Policy at 37) The same cannot be said of other incidents comprising respondent's compliance history, however.

As indicated in Finding of Fact 39, on December 3, 1993, respondent signed Order on Consent C9-9026-93-04. This order alleged that respondent had violated 6 NYCRR 373-1.1(d)(1)(iii)(c)(2) for failing to label containers of hazardous waste with their accumulation start dates and 6 NYCRR 373-3.9 for failure to label containers of hazardous waste with the words "Hazardous Waste." These regulatory provisions alleged to have been violated then are the same provisions alleged to have been violated in the first cause of action in the present matter.

Recital 5 of the 1993 Order states: "Respondent, without admitting or denying its liability for the violations alleged herein, waives its right to a hearing or to otherwise contest the Department's allegations, consents to the issuance of this Order and agrees to be bound by its terms." (DEC Ex. 5 p. 2) As further stated in the Order, respondent agreed to "come into compliance with the requirements of the cited regulations by

March 31, 1994," and paid a penalty of \$1,000. Although the 1993 consent order asserted that the document was being executed without any admission of liability on the part of respondent, the order also clearly stated that respondent was waiving its "right to a hearing or to otherwise contest the Department's allegations." Accordingly, the labeling violations observed by the Department's inspector which were alleged in the consent order are uncontested matters of historic fact which can be considered by the Department when reviewing this respondent's history of non-compliance.

On February 6, 2001, the Department made a hazardous waste compliance inspection of respondent's facility. Respondent's employee, Edward Spiesz, was present at the facility and accompanied the Department's inspector, Robert Wozniak, on the inspection. (T 3/1/06 pp. 306-307) By letter dated February 21, 2001, and addressed to Edward Spiesz as Vice President of respondent, Nelson F. Schnabel, an Environmental Engineer I and Reviewer with the Department's Region 9 Division of Solid and Hazardous Materials, advised Edward Spiesz of the results of the inspection of February 6, 2001. (DEC Ex. 3)

The letter advised respondent that the Department considered respondent to be a small quantity generator of hazardous waste and went on to enumerate eleven regulatory violations observed by Inspector Wozniak. Among these violations, the letter of February 21, 2001, stated that respondent had violated:

1. 6 NYCRR 372.2(a)(8)(iii)(d) for failing to mark all those containers in the storage area, which should have been so marked, with their respective accumulation start dates. (Id. at 2)
2. 6 NYCRR 373-3.9(d) for failure to mark fifteen of eighteen containers in the storage area with the words "Hazardous Waste" and with other words identifying that container's contents. (Id.)
3. 6 NYCRR 373-3.9(e) for failure to inspect at least weekly the container storage area "looking for leaking containers and for deterioration of containers and the containment system caused by corrosion or other factors." (Id. at 3)

4. 6 NYCRR 373-3.3(f) for failure to have adequate aisle space. (Id.)

After listing the violations observed during the inspection of February 6, 2001, the letter of February 21, 2001, asserted:

"Please be advised that your facility is under the continuing obligation to comply with all the applicable state and federal regulations regarding the management of hazardous waste. If your facility should be found in violation of the regulations in the future, you may be subject to escalated enforcement action, including monetary penalties." (Id.)

At the adjudicatory hearing, Edward Spiesz said that any recommendations made by Inspector Wozniak during the inspection of February 6, 2001, were "implemented." (T 3/1/06 p. 308) As is apparent, the four regulatory provisions violated and enumerated above from the February 6, 2001, inspection are the same four regulatory provisions alleged to have been violated and enumerated in the four causes of action articulated in the present complaint.

On February 21, 2002, the Department made another hazardous waste compliance inspection of respondent's facility. As was the case during the 2001 inspection, respondent's employee, Edward Spiesz, was present at the facility and accompanied the Department's inspector, Kathleen Emery, on the inspection. (T 3/1/06 p. 308) By letter dated March 4, 2002, and addressed to Edward Spiesz as Vice President of respondent, Nelson F. Schnabel, on behalf of the Department, advised Mr. Spiesz of the results of the inspection of February 21, 2002. (DEC Ex. 4)

As with the prior inspection in 2001, the letter advised respondent that the Department considered respondent to be a small quantity generator of hazardous waste and went on to enumerate four regulatory violations observed by Inspector Emery. The Department's letter of March 4, 2002, stated that respondent had violated:

1. 6 NYCRR 372.2(a)(8)(iii)(d) for failing to mark two containers in the outdoor storage area with their respective accumulation start dates. (Id. at 1)

2. 6 NYCRR 373-3.9(d) for failure to mark the aforementioned two containers with the words "Hazardous Waste." (Id.)
3. 6 NYCRR 373-3.9(e) for failure to inspect at least weekly the container storage area "looking for leaking containers and for deterioration of containers and the containment system caused by corrosion or other factors." (Id.)
4. 6 NYCRR 373-3.3(f) for failure to have adequate aisle space. (Id.)

After listing the four violations observed during the inspection of February 21, 2002, the Department's letter of March 4, 2002, reiterated the assertion it had made in its prior letter of February 21, 2001:

"Please be advised that your facility is under the continuing obligation to comply with all the applicable state and federal regulations regarding the management of hazardous waste. If your facility should be found in violation of the regulations in the future, you may be subject to escalated enforcement action, including monetary penalties." (Id. at 2)

At the adjudicatory hearing, Edward Spiesz said that any recommendations made by Inspector Emery during the inspection of February 21, 2002, were followed. (T 3/1/06 p. 308) As is apparent, the four regulatory provisions violated and enumerated above from the February 21, 2002, inspection are not only the same four violations observed during the inspection of February 6, 2001, but they are also the same four regulatory provisions alleged to have been violated and enumerated in the four causes of action articulated in the present complaint.

The inspection accounts contained in the Department's follow-up letters to the inspections of February 6, 2001, and February 21, 2002, suggest that respondent is in chronic violation of the same regulatory provisions alleged in the present complaint. But beyond simple neglect, the record here suggests a conscious disregard for these regulatory mandates on the part of respondent. Support for this position is found by examining the log maintained by respondent of containers stored in the hazardous waste storage area and entered into the record as DEC Ex. 8. This log shows that beginning with entries on March 18, 2002, and continuing through April 4, 2003, hazardous

waste drums in the storage area were inspected on a weekly basis, with each drum's number, contents and amount in gallons being recorded. Moreover, during this period, as applicable, full dates for the drums and dates full drums were shipped are also recorded. The entries for the last few weeks show the presence of three drums, a drum number "301" containing 35 gallons of "Part A Epoxy," a drum number "305" containing 35 gallons of "Part B Epoxy," and a drum number "403" containing 25 gallons of "Chloride Waste." This record keeping practice abruptly stops on April 4, 2003, however, and does not resume until September 22, 2003, some five days after the inspection on September 17, 2003. On September 22, 2003, the log lists nineteen 55-gallon drums marked full as of that date, including eight drums marked "Chloride Waste Haz." and one drum marked "Paint Waste Haz." Id.

When asked during the adjudicatory hearing why the log was not kept after April 4, 2003, Edward Spiesz said:

"It was repetitious - - it was the same - - same barrels for four months, and we just - - just stopped putting them in. There was only three barrels involved in it." (T 3/1/06 p. 326)

In the first instance, it is clear from this record that when Thomas Corbett inspected the hazardous waste storage area on September 17, 2003, there were considerably more than three drums of hazardous waste present. In addition, of the three drums last logged on April 4, 2003, only the drum marked "305" was still present in the area on the date of Corbett's inspection. In fact, on this record, the only drum bearing any kind of label was drum "305." From the previous inspections of February 6, 2001 and February 21, 2002, it is clear that respondent was aware of the labeling requirements imposed by the regulatory provisions cited in the previous inspections and in the present complaint, and of respondent's continuing obligation to observe them. And yet, except for drum "305," no other drum was labeled at all. Clearly, even "walk-by" inspections would have readily revealed this regulatory deficiency. Arguably, such conduct evinces a conscious disregard for regulatory requirements.

The foregoing facts, as shown by this record, demonstrate a pattern of non-compliance and justify Staff's requested upward adjustment of the penalty by a factor of twenty-five percent, to the amount of \$93,750.

CONCLUSIONS

1. Respondent, Accent Stripe, Inc., located at 3275 Benzing Road, Orchard Park, New York 14127, is a small quantity generator of hazardous waste, as defined by 6 NYCRR 370.2(b)(83) and (173).

2. As a result of its business activities, respondent generates spent halogenated solvent methylene chloride, a hazardous waste defined as such pursuant to 6 NYCRR 371.4(b)(1) and assigned the generic USEPA hazardous waste number F002.

3. As a result of its business activities, respondent generates epoxy waste which, having the characteristic of ignitability, is a hazardous waste pursuant to 6 NYCRR 371.3(b) and assigned the generic USEPA hazardous waste number D001.

4. Respondent stores the aforementioned hazardous waste in a designated fenced hazardous waste storage area at its facility.

5. The aforementioned hazardous wastes are stored in containers, each container consisting of an 55-gallon drum, covered by a top which is secured by a bolted lock ring. Unless the bolted lock ring is secured in place, volatile emissions of the hazardous wastes contained in a drum will be released to the air and environment. Accordingly, unless the bolted lock ring is secured, a drum is not closed.

6. On September 17, 2003, the hazardous waste storage area contained seven 55-gallon drums of spent methylene chloride. None of these seven drums were labeled with the words "Hazardous Waste" nor with other words to identify the contents of the drum, in violation of 6 NYCRR 373-1.1(d)(1)(iii)(c)(3) and 6 NYCRR 373-3.9(d)(3).

7. On September 17, 2003, of the seven drums containing spent methylene chloride, four were observed to be full. None of these four drums were marked with their respective accumulation start dates, in violation of 6 NYCRR 373-1.1(d)(1)(iii)(c)(2).

8. On September 17, 2003, the hazardous waste storage area contained one drum of hazardous epoxy waste. While this drum was

labeled with the words "Hazardous Waste," it was not otherwise labeled to indicate the contents of the drum, in violation of 6 NYCRR 373-1.1(d)(1)(iii)(c)(3) and 6 NYCRR 373-3.9(d)(3).

9. On September 17, 2003, none of the four drums containing spent methylene chloride, which were observed to be full, were secured by their respective bolted lock rings thus allowing the volatile emission of spent methylene chloride to the air. The characteristic odor of the hazardous waste was readily detectable and observed by the Department inspector. Streaking from spilled methylene chloride could also be observed down the side of one of the four drums. Accordingly, these containers were not being kept closed and were being handled in a manner which could cause them to leak, in violation of 6 NYCRR 373-3.9(d)(1) and (2).

10. The lack of appropriate labels on the drums containing hazardous wastes placed in the hazardous waste storage area, the lack of secured bolted lock rings on some of those drums, and the obvious odor of methylene chloride were conditions readily observable during even the most cursory "walk-by" inspection of the storage area. Yet, respondent failed to correct these conditions. As further suggested by its failure to maintain its inventory log for a period of five months preceding the Department's inspection of September 17, 2003, respondent failed to meet its duty and responsibility, imposed by 6 NYCRR 373-3.9(e), to make the inspections and, if necessary, take such corrective action as appropriate. Accordingly, respondent violated this regulatory provision.

11. On September 17, 2003, access to the drums containing hazardous wastes in the hazardous waste storage area was blocked by pallets of buckets and other items, in violation of 6 NYCRR 373-3.3(f).

RECOMMENDATION

In consideration of the above Findings of Fact, Discussion and Conclusions, I recommend the Commissioner issue an order finding that respondent, Accent Stripe, Inc., has violated ECL article 27, title 9 and the aforementioned provisions of 6 NYCRR parts 372 and 373. Moreover, for these violations, I recommend that the Commissioner impose a civil penalty of \$93,750. In addition, I recommend that the Commissioner direct that

respondent provide adequate training to its employees in the proper handling of the hazardous wastes it generates and accumulates, both during its normal operations and in emergency situations, as provided in 6 NYCRR 372.2(a)(8)(iii)(e)(3). Finally, I recommend the Commissioner direct respondent that, if respondent intends to continue to make further use of spent methylene chloride in its operation as a cleanser and solvent, it make the appropriate application to the Department pursuant to 6 NYCRR 371.1(c)(7).