UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

83 SEP 15 P3:15

OFFICE OF
THE ADMINISTRATOR

IN RE)
) RCRA 83-160-R-KMC
CITY INDUSTRIES, INC.)
) ORDER ON MOTION
Respondent)

This matter is before me on a Motion to Dismiss filed by the Respondent seeking a dismissal of the Complaint heretofore issued by the Complainant on May 20, 1983. Respondent's grounds for the dismissal are based on its argument that the Complaint fails to state a cause of action upon which relief can be granted.

In the above-mentioned Complaint, the Agency seeks a civil penalty in the amount of $5,000.00 for the Respondent's failure to properly file for a Part B TSD permit, under RCRA. Without restating the entire regulatory scheme which Congress fashioned and codified in the Resource Recovery Act and its subsequent amendments, it is sufficient for the purposes of this Opinion to state that persons engaged in the type of business which the Respondent pursues is required to have a permit, issued by the EPA in this case, in order to continue in such business. The Regulations have set up a procedure, in regard to these permits, which is divided into two parts. Facilities in existence on November 19, 1980, were to file a Part A application and notification, and based upon the information contained therein were granted "interim status" and treated for all practical purposes as having been issued a permit.

This the Respondent did and as of the date of the Complaint was so permitted. Following the promulgation of additional regulations, persons such as the Respondent were advised to apply for a Part B or final permit. The Agency advised the Respondent to do so in February 1982. Respondent sought an extension which was granted and eventually submitted its application. This application was deemed by the Agency to be inadequate. The Respondent was so advised and resubmitted its application in January 1983. This application was also deemed to be inadequate. The upshot of all of this is that the Respondent failed to provide the Agency with an adequate submission and the Complaint was issued for failure to do so within the time limits set by the Agency. The record further reflects that in July 1983, the Agency notified the Respondent that its application for a RCRA Permit had been denied.

The Respondent, in his Motion, takes the position that the Agency has no authority to assess a civil penalty for the failure to file an adequate permit application, but rather that its sole remedy in such a circumstance is to deny the permit, the practical effect of which would be to put the Respondent out of business. The Agency argues that, in fact, it can both deny the permit and seek a civil penalty for the failure to apply.

To put the controversy in another light, the Respondent takes the position that since the Act does not require any one to apply for a permit, such application is purely voluntary and the failure to so apply cannot form the basis for a penalty assessment. The Complainant sidesteps this issue and merely reaffirms its authority to levy a penalty as well as deny the permit.

The Complainant bases his interpretation of the Agency's authority on the language of 40 C.F.R. §124.3(d) which states that:

> "If an applicant fails of refuses to correct deficiencies in the application, the permit may be denied and appropriate enforcement actions may be taken under the applicable statutory provision including RCRA section 3008, SDWA sections 1423 and 1424, CAA section 167, and CWA sections 308, 309, 402(h) and 402(k)."

The Complainant argues that this language allows the Agency to deny the permit and take appropriate enforcement actions under several statutes including §3008 of RCRA. The Respondent agrees that the Agency may do both, but that it must first deny the permit then take enforcement actions only if the facility continues to engage in activities under RCRA after the effective date of the permit denial and, in this case, revocation of interim status.

Since the Complainant relies on §3008 of RCRA as the basis for his action, one must look to the statute to determine its limits. §3008(a)(1) of RCRA entitled "Federal Enforcement" provides, in pertinent part, that:

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

It is easily seen that in order for that section to be triggered, it must be shown that a person has violated some requirement of the Act. No where in the Act does it say that a person must apply for a permit. §3005 of the Act says that any one engaging in an activity described therein must have a permit and after the effective date of the regulations any described activity not done in accordance with the permit is prohibited. It could, of

course, be argued that one cannot get a permit without first applying for it. But does that argument, of necessity, authorize the Agency to seek a civil penalty if one doesn't apply? I doubt it.

The regulatory scheme fashioned by Congress under RCRA envisions a so-called "cradle to the grave" control of hazardous wastes. This means that EPA wants to know when someone generates a hazardous waste, who ships it, where they ship it, who treats it and when and where it is finally disposed of. To effectuate this program, the Act sets up a series of permits, manifests and control documents, which track each regulated amount of a designated substance from its creation to its ultimate resting place.

Obviously, an essential part of this scheme is a procedure which allows the Agency to identify those persons who are involved with the hazardous waste somewhere along the line. The Complainant, no doubt, feels that the requirements to apply for a permit is the key to such an identification scheme. This is not so. The requirement to notify the Agency that one is engaging in a regulated activity is not contained in §3005, regarding permits, but in §3010 which requires that such a person notify the Agency of that fact and specifically tell it the location and general description of such activity and a list of the hazardous wastes handled. Interim status such as enjoyed by the Respondent at the time of the issuance of the Complaint, is obtained by complying with §3010, supra, and simply applying for a RCRA permit. However, only the notification contained in §3010 is actually mandated by the Act. Failure to notify EPA under §3010 is clearly a violation of the Act and could form the basis for an enforcement action under §3008. Whether or not failure to apply for a Part B permit is a violation of the Act is not that clear.

The clear intent of the Act is to require those persons engaged in hazardous waste handling to obtain a permit or get out of the business. I find nothing in either logic or the Act that would compel anyone to apply for a permit under penalty of fine for failure to do so. If one fails to obtain a permit and continues to operate, he would be subject to civil or criminal action for operating without a permit, not for failure to apply for one.

This philosophy is reinforced by the Preamble to the RCRA regulations, which states that:

> "EPA cannot initially withhold interim status from facility owners or operations who otherwise qualify, based on the Agency's subjective judgments of financial capability, intent to ultimately comply with RCRA's requirements, or on the basis of State or Federal permits issued under other statutes. If EPA becomes aware of facilities which are not meeting the interim status standards, the Agency can bring an enforcement action against them under §3008 of RCRA, or can move quickly towards final disposition of the facility's permit application." (45 Fed. Reg. 33164, May 19, 1980)

In its brief, Complainant sets forth a detailed dissertation on the Respondent's past failure to comply with interim status requirements and its apparent "waffling" on the question of whether it would correct its Part B application or go out of business. This information is interesting but irrelevant. The only violation alleged by the Agency in its Complaint is the Respondent's failure to submit an acceptable permit application within the time limit set by the Agency. If the Agency has reason to believe, as they apparently do, that the Respondent is continuing to engage in activities regulated by the Act subsequent to the revocation of its interim status and permit denial, it has a duty to the public to take appropriate civil or criminal actions to halt such activity.

Under the circumstances of this case, I am therefore of the opinion that the Agency does not have the authority to assess a civil penalty for the failure of a person to apply for a final Part B permit. The statute and applicable regulations limit the Agency's options in such cases to a revocation of interim status and to later seek civil or criminal sanctions if the situation so warrants. It should also be noted that no where in the voluminous penalty guidance documents or penalty assessment policy papers issued by the Agency is there any mention of how to set a penalty for non-appliers or that any penalty is even appropriate.

In making this decision, I note that, to my knowledge, this is a case of first impression in the Agency and, therefore, invite appellate review by the Administrator. I am further of the belief that nothing herein contained will upset the regulatory scheme established by Congress and further particularized by the Agency through its promulgated regulations.

Accordingly, it is hereby ordered that:

The Motion to dismiss the Complaint is granted, with prejudice.

T. B. Yost

Thomas B. Yost
Administrative Law Judge

DATED: October 4, 1983

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

83 OCT 5 P3:15

IN RE	)	
	)	RCRA 83-160-R-KMC
CITY INDUSTRIES, INC.	)	
	)	CERTIFICATION OF SERVICE

In accordance with §22.20(b) and §22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties...(45 Fed. Reg. 24360-24373, April 9, 1980), I hereby certify that the original of the foregoing Order on Motion issued by Honorable Thomas B. Yost, along with the entire record of this proceeding was served on the Hearing Clerk (A-110), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 by Certified Mail Return Receipt Requested; that a true and correct copy was hand-delivered on Keith M. Casto, Esquire, U.S. Environmental Protection Agency, 345 Courtland Street, N.E., Atlanta, Georgia 30365; and that a true and correct copy was served by Certified Mail Return Receipt Requested on Charles A. Perry, Esquire (for Respondent), Elarbee, Thompson & Trapnell, 800 Peachtree-Cain Tower, 229 Peachtree Street, N.E., Atlanta, Georgia 30043.

Dated in Atlanta, Georgia this 4th day of October 1983.

Sandra A. Beck
Regional Hearing Clerk
(FTS: 257-2681, Comm. 404/881-2681)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	RCRA Docket No. 83-H-002
	)	
WILLIS PYROLIZER COMPANY,	)	
	)	
Respondent	)	

1. Resource Conservation and Recovery Act - VIOLATIONS - The failure to notify the Environmental Protection Agency, pursuant to Section 3010 of the Act, of the identity of any and all hazardous waste handled and generated by Respondent, was a violation for which assessment of a civil penalty is appropriate.

2. Resource Conservation and Recovery Act - VIOLATIONS - The transportation, treatment, storage or disposal of any identified or listed hazardous waste of which the Agency has not received the timely notification required by Section 3010(a) of the Act is prohibited and any such handling by Respondent was in violation of the Act and pertinent regulations.

3. Resource Conservation and Recovery Act - HAZARDOUS WASTE - The Act (RCRA), which contemplates comprehensive "cradle to grave" regulation, and the regulations promulgated pursuant thereto, provide regulation and management of hazardous waste from the time of its generation until it is properly disposed of or used; Respondent's failure to properly include, identify and specify any and all hazardous waste handled, on the Notification and the Part A Permit Application, is a serious violation for the reason that such failures frustrate the scheme of regulation provided by the Act and pertinent regulations promulgated pursuant thereto (42 USCA 6930[a]; 40 CFR 122.23[b][1]).

4. Resource Conservation and Recovery Act - REGULATIONS - Specification, on the Notification form, of the capacities and processes for the treatment, storage and disposition of all hazardous wastes handled by Respondent are important and serious aspects of the scheme of regulation set forth in the Act.

5. Resource Conservation and Recovery Act - REGULATIONS - Formulation and implementation of a written waste analysis plan, a written schedule for inspections and a written operating record and generally providing for precautionary actions relating to the safety and security of the TSD facility are important and legitimate management functions required by pertinent regulations promulgated pursuant to the Act for protection of public health and the environment (40 CFR 265.13 through 265.143).

6. Resource Conservation and Recovery Act - ENFORCEMENT - STATE PROGRAM - The Administrator is authorized under the provision of 42 USC 6928(a) to proceed with enforcement of the provisions of the Act, by giving notice to the state in which such violation occurs, where said state is authorized to carry out a hazardous waste program under 42 USC 6926. In such instance, while Congress intended that the states have primary authority to administer the program, subject to national guidelines provided by the program and EPA regulations, EPA retained the authority to achieve the purposes and goals of the Act, including the right to take enforcement action in appropriate cases, even after a state program has been approved.

7. Resource Conservation and Recovery Act - ENFORCEMENT - AGENCY - Where the State of Nebraska exercised its "Phase One" authority and inspected the facility of Respondent, it was acting, not as an agent or investigative arm of the U.S. EPA, but on its own behalf (42 USCA 6928[a][2]; 45 FR 33394).

8. Resource Conservation and Recovery Act - CIVIL PENALTY - Intent is not an element of an offense for which a civil penalty is provided, (42 USC 6928[g]). Lack of intent may be considered in determining the seriousness of a violator's misconduc

9. Resource Conservation and Recovery Act - CIVIL PENALTY - In determining the reasonableness of a civil penalty, the seriousness of the violation found and any good-faith efforts to comply with applicable requirements should be considered (42 USC 6928[c]).

10. Resource Conservation and Recovery Act - CIVIL PENALTY - The size of Respondent's facility is not a criteria provided by the Act, 42 USCA 6928(c), to be considered in the determination of an appropriate civil penalty which may be assessed.

11. Resource Conservation and Recovery Act - WAIVER; ESTOPPEL - When an agency of the United States Government is performing a regulatory function pursuant to an Act and regulations designed to protect or enforce a public interest or right, it may not be estopped.

APPEARANCE FOR RESPONDENT:

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Omaha, Nebraska 68106

APPEARANCE FOR COMPLAINANT:

Barbara L. Peterson, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agenc
324 East 11th Street
Kansas City, Missouri 64106

INITIAL DECISION

Marvin E. Jones
Administrative Law Judge

On March 18, 1983, subject Complaint, Compliance Order and Notice of Opportunity for Hearing was issued to Respondent, Willis Pyrolizer Company, a partnership, Jackson, Nebraska, pursuant to Section 3008(a)(1) of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act (RCRA) of 1976, as amended, 42 USC 6928(a)(1), and in accordance with the United States Environmental Protection Agency (hereinafter "EPA" or "the Agency") Consolidated Rules of Practice, 40 CFR Part 22, charging said Respondent with thirteen (13) violations (Counts I through XIII) of Section 3010(a) of RCRA, 42 USC 6930(a); the regulations respecting applicable requirements and promulgated pursuant to said Section 3010(a); and Rules and Regulations of the State of Nebraska governing hazardous waste management (Title 128, HWR 1/) which state rules adopt federal regulations found at 40 CFR Parts 122 and 265. Said Complaint proposes that civil penalties should be assessed for each violation so alleged pursuant to Section 3008(g) of RCRA, 42 USC §6928(g), and states that the penalties therein proposed are based on the factors in said statute provided.

Count I alleges that Respondent, in failing to give notification by August 18, 1980, of its handling of listed hazardous

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1/ Title 128, Rules and Regulations Governing Hazardous Waste Management in Nebraska, Nebraska Department of Environmental Control.

wastes F001, F002, F003, F005 (as identified or listed at 40 CFR 261.21 and 261.32, respectively) and the generation of a solid waste (by incineration), thereby violated said Section 3010(a), which provides, in pertinent part, as follows:

> ". . . Not later than ninety days after promulgation of regulations under Section 3001 identifying by its characteristics or listing any substance as hazardous waste subject to this subtitle, any person generating or transporting such substance or owning or operating a facility for treatment, storage or disposal of such substance shall file with the Administrator (or with States having authorized hazardous waste permit programs under Section 3006) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person. . . . No identified or listed hazardous waste subject to this subtitle may be transported, treated, stored, or disposed of unless notification has been given as required under this subsection."

Count II alleges that on October 15, 1980, pursuant to Section 3005 of RCRA, 42 USC §6925, Respondent submitted a Part A Hazardous Waste Permit Application, to obtain Interim Status authority to operate, indicating that its facility handled hazardous wastes Numbers K017 and U188; that, on August 27, 1982, it submitted a revised Part A Application which specified the hazardous wastes handled by it as D001, F001, F002, F003, F005 and hazardous waste ash derived from incineration of such wastes; and that, having failed to specify the listed wastes handled by it in its Part A Application submitted October 15, 1980, Respondent has treated, stored and disposed of hazardous wastes not specified in its Part A Application in violation of Title 128, HWR, which adopts federal regulations at 40 CFR 122.23(b)(1).

Count III alleges that said Part A Application, submitted October 15, 1980, specified that said handling included treatment of hazardous waste by incineration and storage in containers. An EPA inspection on August 24, 1982 (and Respondent's revised Part A Application, August 27, 1982), revealed that Respondent was treating such wastes by solidification and that storage of disposal of hazardous waste ash consisted of its deposit on the ground and in tanks; and that such handling violates said Title 128, HWR, which states in pertinent part:

> ". . . during interim status a facility shall not:
>
> (1) Treat, store, or dispose of hazardous waste not specified in Part A of the Permit Application;
>
> (2) Employ processes not specified in Part A of the Permit Application; or
>
> (3) Exceed the design capacities specified in Part A of the Permit Application."

Count IV charges Respondent with "exceedence of the process design capacities specified in said Part A Application" in violation of said Title 128, supra, in that said Part A Application of October 15, 1980, specified that said facility had a process design container storage capacity of 4500 gallons and a process design incinerator capacity of 100 gallons per hour whereas Respondent was storing 44,000 gallons, more or less, in containers and has installed a second incinerator increasing its incinerator treatment capacity without prior notification and approval.

Count V alleges that Respondent failed to develop and follow a written waste analysis plan and to keep such plan at subject facility as required by said Title 128, HWR, which adopts 40 CFR 265.13(b).

Count VI alleges that Respondent failed to undertake security of its facility as provided by 40 CFR 265.14, adopted by said Title 128, HWR.

Count VII alleges that Respondent failed to develop and follow a written schedule for inspecting, monitoring safety and emergency equipment, security devices and equipment important to prevention, detection and response to environmental and human health hazards; that such schedule was not kept at its facility and that no log or summary of inspections was recorded or kept as required by said Title 128, HWR.

Count VIII alleges that Respondent failed to install communications and fire-fighting equipment as provided by 40 CFR 265.32, the provisions of which are adopted and required by said Title 128, HWR.

Count IX alleges that Respondent failed to maintain aisle space among hazardous waste containers sufficient to allow the unobstructed movement of personnel and equipment as provided by 40 CFR 265.35, the provisions of which are adopted and required by said Title 128, HWR.

Count X alleges that Respondent failed to sign and date manifests accompanying shipments of hazardous waste to the extent and in the manner provided by 40 CFR 265.71, which provisions are adopted and required by said Title 128, HWR.

Count XI alleges that Respondent failed to keep written operating records at subject facility per 40 CFR 265.73 and said Title 128, HWR.

Count XII alleges that a start-up of Respondent's incinerator on or about August 24, 1982, resulted in the unplanned release of waste which threatened human health and the environment in violation of the provisions of 40 CFR 265.31, adopted and required by said Title 128, HWR.

Count XIII alleges that Respondent has failed to establish financial assurance for closure of the facility as provided at 40 CFR 265.143, the provisions of which are adopted and required by Title 128, HWR.

The Compliance Order directed to Respondent and accompanying subject Complaint ORDERED the payment of civil penalties, in said Complaint proposed, in the total sum of $35,400; and further ORDERED that the violations in said Complaint alleged be remedied and that Respondent should conduct only such operations that fully comply with applicable rules and regulations.

An adjudicatory hearing, requested by Respondent, was held, and the case submitted, on Wednesday, July 27, 1983, in the Workmen's Compensation Courtroom, Hall of Justice, 17th and Farnam Streets, Omaha, Nebraska.

Upon consideration of the evidence, the proposed findings of fact and conclusions of law and the accompanying briefs and arguments of the parties, I make the following

FINDINGS OF FACT

1. Willis Pyrolizer Company ("Respondent"), a partnership, operates an incinerator at a facility located on Nebraska Highway 20, west of the City of Jackson, Nebraska ("the facility").

The partnership was formed in January, 1980, by Erwin O'Neill (a.k.a. John E. O'Neill), Gerald A. Chicoine and Tom Keller (deceased), to provide heat for the manufacturing processes of Willis Company (another and separate partnership which is in the business of manufacturing wood fiber pelletized absorbent); and also to dry sand, a use which has never been utilized. Erwin O'Neill is the chief operating officer and manager of Respondent and is one of six partners of Willis Company (TR. 3, 111-114, 130, 184, 198-199).

2. In June, 1980, Respondent began to acquire and use hazardous wastes to fuel the incinerator. Respondent stores the hazardous wastes in a Quonset building at the facility, as well as on a concrete pad, adjoining the Quonset, and in warehouses north of Highway 20 pending their use as fuel (TR. 113-114, 174-175, 187-188, 207, Complainant Exhibit ["CE"]-3, CE-13A-F).

3. As a result of the incineration of hazardous wastes, Respondent generates a hazardous waste ash which, prior to August, 1982, was disposed of on the ground at the facility (TR. 21, 160, CE-16).

4. In August, 1980, Respondent filed a Notification of Hazardous Waste Activity with EPA, which indicated that Respondent was engaged in the treatment, storage or disposal of hazardous wastes which have been assigned EPA identification numbers K086, F010 and D001 (CE-1).

5. On October 15, 1980, Respondent filed Part A of its Hazardous Waste Permit Application ("Part A Permit Application") with EPA, which stated that Respondent had a treatment capacity of 100 gallons of hazardous waste per hour; container storage

capacity of 4500 gallons; and that Respondent treated and stored hazardous wastes assigned EPA identification numbers U188, K017 and D001 (CE-2).

6. On September 29, 1981, the Nebraska Department of Environmental Control (NDEC), Division of Air Pollution Control, conducted an inspection of the facility. The NDEC inspector observed, or was informed by Erwin O'Neill, that waste toluene (F005), waste methyl ethyl ketone (F005), and waste acetone (F003) were among the hazardous wastes being used to fuel the incinerator (Respondent ["R"]E-1); and that Atwood Enterprises, Inc., was Respondent's testing firm who obtained analyses of said wastes prior to their distribution to Respondent (RE-1).

7. On August 24, 1982, EPA conducted an inspection of the facility. During the inspection, the inspector observed, or was informed by Erwin O'Neill, that:

(a) Respondent treated and stored hazardous wastes which were not listed in its Part A Permit Application (TR. 17, 18).

(b) Respondent was storing quantities of hazardous waste in excess of the container storage design capacity specified in its Part A Permit Application (TR. 23). Actually, 1400 to 1600 barrels of waste are stored in a Quonset hut and on the concrete pad outside (TR. 123-124).

8. Respondent stated, at the time of the inspection on August 24, 1982, that they had not developed and did not follow a written waste analysis plan; that they had signed a contract with Atwood Enterprises, Inc. (broker) to be its "acquirer/supplier" of wastes and to look at the analysis of the original generator where such analysis was available; after which, Respondent took

samples and forwarded them to the broker for verification analysis by the broker's chemist. The "profiles," or analyses, of each waste were not then kept "on-site," but were kept at the broker's. At the time of the hearing, Respondent stated it was then keeping profiles of each waste handled "on-site" and reported the employment of a safety director to help in keeping records (TR. 83, 140).

9. Respondent, in August, 1981, installed a seven-foot fence topped with three strands of barbed wire around a Quonset hut and adjacent concrete pad used for storage of hazardous waste. Gates to this area are unlocked when personnel are at work in the area, but locked when said personnel are off duty. A fence was installed around most of the area occupied by a pyrolizer and concrete pad which, with a boiler, is east and immediately adjacent to an office and elevator. This partially enclosed area has, since summer, 1981, been used for storage (TR. 75, 85, 177, 197; CE-12-A, CE-13-A)

10. Respondent's managing partner resides approximately 100 feet from its office. A guard dog detects any vehicle near the premises at night (TR. 143).

11. Prior to August 24, 1982, Respondent wrote inspection reports only if it encountered a problem discovered by inspections made at least daily. Since the inspection by EPA on said date, Respondent has upgraded its inspection logs and summary (TR. 148-149).

12. The plant manager makes a complete tour first thing in the morning, a 20-minute, once-a-day chore because the distance from one active portion of the facility to another is about 100 feet (TR. 144).

13. The storage facility is used for short-term, not permanent or long-term, storage. A load that comes in usually will be burned within two weeks. Barrels are inspected upon arrival at said facility and, where the condition of any of the barrels indicates any likelihood of leaking, or other problems, those barrels are set aside for immediate dumping (TR. 147).

14. On August 24, 1982, Respondent's facility had three telephones on the premises: at the manager's house, at the office and at the Quonset. Two telephones have since been added. The normal means of communication is hollering or yelling because of the small distances involved (TR. 150, 151).

15. Four fire extinguishers were maintained by Respondent at the time of the EPA inspection on August 24, 1982 (TR. 150). At the time of hearing, Respondent kept in excess of 20 fire extinguishers to be used in case of fire (TR. 203).

16. A siren, procured but not installed at the time of said inspection, now can be sounded at three points in Respondent's facility: at the burner, at the dump station and at the main office (TR. 151).

17. At the time of said inspection, Respondent had in place a 30-gallon-per-minute, normal high pressure hydrant, installed two months previously. Respondent now utilizes an 8000-gallon tank with a high-speed pump which can pump 320 gallons of water per minute for over 20 minutes; the local fire department can reach the facility in about eight minutes (TR. 151, 152).

18. The drums in Respondent's storage area in the Quonset and on the concrete pad south of the Quonset were stacked three to four drums high, about one or two inches apart. EPA Inspector Smith

observed that inadequate room was afforded to check for leaks or to respond in an emergency should it be necessary to clean up a spill or fight a fire (TR. 76, 146, 200; CE-13).

19. Respondent's manager pointed out that said barrels were stacked in such manner that they are "pyramided and offset," causing the barrels to "tie lock," and it is not difficult to observe any leaks, i.e., "staggertized stacking" (TR. 146, 147, 200).

20. Inspection by Respondent's personnel is done in daylight hours when the 14-foot-high, 16-foot-wide doors on the east of the Quonset are opened. Three roof airlifts let in light as does a three-foot square vent on the west. No electricity is used in the Quonset because of the possiblity of sparks and fumes (TR. 200).

21. Respondent's contact with available fire departments indicates they will not enter the building but will apply "foam" from the outside (TR. 203).

22. The project manager for PEDCo, an environmental consulting firm employed by EPA, participated in the inspection on August 24, 1982, and found that (TR. 100, 102):

(a) A number of manifests were not signed by or on behalf of Respondent, a TSD facility.

(b) A number of manifests were in possession of Respondent which were not dated and, therefore, did not reveal when the particular shipment of waste was received.

(c) On some manifests, the number indicating the quantity of waste received had been changed without reason stated, and a different number substituted therefor.

(d) Some manifests in possession of Respondent Willis Pyrolizer indicated that the receiving TSD facility was Atwood Enterprises, Inc.

(e) In instances, Respondent had in its possession two copies of a particular document indicating that one of the copies had not been returned to the appropriate facilitiy, e.g., the generator of said waste (CE-18).

23. The implementation by Respondent of a written internal operating log (to keep track of the location and identity of wastes received) was accomplished in September, 1982; a daily inspection log (records of daily inspections) was implemented on January 1, 1983 (TR. 149).

24. Mr. O'Neill, Respondent's managing partner, indicated during the inspection on August 24, 1982, that Respondent did not then have a closure plan nor a closure cost estimate, that the financial assurance required had not then been obtained (TR. 31). The insurance company consulted by Respondent could not arrange for the surety bond coverage requested. Subsequently, Respondent has funded the closure cost in cash, as represented by trust agreement (TR. 163-164; RE-4).

25. In the Quonset hut, drums are stacked three- to four-high and four- to six-drums deep and a 10- to 12-foot aisle is afforded between the wall and the drums (TR. 229).

26. During said inspection, the incinerator operator, as a part of normal operating procedure, was engaged in cleaning the atomizer. When the nozzle was clean, it was put back in the incinerator by the operator, who started fuel flow, but did not start the air simultaneously. As a result of this oversight, fuel drained backward onto the flex/air hose instead of being blasted into the incinerator. When the incinerator operator realized his omission and started the air pressure, several drops of the paint

waste went through an air crack and onto the face of EPA Inspector Flournoy. As this had not occurred previously, Respondent attributed the incident to operator error and points out that said waste's ignitable character alone accounts for its classification as hazardous (TR. 29, 54, 155, 158).

27. Following the inspection, a Notice of Violation was issued to Respondent which cited the violations identified during the inspection (CE-16).

28. On or about August 27, 1982, Respondent submitted a revised Notification and an amended Part A Permit Application which reflected the previously unreported hazardous wastes treated and stored at the facility; Respondent's hazardous waste generation activities, and treatment and storage capacities at the facility. The amended Part A Permit Application also sought EPA approval of changes in Respondent's operations, specifically, the addition of solidification treatment of hazardous wastes to the processes employed by Respondent; the addition of a tank for hazardous waste storage; and the addition of a second incinerator unit (CE-4).

29. On September 8, 1982, and March 22, 1983, Respondent submitted its justification for the addition of a second incinerator at the facility (CE-5, CE-6, RE-11).

30. On May 11, 1983, EPA denied Respondent's requests for approval of solidification treatment processes at the facility, the addition of a new tank, and the addition of a second incinerator as changes during interim status. EPA approved Respondent's request for additional container storage capacity (TR. 34).

CONCLUSIONS OF LAW

1. Respondent is a "person" within the meaning of Section 1004(15) of RCRA, 42 USC 6903(15).

2. Respondent operates a facility for treatment, storage, or disposal of hazardous wastes within the meaning of Section 3010(a) of RCRA, 42 USC 6930(a).

3. Respondent is a generator of hazardous waste within the meaning of Section 3010(a) of RCRA, 42 USC 6930(a), 40 CFR 261.3 and 40 CFR 262.11. 2/

4. Respondent violated the notification requirements of Section 3010(a) of RCRA, 42 USC 6930(a), by failing to notify EPA of the hazardous waste handled by Respondent, of its hazardous waste generation activities, and by treating, storing or disposing of hazardous wastes not listed in its notification.

5. Respondent violated federal regulations set forth at 40 CFR Section 122.23(b)(1), by treating, storing or disposing of hazardous wastes, which were not specified in its Part A Permit Application.

6. Respondent violated federal regulations at 40 CFR Section 122.23(b)(2) by employing (solidification) treatment and (ash) disposal processes, which were not specified in its Part A Permit Application.

2/ The Federal rather than the parallel State Standards are cited herein. EPA, in this action, is actually enforcing Interim Status Standards provided by Title 128 HWR Nebraska Department of Environment (45 FR 33394). Under the provisions of Condition 1 of 42 U.S.C.A. §6926 and 6927 and Rule 34, HWR, the Federal and State Standards are equivalent; the requirements specified are those also provided in the parallel State Standards.

7. Respondent violated federal regulations at 40 CFR Section 122.23(b)(3) by (a) storing hazardous waste in excess of the container design storage capacity specified in its Part A Permit Application; and (b) by increasing its treatment design capacity specified in its Part A Permit Application by adding a new incinerator.

8. Complainant has the burden of proving that the alleged violations occurred and that the civil penalties proposed are appropriate (40 CFR 22.24).

9. Respondent violated the Federal Interim Status Standard (Standard) set forth in 40 CFR 265.13(b) in that it did not have at its TSD facility, on the date of subject EPA inspection, a written waste analysis plan describing the procedures to be by it used to comply with the provisions of 265.13(a) under which Respondent is required to obtain a detailed chemical and physical analysis of representative samples of any and all waste by it received at said facility.

10. Respondent violated the Standard set forth in 40 CFR 265.14 (Security) in that the fence around the area adjacent to the incinerator which was for storage of hazardous waste did not "completely surround" said active portion of Respondent's facility (see 265.14[b][2][i]) and a means to control entry to said facility, at all times, was not installed and implemented (see 265.14[b][2][ii]). On this record, it is clear that a potential hazard was presented in the event physical contact with said stored hazardous waste was made by unknowing or unauthorized persons or livestock.

11. Respondent violated 40 CFR 265.15(b)(1) and (2) in that it did not develop and follow a written schedule for inspecting its equipment important to preventing, detecting or responding to potential environmental or human health hazards as in said section set forth.

12. Respondent violated 40 CFR 265.31 in that it failed to maintain and operate its incinerator to minimize the possibility of an unplanned release of hazardous waste.

13. Respondent violated 40 CFR 265.32 for the reason that it had not, on and prior to August 24, 1982, adequately equipped subject facility with communications and fire control equipment.

14. Respondent violated 40 CFR 265.35 for the reason that it did not store its hazardous waste in such manner as to afford aisle space adequate to detect potential hazards and to allow, in an emergency, unobstructed movement of personnel and equipment necessary to abate fire, spills and contamination.

15. Respondent did not keep at its facility a written operating record reflecting the information required by 40 CFR 265.73 and thereby violated said section.

16. On and prior to August 24, 1982, Respondent was in violation of 40 CFR 265.143 in that it had not established financial assurance for closure of said TSD facility.

17. By exercising its "Phase One" authorization and inspecting Respondent's subject facility, the State of Nebraska was acting on its own behalf and not as an agent or in the capacity of an investigative arm of U.S. EPA (Subsection 2, 42 USCA Section 6928[a]; Legislative History of Section 3008, House Committee on Interstate and Foreign Commerce Report No. 94-1461, page 31 [September 9, 1976]; and 45 FR 33394 [May 19, 1980]; at preamble to 40 CFR 123.128[f] and [g]).

18. The violations with which Respondent is charged in subject Complaint are regulatory in nature, promulgated to protect a public interest, and the contentions of Respondent urging estoppel and waiver are misplaced and inappropriate (Beaver v. U.S., 350 [F.2d] 4,8[4][1965] and Stone v. U.S., 286 [F.2d] 56, 59 [1961]; citing Utah Power and Light Co. v. U.S., 243 US 389, l.c. 409; Jackson v. U.S., 234 FS 586 [EDSC1964]; Davis, Administrative Law Treatise [1982 Supplement] Sections 17.03 and 17.04, pages 256-257).

19. Intent is not an element of an offense for which a civil penalty is provided under 42 USCA Section 6928(g); however, lack of intent will be appropriately considered in taking into account the seriousness of the misconduct of the violator and his good-faith efforts to comply with the applicable requirements of the Statute and Regulations (42 USCA 6928[c]).

20. Size of Respondent's business and its ability to pay are not criteria which are required by the Statute and applicable regulations to be considered in the assessment of an appropriate civil penalty (42 USCA 6928[c]).

DISCUSSION

The pertinent regulations here invoked were promulgated by EPA, as directed by Subtitle C of the Act, "to protect human health and the environment from the improper management of hazardous waste", and are sufficiently comprehensive that, when implemented, they will achieve the end intended by Congress: provide "cradle to grave" regulation of hazardous waste (see 45 FR 33066 - Summary and Background).

Appendix I to Part 260 of 40 CFR, at page 341, states that owners or operators of TSD facilities who qualify for interim status, by filing a notification form on or before August 18, 1980, and a Part A Application for permit prior to November 19, 1980, must:

1. Have been engaged in its hazardous waste activity prior to the effective date of the Act;

2. Comply with Section 3010 notification requirements, and

3. Apply for a permit under Part 122 (of 40 CFR).

Respondent, having qualified for interim status, must comply with the Part 265 rules - requirements and standards - until final administrative disposition of its permit application is made (TR. 8). If a permit is issued, it will then be required to comply with the permit which will be based on Part 264 rules.

Under Section 3006 of the Act (42 USC 6926), the State of Nebraska sought and received authorization to carry out subject program by adopting the regulations previously promulgated by EPA (see Title 128, HWR, page 1, note 1, supra). The Act contemplates and requires that the State Program be "substantially equivalent to the Federal Program" (Section 6926[c], supra, and Section 6929]); the Act provides, Section 6928(a)(2), that where, as in this instance, (violations) occur in "a State which is authorized...", the Administrator shall give notice to the State, in which the the violation occurred, prior to taking action to enforce the State regulations. Section 6928(c) of the Act provides for the assessment of a penalty which the Administrator determines is reasonable, "taking into account the seriousness of the violation and any good faith efforts to comply" with applicable requirements.

Thus, even though Nebraska has been given "Phase One" authority, EPA retains the right of federal enforcement of the state program (Section 3008[a][2] of RCRA, 42 USC 6928[a][2]). The legislative history of Section 3008 supports this interpretation. House Committee on Interstate and Foreign Commerce Report No. 94-1461 (September 9, 1976), at page 31, states:

> "This legislation permits the state to take the lead in the enforcement of the hazardous waste laws. However, there is enough flexibility in the act to permit the Administrator, in situations where a state is not implementing a hazardous waste program, to actually implement and enforce the hazardous waste program against violators in a state that does not meet the federal minimum requirements. Although the Administrator is required to give notice of violations of this title to the states which authorized hazardous waste programs, the Administrator is not prohibited from acting in those cases where the states fail to act, or from withdrawing approval of the state hazardous waste plan and implementing the federal hazardous waste program pursuant to Title III 3/ of this act."

We can also look to the Clean Water Act (CWA), which is highly analogous to RCRA in this regard, and from which Section 3008 was drawn. 4/ Cases involving similar provisions of the CWA (e.g., Section 309 and 402) support the proposition that, while

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3/ The House Bill (H.R. 14496) was amended subsequent to the submission of this report, which changed the references of Title III to Subtitle C of the final Act.

4/ See Report of Senate Committee on Public Works, No. 94-988, page 17, dated June 25, 1976, which states with reference to what is now Section 3008:

> "In any regulatory program involving Federal and State participation, the allocation or division of enforcement responsibilities is difficult. The Committee drew on the similar provisions of the Clean Air Act of 1970 and the Federal Water Pollution Control Act of 1972."

Congress intended that the states have primary authority to administer the program subject to national guidelines provided by the Act and by the EPA regulations, EPA retained the authority to achieve the purposes and goals of the Act, including the right to take enforcement action in appropriate cases, even after a state program has been approved. See Cleveland Electric Illuminating Co. v. EPA, 603 F.2d 1 (6th Cir., 1979); U.S. v. City of Colorado Springs, Colorado, 455 F. Supp. 1364, (D.C., Colo., 1978); Chesapeake Bay Foundation, Inc., v. Virginia State Water Control Board, 453 F. Supp. 122 (D.C. Va., 1978); U.S. v. Cargill, Inc., Civ. Docket #80-135, (D.C. Del., Feb. 12, 1981); and Shell Oil Co. v. Train, 415 F. Supp. 70, (D.C. Cal, 1976), where the Court, after quoting from legislative history of the CWA, stated, l.c. 77:

> "The language suggests that Congress did not intend the environmental effort to be subject to a massive federal bureaucracy; rather, the states were vested with primary responsibility for water quality, triggering the federal enforcement mechanism only where the state defaulted...The overall structure is designed to give the states the first opportunity to insure its proper implementation. In the event that a state fails to act, federal intervention is a certainty".

Further, such position is consistent with the Congressional expression contained in 40 CFR Section 6929, which prohibits states from imposing regulations less stringent than federal regulations, but reserves to them the right to impose more stringent regulations.

Respondent's repeated contention that Complainant should be estopped from the federal enforcement provided and claims of waiver fail to recognize that the instant case deals with regulatory provisions designed to protect a public interest. It should

suffice to point out that it is well established that such contention is inappropriate under the facts here presented. When the government is not acting in a proprietary capacity, it may not be estopped: see Beaver v. U.S., 350 F.2d 4, 8(4)(9CCA, 1965), which states, citing Utah Power and Light Co. v. U.S., 243 U.S. 409:

> "As a general rule, laches or neglect of duty on the part of officers of the government (such as an implied acquiescence...) is no defense to a suit to enforce a public right or protect a public interest.".

See further Air-Sea Brokers, Inc., v. U.S., 596 F.2d 1008, 1011 (CCA 1979); Enfield v. Kleppe, 566 F.2d. 1139 (10 Cir., 1977); Davis, Administrative Law Treatise (1982 Suppl.), pages 256-257.

Respondent urges the adoption of certain provisions of the Marine Protection Research and Sanctuaries Act, 33 USCA 1401 et seq., particularly Section 1415(a) thereof, for the determination of civil penalties; and of 40 CFR 22.35(c), the regulation pertaining to civil penalties assessed for violations of the Federal Fungicide, Insecticide and Rodenticide Act (FIFRA), and contends that the size of Respondent's business should be considered in assessing appropriate penalties for any violations found. Complainant points out that the applicable and pertinent sections of the Act and Regulations are silent as to consideration of Respondent's size or ability to pay. Nor does the Act purport to adopt or authorize consideration of provisions from the acts and regulations hereinabove mentioned. I conclude that the elements to be considered in such determination are limited to those provided in 40 CFR 22.27(b); and agree with Complainant that Section 3008 of the Act is intended to deter violations by all persons regardless of size or ability to pay for the reason that

the potential for harm to health and environment is no less whether the violation be that of a small or large company. 5/ This question is addressed by Administrative Law Judge Thomas B. Yost in re City Industries, Inc., RCRA 81-6-R-DSE-C as follows:

> "The omission by Congress of this criteria from RCRA indicates to me the seriousness with which Congress viewed violations of the Act and their determination that persons who violate the terms thereof shall be subjected to heavy penalties (up to $25,000 a day)" (page 19 of Decision).

CIVIL PENALTIES

In assessing the civil penalties, I have given consideration to 40 CFR 22.27(b) which provides:

> "(b) Amount of civil penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease..."

Section 3008(c) of RCRA, 42 USC 6928(c) provides the criteria for penalty assessment, stating:

> "Any order issued under this section...shall state with specificity the nature of the violation and specify a time for compliance and assess a penalty, if any, which the administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirement."

I take notice of in-house memoranda developed by the Office of Solid Waste and Emergency Response in EPA Headquarters, entitled, respectively: "Penalty Policy for RCRA Subtitle C Violations, Guidance on Developing Compliance Orders under Section 3008 of RCRA",

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5/ The size of a facility could, of course, be material in determining the "seriousness" of the violation and "good faith efforts to comply" by a Respondent.

and "Guidance on Application of Interim Status Standards..." The purpose of these documents was to provide guidance to the regional offices in determining how to proceed against persons or facilities which had violated certain requirements of the statute and the regulations promulgated pursuant thereto. These documents also were intended to expand upon and modify a previous document entitled: "Framework for the Development of a Penalty Policy for Resource Conservation and Recovery Act", prepared for the Office of Enforcement, EPA, by Policy Planning and Evaluation, Inc., a contractor located in McLean, Virginia. It should be noted that, although this policy has never been officially adopted by the Agency nor published in the Federal Register, its use by the Agency for the purpose described has been approved by judges within the Agency in previous decisions (see, e.g., Judge Yost's decision in re Kuhlman, RCRA-83-H-004 [EPA, Region VII]).

The Draft Penalty Policy provides a basis whereby a uniform penalty assessment process can be utilized by all the Regions within EPA so that there is not a disparity among the Regions in assessing penalties for the same or similar violations. One of the foundations of this process is the establishment of classifications of violations and then the creation of the penalty matrix for each class of violations. This matrix is a grid; upon one axis there is Conduct and on the other axis there is Damage. Each of these axes is divided into three categories: major, moderate and minor, in descending order of seriousness.

The attachments to these Exhibits indicate that the Agency has altered the configuration of the original matrix so that the axes now are identified as Actual or Threatened Damage, with the

degrees of seriousness being identified as Major, Substantial and Moderate, and the other axis identified as Classification of Respondent's Noncompliance with Regulatory Standards, likewise being divided into the same three categories of seriousness. (The matrix is attached to this decision and designated "Attachment No. 1.")

I have considered the above along with the pertinent provisions of the Act, supra, in arriving at appropriate penalties for the violations found to have occurred.

Count I of the Complaint charges Respondent with failure to notify EPA of its treatment, storage and disposal of four listed hazardous wastes, viz., F001, F002, F003 and F005, in its Notification of Hazardous Waste Activity, filed on August 18, 1980. The charge is not denied by Respondent; however, Respondent offers as an excuse that it was unaware, on August 18, 1980, of what "ignitable wastes" it would be burning except that the wastes burned would be "ignitable", and that, since they indicated such characteristic of the wastes they expected to burn in their incinerator, they "felt" the Notification was correct and that they were in compliance with pertinent regulations. Inspection of the Notification filed, EPA Form 8700-12 (CE-1), shows that it requires a listing of "Listed Wastes" (from 40 CFR 261.31) in Section IX. A., as well as an indication of the characteristics of non-listed hazardous wastes (in Section IX. E. of the form) by checking the square opposite the word "ignitable". In Section IX. A., Respondent represented that the listed wastes which it would treat/store/dispose of were those identified and listed in said Section 261.31 as K086 and F010. Section 261.2 provides that such wastes are subject to the Notification requirements of Section 3010 of the Act. Reference

to 42 USC 6928(g) (Section 3008 of the Act) reflects that intent is not an element of an offense for which a civil penalty is there authorized to be assessed. The word "knowingly" is not present as in subsections (d) and (e) of said Section 6928, which prescribes criminal penalties.

Clearly, the violation is shown by this record, and its seriousness is apparent when the purpose of the required notification is considered. To sanction inaccurate reports respecting the location and character of hazardous waste would indeed frustrate the scheme of regulation enacted by Congress for the protection of the public health and environment. The penalty proposed in the sum of $2500 is appropriate to the violation found, and will be assessed.

Count II of subject Complaint charges that Respondent's Part A Application, filed on October 15, 1980, pursuant to Section 3005 of the Act, represented that it handled hazardous wastes listed in 40 CFR 261.32 and 261.33, respectively, as numbers K017 and U188. The record clearly indicates that Respondent treated, stored and disposed of hazardous wastes not specified in its Part A Application (CE-2), in direct violation of Section 3005(a) of the Act and 40 CFR 122.23. The only response given by Respondent to the charge is that Complainant is estopped because of the claimed acquiescence of the State of Nebraska. It has been pointed out that this is a regulatory proceeding under the Act, remedial in nature, where the protection of a public interest is involved; that, under any of the facts here presented, the claim of estoppel will not be countenanced; further, there is no agency present as claimed (see Discussion, supra). Even if there were

facts present supporting Respondent's claim of agency, we are referred to those cases holding that "the United States is neither bound nor estopped by acts of its officers or agents (causing) to be done what the law does not sanction or permit". See Stone v. United States, 286 F.2d 56 (8CCA, 1961), and see Section 3009 of the Act, 42 USC 6929. See also United States v. Zenith-Godley Co., 295 F.2d 634 (2 CCA 1961), citing Federal Crop Insurance Corp. v. Merrill, 332 US 380, 68 S.Ct. 1 (1947).

In the premises and for the reasons alluded to concerning the charge in Count I, I find that the penalty proposed in the sum of $2500 is appropriate and will be and is hereby assessed.

Count III charges that Respondent, at variance with the statement in its Part A Application, treated hazardous waste by solidification (as well as by incineration); stored wastes by depositing it on the ground and storing in tanks (as well as containerizing, as specified); said charges are supported by the record (CE-4; CE-7). Under the provisions of 40 CFR 261.3(c)(2), ash generated from the incineration of listed wastes (or mixture of characteristic and listed waste) is a hazarous waste. Respondent did not utilize Sections 260.20 or 260.22 in an attempt to have said ash excluded from the aforesaid provision. Respondent, on finding it was in violation as a generator of said ash, did proceed to containerize said ash and, thereupon, ceased depositing it on the ground. It also acted to cease unauthorized solidification. Though intent to violate is not an element of the defense charged, the record reflects that Respondent's violation persisted only until it was advised that such treatment and storage were unauthorized, indicating the violations were, in fact, unintentional. Such lack of intent should, and will, be considered on determining

the seriousness of the violations found. I find that an appropriate penalty to be assessed is the sum of $1000.

Count IV charges Respondent with "exceedence" of the storage capacity specified in its Part A Application. Said Application specified only about 10% of what its storage capacity actually was at the time and the record indicates that said storage capacity has continued to increase. Further, a second incinerator was installed, increasing the facility's incinerator capacity. On this record, (Respondent) later sought and obtained an increase in its container storage capacity (TR.34), stating that the storage capacity stated on its original application was a clerical error. It admits the second incinerator is operable but is intended to be used only in case the original incinerator is not operating. In both instances, the violation charged is present. However, because of an on-going and good-faith effort to achieve compliance in these respects, I find that the penalty assessed should appropriately be fixed at the sum of $1000.

I found that, throughout this record, there is indication that Respondent was aware that it lacked knowledge and expertise respecting the interpretation of the Act and pertinent regulations. Rather than seek authoritative advice from the Agency prior to implementing unauthorized acts and processes, it chose to "gamble" that it could bend the rules to approximate its chosen interpretation. Such gambles have been "losing" ones, as such regulations, being remedial in nature, are intended, where a public interest is so deeply affected, to be strictly construed, and are entitled to broad interpretation; see Cattlemen's Investment Co. v. Fears, 343 F. Supp. 1248 (1972), citing Tcherepin v. Knight, 389 US 332 (1967).

Count V charges Respondent with failure to develop and follow a written waste analysis plan. If developed, such written plan must be kept at the facility. On this record, I find that such plan did not exist up to the time of the inspection; that presently - some time later - Respondent, on this record, has recognized such requirement and is engaged in an on-going effort at developing a written analysis plan and to implement same, and that such is now to be available at the facility. The violation found, because of its importance to the scheme of regulation intended by the Act, is of a serious nature. Because of Respondent's efforts to take corrective action to comply with regulatory provisions, I find that the penalty proposed should be decreased to $1500.

Count VI charges deficiencies in Respondent's security efforts at its facility in violation of 40 CFR 265.14. The storage areas are only partially enclosed (Fact 9); the gate to the seven-foot fence, around the Quonset area and pad, is locked only when personnel are off duty. To Respondent's credit, its managing partner has a guard dog and lives approximately 100 feet from its office. I find that an appropriate penalty to be assessed is the sum of $250.

Count VII charges failure to develop a written schedule for inspections, which should be kept at subject facility. Prior to the EPA inspection of August, 1982, Respondent professed to write inspection reports only when and if it encountered a problem discovered by daily inspections. Since the EPA inspection, Respondent has enlisted assistance and has upgraded its inspection logs and summary (Fact 11). In the premises, I find that an appropriate civil penalty which should be assessed is the sum of $750.

Count VIII charges failure to install equipment as required by 40 CFR 265.32. Since the said EPA inspection, Respondent has increased the number of telephones and fire extinguishers and has now installed a siren which can be sounded at three locations at the facility, as well as an 8000-gallon tank with a high-speed pump (Facts 14, 15, 16 and 17). For said violation, a penalty of $500 is assessed.

Count IX charges that Respondent failed to maintain sufficient aisle space, in accordance with 265.35 (Facts 18, 19, 20 and 25). Said charge is discussed at length by both parties. The charge is supported on this record and I find that the proposed sum of $1000 should appropriately be assessed.

Count X charges that Respondent failed to sign and date certain manifests accompanying shipments of hazardous waste. This record reflects (Fact 22 and subparts thereof) that Respondent violated the spirit and intent of the Act in that the failures testified to, taken collectively, seriously affected the efforts of the Agency to keep abreast of the location, quantity and identity of hazardous wastes handled by TSD facilities. I find that the penalty proposed, in the sum of $1400, is appropriate and should be and it is hereby assessed.

Count XI charges that Respondent failed to maintain written operating records, as required by 40 CFR 265.73, providing a description and quantity of each hazardous waste received, along with its location and the methods and dates of the treatment, storage or disposal at subject facility of each such waste. Also, records and results of each inspection are required to be kept. This is an important aspect of the handling of hazardous wastes, and failure to comply with the regulation is serious in

that it affects the Agency's efforts and ability to effectively track hazardous waste subject to regulation. Respondent's failure, standing alone, could seem trivial, but such violation, along with other like violations, could eventually frustrate the scheme of regulation which Congress enacted to ensure that any handling, which might endanger the environment or the public health, would cease. On this record, it is admitted that no such records were kept (C E-17); however, the record further indicates that Respondent is endeavoring to comply with the regulation, beginning in September, 1982. I find that a penalty in the sum of $1500 is appropriate and should, and will, be assessed.

Count XII charges improper operation of Respondent's incinerator, which resulted in the unplanned release of hazardous waste which threatened human health. I find that the charge is based on an unusual occurrence due to a mental lapse on the part of Respondent's employee, the incinerator operator. While violations of Sections 265.345 and 265.31 are indicated, it is clear on this record that the incident was not due to faulty equipment or to improper functioning of the incinerator, but, rather, to anxiety of the operator, because of his awareness that the EPA inspector was observing his actions in cleaning the atomizer and nozzle preparatory to starting the fuel and air flow. Because of the operator's mental lapse, the fuel and air were not fed simultaneously, which caused the unexpected release of fuel, which drained backward onto the flex/air hose instead of being blasted into the incinerator. I conclude that the assessment of a civil penalty on account of such incident is not appropriate, and no penalty will be assessed, as it is assumed that like incidents can and will be avoided.

Count XIII charges that Respondent failed to establish financial assurance for closure of its facility in violation of 40 CFR 265.143; and, on this record, at the time of the inspection, Respondent did not have a closure plan nor a closure cost estimate (TR.31). At the outset, Respondent had relied on an insurance company which, when consulted, indicated it could arrange for the surety bond coverage requested. After it was determined that such bond could not be arranged, Respondent funded the closure cost in cash (Fact 24). An effort was exerted by Respondent to arrange for the surety bond coverage until it became apparent that such was impossible. At or near that time, Respondent used a trust agreement to fund the closure cost in cash (RE-4). 6/ Because of Respondent's efforts exerted to obtain such coverage, and its belief that the insurance company consulted would supply its need in this respect, I find that an appropriate civil penalty for said violation should be $1000 instead of the $5000 proposed.

On consideration of the record, the submissions of the parties and the conclusions reached herein in accordance with the criteria set forth in the Act, I recommend adoption of the following

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6/ A violation of said section and the assessment of a civil penalty is indicated on this record for the reason that, on August 24, 1982, Respondent did not have a closure plan or closure cost estimate.

PROPOSED FINAL ORDER 7/

1. Pursuant to Section 3008(c) of the Resource Conservation and Recovery Act, 42 USC 6928(c), a civil penalty in the sum of $14,900 is hereby assessed JOINTLY AND SEVERALLY against the Respondent, Willis Pyrolizer Company, Jackson, Nebraska, and the partners thereof, namely, JOHN ERWIN O'NEILL, GERALD A. CHICOINE, and the estate of Tom Keller, deceased;

2. Payment of the full amount of the civil penalty assessed shall be made, within 60 days of the Service of the FINAL ORDER, upon Respondent, by forwarding to the Regional Hearing Clerk, EPA, Region VII, a Cashier's or Certified Check payable to the United States of America;

3. Respondent shall comply with the Compliance Order contained in paragraph 62, page 11, of subject Complaint and shall provide NOTICE OF COMPLIANCE with the terms of same, with a description of steps taken to achieve compliance, within five (5) days of completion to the following:

(a) The Regional Administrator, U.S. EPA, Region VII;

(b) The Regional Hearing Clerk, said Region VII, and

(c) Complainant's Counsel of Record.

7/ 40 CFR 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its service upon the parties and without further proceedings unless (1) an appeal to the Administrator is taken from it by a party to the proceedings or (2) the Administrator elects, sua sponte, to review the Intial Decision.

Section 22.30(a) provides that an appeal herefrom shall be filed within 20 days after service of the Initial Decision, accompanied by appellant's brief.

In the event, and in those instances where, any of said actions has already been completed, notice of same shall be provided within five (5) days from and after the effective date hereof.

DATED: December 5, 1983

Marvin E. Jones
Administrative Law Judge

THE PENALTY MATRIX FOR CLASS [illegible] VIOLATIONS
AND FOR CONTINUED OR FLAGRANT CLASS III VIOLATIONS

Classification of Respondent's non-compliance with Regulatory Standards → / Actual or Threatened Damage ↓	Major	Substantial	Moderate
Major	$25,000 to 20,000	$10,000 to 8,000	$2,500 to 1,500
Substantial	19,000 to 15,000	7,000 to 5,000	1,000 to 500
Moderate	14,000 to 11,000	4,000 to 3,000	400 to 100

PENALTY CALCULATION

1. Selection of Appropriate Penalty Cell

   (a) Determine "Damage" Category -- the actual harm or potential for harm to human health or the environment. Based on the facts of a particular situation, this threat should be classified as major, substantial or moderate.

   ALL CLASS III VIOLATIONS ARE PRESUMED TO POTENTIALLY CAUSE "MODERATE" DAMAGE

   (b) Determine "Non-compliance" Category -- extent of Respondent's non-compliance with regulatory standards. Based on the facts of a particular situation, this noncompliance should be classified as major, substantial or moderate.

2. Determine Base Penalty Amount

   Each cell contains a limited range from which to choose; often the midpoint may be chosen but it is at the discretion of enforcement personnel to go higher or lower depending on the circumstances of the case.

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded to the Regional Hearing Clerk of Region VII, U.S. Environmental Protection Agency, the Original of the above ~~and~~ foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, and have referred said Hearing Clerk to said section which further provides that, after preparing and forwarding a copy of said Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk, who shall forward a copy of said Initial Decision to the Administrator.

DATED: Dec. 5, 1983

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ