7/30/86

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of Millipore Corporation, Cidra, Puerto Rico, PRD 091198366, Respondent,	)	Docket No. II-RCRA-85-0303

Resource Conservation and Recovery Act. -- Closure of waste facility -- Commencement of a partial closure of a waste facility prior to the expiration of 180 days from the date of the submission of the closure plan is a violation of Rule I-805-A(3)(a) of the Commonwealth of Puerto Rico Rules for the Control of Hazardous and Nonhazardous Solid Waste (RCHNSW).

Resource Conservation and Recovery Act. -- Civil Penalty -- Failure of EPA or EQB of Puerto Rico to respond to the submission of a partial closure plan within 90 days as provided by the applicable rules constitutes a mitigating factor in the determination of the amount of the civil penalty.

Appearances:

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Counsel for Complainant

ACCELERATED DECISION [1]

of

Honorable Edward B. Finch
Chief Administrative Law Judge

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, (hereinafter RCRA), Section 3008, 42 U.S.C. 6928, for assessment of a civil penalty for alleged violation of the Act, and an order requiring compliance with certain regulatory requirements. [2]

Section 3006(b) of the Act, 42 U.S.C. §6926(b), provides that the Administrator of the U. S. Environmental Protection Agency (EPA) may, if certain criteria are met, authorize a State to operate a hazardous waste program in lieu of the federal program. The Administrator authorized Puerto Rico to operate a program in lieu of the federal program on October 14, 1982. Section 3008 of the Act, 42 U.S.C. §6928, authorizes EPA to enforce the provisions of the authorized State program.

1/ This Accelerated Decision constitutes an Initial Decision, 40 CFR 22.20(b).

2/ Pertinent provisions of Section 3008 are:

> Section 3008(a)(1): "[W]henever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both. . . ."
>
> Section 3008(g): "Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

The Director of the Air and Waste Management Division of the EPA, Region II, Complainant in this proceeding, has determined that Respondent, Millipore Corporation, has violated the Commonwealth of Puerto Rico Public Policy Environmental Act (Law No. 9 of June 18, 1970, as amended, 12 L.P.R.A. §1121 et seq.) and Section 3004 of the Act, 42 U.S.C. §6924 and the regulations promulgated under both statutes. Specifically, Respondent was charged with violation of Rule I-805-A(3)(a) of the Commonwealth of Puerto Rico Rules for the Control of Hazardous and Nonhazardous Solid Waste (hereinafter RCHNSW) which requires the owner or operator to submit a closure plan to the Environmental Quality Board (hereinafter EQB) at least 180 days before the date he expects to begin closure.

The Complaint charged the following:

1. Respondent owns and operates a facililty located at PR 172 KM 7 Bo. Certenejas, Cidra, Puerto Rico.

2. By notification dated December 15, 1983, Respondent informed EPA that it conducts activities at the facility involving "hazardous waste," as that term is defined in Section 1004(5) of RCRA, 42 U.S.C. §6903(5) and in 40 CFR 261.3, which correspond to Commonwealth laws and regulations found at Rule 102 of RCHNSW. By application dated December 15, 1983, Respondent requested a permit to conduct its hazardous waste activities.

3. On or about February 10, 1984, and June 19, 1984, inspections of the facility were conducted by a duly designated respresentative of EPA pursuant to Section 3007 of the Act, 42 U.S.C. §6927. Said inspections were conducted for the purpose of enforcing the EPA regulations for hazardous waste management, 40 CFR Parts 260 through 265 and 270 (published in 45 Fed.

Reg. 33073 et seq. May 19, 1980, and as later amended), promulgated pursuant to Subtitle C of the Act, 42 U.S.C. §6921 et seq. as well as for the purpose of enforcing the corresponding EQB regulations for hazardous waste management, Regulation for the Control of Hazardous and Non-Hazardous Solid Wastes. The above-referenced inspections revealed that the Respondent's facility was being used for the storage of hazardous waste.

4. On or about December 19, 1983, Respondent submitted a Closure Plan to EQB, indicating that closure of the then existing hazardous waste storage facility would be initiated on February 28, 1984 (approximately 40 days after submission of the Closure Plan).

5. On or before May 7, 1984, closure of the old hazardous waste storage facility had been initiated by the shipment of hazardous waste to Servicios Carbareon, by the Respondent (approximately 140 days after submission of the Closure Plan).

6. Rule 805 A.3.a of RCHNSW provides that the owner or operator must submit his Closure Plan to the Board at least 180 days before the date he expects to begin closure. Respondent expected to begin closure approximately forty (40) days after it submitted its Closure Plan to EQB; and did, in fact, begin closure 140 days or less after it submitted its Closure Plan to EQB. Respondent is, therefore, in violation of Rule 805 A.3.a. of RCHNSW.

Respondent's Answer asserts that there was no closure of its facility and, therefore, there was no violation in that the only thing that occurred.

was that the hazardous waste storage area was moved from one location within Respondent's single facility to a different location within the same facility, a change only in the location of the storage shed.

And further, that the closure requirements of RCHNSW do not apply. The fact that Respondent improperly designated its notice as a partial Closure Plan should not be used to penalize Respondent. The December 15, 1983 notice was filed only because the EQB requested it.

And assuming that RCHNSW applies, Respondent asserts that there was no violation because the actual closure took place more than 180 days after the notice was given. The notice was sent to EQB on December 15, 1983 and received on December 19, 1983. The original storage area continued to be used from December 19, 1984 for a period of more than 180 days.

In addition to denying that any violations were committed, Respondent submits that the proposed penalty of $17,500 is grossly exaggerated. The facility in question is used to store solvents and spent oil. It is properly diked and secured. The waste is stored in 55-gallon drums that meet all applicable requirements. The maximum amount of waste stored is about 5,500 gallons. If a violation had occurred, the "Potential for Harm" would be minor, not major and the deviation would be minimal, not moderate.

No hearings were held. Subsequently, Respondent agreed that the partial closure rules did apply and that the closure of the then existing hazardous waste storage area, which is the subject of this action, was begun on or about June 4, 1984. See Stipulation Of Fact By Respondent, dated February 4, 1986, and Complainant's Prehearing Stipulation Of Fact. Both Stipulations were submitted for the record by letter dated February 11, 1986.

Subsequently, Motion For Accelerated Decision And Brief was filed by Complainant dated May 16, 1986 which states "Based on an earlier exchange of Stipulations Of Fact between the parties, the Judge determined the sole remaining issue in this matter is the amount of the penalty to be assessed."

Respondent filed a Reply To Complainant's Motion For Accelerated Decision And Brief in which it does not dispute the fact of the violation charged, but rather directs its remarks to the fact that this case does not warrant a penalty assessment at all or, alternatively, if any penalty is to be ordered, it should be nominal in view of Complainant's actions.

Findings of Fact

1. Millipore Corporation is a corporation organized and existing under the laws of the Commonwealth of Massachusetts. Millipore owns and operates a manufacturing facility located in Cidra, Puerto Rico. Millipore's Cidra facility, EPA RCRA ID #PRD091198366 submitted a part "A" permit application and received interim authorization to store hazardous waste.

2. On November 3, 1983, Millipore's Environmental Consultant, Rafael Cruz Perez, P.E., consulted with Mayra Perez, a representative of the EQB, to obtain advice of the EQB requirements for relocating Millipore's on-site storage area.

3. On or about December 12, 1983, Ms. Perez informed Millipore (through a telephone conversation with Mr. Raphael Cruz Perez) that a partial closure plan would be required.

4. On December 15, 1983, a partial closure plan describing Millipore's proposal for relocating its hazardous waste storage facility was submitted to the EQB. The EQB received this submission on December 19, 1983.

5. On February 15, 1984, Carlos O'Neill, an EPA engineer, inspected the Cidra facility. Mr. O'Neill's inspection concentrated on records and procedures. Mr. O'Neill made no reference to any deficiencies in the partial closure plan.

6. The December 15th partial closure plan had identified February 28, 1984 as the date when Millipore intended to initiate closure of the existing hazardous waste storage facility. The closure of the existing facility did not take place on that date.

7. On May 7, 1984, a regular waste shipment was made from the old hazardous waste storage area. That shipment contained 48 drums of properly labeled and identified hazardous waste. This action constituted the commencement of partial closure of the old facility (140 days).

8. On June 4, 1984, Millipore's new hazardous waste storage facility was completed and put into operation. At this time, hazardous waste was still being stored in the storage area covered by the December 15th submission.

9. On June 19, 1984, the new hazardous waste storage area was inspected by Ms. Lourdes Figueroa, and EQB engineer. No violations were noted during her inspection.

10. On June 25, 1984, all waste from the old facility was transferred to the new storage facility and closure of the old facility was completed.

11. On or about July 11, 1984, the old hazardous waste storage facility was placed into service as a plant carpentry shop.

12. On July 16, 1984, Millipore received EQB's first written response to Millipore's partial closure plan. This was approximately seven (7) months after the partial closure plan was submitted to EQB. By letter, EQB requested

additional information on the cost and storage capacity of the new hazardous waste storage site. By letter dated July 31, 1984, Millipore provided EQB with the requested information.

13. By letter dated August 14, 1984, EQB requested additional information from Millipore Corporation regarding the new hazardous waste storage facility. By letter dated August 27, 1984, Millipore responded to the EQB's August 14, 1984 request.

14. On October 8, 1984, Ms. Ivette De Jesus and Mr. Pedro Velez, EQB engineers, inspected the old and new hazardous waste storage facilities. On June 25, 1985, the U. S. Environmental Protection Agency filed a Complaint, Compliance Order and Notice of Opportunity for Hearing for this case, alleging that Millipore had violated Rule 805A.3.a. of RCHNSW. Rule 805A.3.a of RCHNSW provides that the owner or operator of a hazardous waste facility must submit his Closure Plan to the EQB at least 180 days before the date he expects to begin closure. The Respondent Millipore Corporation filed a timely Answer to the Complaint.

15. Respondent is liable for the assessment of a civil penalty under these facts.

Discussion and Conclusions

Partial Closure.

Respondent states that no violation of the closure requirements has occurred because, "The only thing that has occurred is that the hazardous waste storage area was moved from one location within Respondent's single facility to a different location within the same facility."

Complainant maintains, however, that such a move constitutes a closure pursuant to the definitions of "closure" and "closed portion" found at Part 102 of the Commonwealth Regulations for the Control of Hazardous and Nonhazardous Solid Waste. Those definitions read, as follows:

Closure

"The act of securing a 'solid waste facility' after it or any portion of it has ceased receiving 'solid waste' for 'storage,' 'treatment,' or 'disposal' in order to satisfy the condition of registration and other requirements of this regulation."

Closed Portion

"That portion of a 'solid waste facility' which an 'owner' or 'operator' has closed in accordance with an approved facility closure plan and all applicable closure requirements." (Emphasis added.)

Respondent was unaware of the fact that the closure of a "portion" of a facility requires an approved Closure Plan.

Respondent stated that the old facility continued to be used for a period of more than 180 days after the Closure Plan was received by the EQB.

The amount of time the area was used, however, is irrelevant. Rule 805 A.3.2. of RCHNSW requires that, "The owner or operator must submit his closure plan to the Board at least 180 days before the date he expects to begin closure." (Emphasis added.) The Closure Plan submitted by Respondent on December 15, 1983 (Complainant Exhibit 4) indicates on page 2 that "Closure of the site will be initiated on or about February 15, 1984, and completed February 28, 1984." This statement alone indicates that Respondent expected

to begin closure within a mere sixty (60) days of the date the Closure Plan was submitted. Evidence of admissions by the Respondent that closure actually began and was completed less than 180 days after the Closure Plan was submitted.

Amount of Civil Penalty

Complainant proposes the assessment of a civil penalty in the amount of $17,500 for the violation specified, i.e., violation of Rule 805A.3.a of RCHNSW.

Complainant has submitted a Brief In Support Of The Assessed Penalty which is lengthy, but points up very salient circumstances regarding the Penalty Policy itself and its application to the facts of this case.

The EPA Final RCRA Civil Penalty Policy, issued on May 8, 1984, sets forth the Agency's policy for assessing administrative penalties under RCRA. The purpose of the policy is to assure that RCRA civil penalties are appropriate for the gravity of the violation committed; that economic incentives for noncomplilance with RCRA are eliminated; that persons are deterred from committing RCRA violations; and that compliance is achieved.

The Penalty Policy anticipates, however, that in many cases the fact of a violation will be less of an issue than the amount of penalty. "The burden always is on the violator to justify any mitigation of the assessed penalty. The mitigation, if any, of the penalty assessed in the complaint should follow the guidelines in the adjustment factors section of this document."

The penalty calculation system consists of (1) determining a gravity-based penalty for a particular violation; (2) considering economic benefit of noncompliance where appropriate; and (3) adjusting the penalty for special circumstances. Two factors are considered in determining the gravity-based penalty:

- potential for harm; and
- extent of deviation from a statutory or regulatory requirement.

The Final Penalty Policy provides a matrix which incorporates these two factors to determine the seriousness of a violation.

I. Gravity-Based Penalty

A. Potential For Harm

The first step, then, in determining the proper penalty for Respondent is to correctly categorize the "Potential For Harm" created by Respondent's admitted closure of a hazardous waste area without an EQB approved Closure Plan, less than 180 days after the "partial closure plan" was submitted to the EQB, as required by the regulations.

The potential for harm resulting from any RCRA violation may be determined by:

- the likelihood of exposure to hazardous waste posed by noncompliance; or
- the adverse effect noncompliance has on the statutory or regulatory purposes or procedures for implementing the RCRA program.

For each of the above considerations -- likelihood of exposure and adverse effect on implementing the RCRA program -- the emphasis is placed on the potential harm posed by a violation rather than on whether harm

actually occurred. The Penalty Policy clearly states, "The presence or absence of direct harm in a non-compliance situation is something over which the violator may have no control. Such violators should not be rewarded by assessing lower penalties when the violations do not result in actual harm."

The issue to determine in assessing Respondent's illegal closure is not whether exposure occurred from such closing, but rather the potential harm created by closing outside the prescribed regulatory procedures. As stated by Judge Thomas Yost in In Re Remelt Metals, Inc., Docket No. RCRA-VIII-81-10, January 7, 1983, at page 8, "As I mentioned in my Accelerated Decision, the intention clearly expressed in the draft penalty policy states that a violator is not to be rewarded for luck where no actual harm can be proven to have occurred as a result of the violation."

While the possible likelihood of exposure occurring from illegal closures is considered, the types and quantity of waste involved are also factors relevant to the assessment of the likelihood of exposure. The "partial closure plan" submitted by Respondent on December 15, 1983 and introduced into the record by Respondent as "Exhibit #1" in its November 15, 1985 Prehearing Exchange package, notes in Table 1 of that document that the waste inventory at closure was 50 drums of waste lacquer base or laquer chips and plastic (EPA #U001); five (5) drums of Waste Solvents (EPA #U001); and forty-five (45) drums of spent oil (EPA #U001). This partial closure plan also indicates that it is estimated that two drums of water wash and two drums of alcohol solvent wash will also be generated from the closing.

The amount and type of hazardous waste involved in the closure combined with the potential effects on the environment which may result from an unapproved, illegal closure of the hazardous waste storage area clearly indicate a "Major" likelihood of exposure for this violation.

B. Adverse Effect On Regulatory Purpose And Procedure

Even though the previous discussion of the "Major" likelihood of exposure is sufficient to determine that a "Major" potential for harm existed at the facility, the adverse effect on regulatory purpose and procedure only adds to the "Major" potential for harm which was created as a result of this particular violation. The potential for harm resulting from Respondent's closure without an approved Closure Plan is classified as "Major" because of its substantial adverse effect on the regulatory purposes and procedures for implementing the RCRA program. Respondent, through its illegal closure, has succeeded in bypassing the entire closure procedure required by the regulations. These avoided procedures include Agency comment and supervision over such details as systems and devices necessary for protection of groundwater, equipment decontamination procedures, a schedule of closure and the final closure tracking dates. Respondent's illegal closure has also effectively precluded the EQB from publishing the required public notice of the anticipated closure in order to solicit public comments, as provided by the regulations.

Closure or partial closure of any hazardous waste facility without an approved Closure Plan successfully avoids the entire regulatory procedure for closure and, thus, clearly has a substantial adverse effect on the regulatory procedures for implementing closures.

Although the Penalty Policy mandates a classification of "Major" for either a substantial likelihood of exposure or a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the RCRA program, this case presents both. Classification of a "Major" "Potential For Harm" is clearly mandated by the above-described circumstances surrounding this violation.

II. Extent Of Deviation From Requirement

Having found a "Major" potential for harm, the "Extent of Deviation" from the RCRA regulatory requirements is the second major factor to be considered on the Penalty Matrix and relates to the degree to which the violation renders inoperative the requirement violated. Noting that in any violative situation, a range of potential noncompliance with the subject requirements exists, the Penalty Policy recognizes that a violator may be substantially in compliance with the provisions of the requirement or it may have totally disregarded the requirement (or a point in between). As with potential for harm, extent of deviation may be classified either as "Major," "Moderate," or "Minor." The "Moderate" classification is assigned to the extent of deviation by the Respondent in this violation.

A "Moderate" extent of deviation is defined by the Penalty Policy as a significant deviation from the requirements of the regulation, but some of the requirements are implemented as intended. This "Moderate" classification is applicable to the Respondent because of its submittal of a partial closure plan on December 19, 1983. At least the EQB had some notice of the Respondent's intention to close its hazardous waste area before the illegal closure occurred.

III. Employing The Matrix And Adjustment Factors

Having determined that the "Potential For Harm" is "Major" and the "Extent Of Deviation" is "Moderate," these two classifications can be plugged into the Matrix. The resulting penalty derived from the Matrix falls in the range from $19,999 to $15,000. The mid-range of these choices was determined to be appropriate for Respondent's violation because of the absence of any highly unusual circumstances which would warrant a selection of either the high range of $19,999 or the lower range of $15,000.

Complainant further avers that from the Stipulation Of Facts entered, it appears Respondent may attempt to allege that downward adjustments may be appropriate based on "Good Faith Efforts To Comply," "Degree Of Willfulness," or "Other Unique Factors." However, despite the several contacts with EQB, admitted in the Stipulation Of Facts, between the date of submission of the Closure Plan (December 15, 1983) and the admitted date closure began (June 4, 1984), no evidence of Respondent inquiring as to the status of approval of its Closure Plan is entered into the record in this matter. And, in fact, no such inquiries were made. Inquiries of this type would have at least indicated some effort to comply and may have resulted in a downward adjustment of the penalty. However, no such attempts were made and, therefore, no such adjustments were or are appropriate.

Furthermore, Respondent has offered, since the issuance of the Complaint, no evidence or even the technical sufficiency of the illegal closure. For example, the Respondent has still made no attempt to submit to the Board a certification of closure prepared by a professional engineer licensed to

practice in Puerto Rico, confirming that the facility has been closed in accordance with the regulations, as required by Rule I-805-A(8) of RCHNSW. None of the factors involved in this matter merit downward adjustments of the penalty. The several contacts with EQB, as demonstrated in the Stipulation Of Facts, related to an expansion of the facility and not the status of the approval of the Closure Plan. No such evidence has been entered into the record in this matter.

Complainant concludes that it has been demonstrated, based on the "Major" potential for harm and the "Moderate" extent of deviation involved in Respondent's illegal closure of its hazardous waste storage area, that the penalty matrix appropriately yields a penalty figure in the range of $19,999 to $15,000.

Despite its several contacts with EQB, Respondent never inquired as to the status of the approval of its Closure Plan, nor encouraged such approval prior to closure of the facility. Had such contacts been made, such adjustments for good faith efforts to comply may have been applicable. On the contrary, the Respondent has failed to introduce any evidence as to the technical adequacy of its closure through the submission of a certification of a professional engineer, as required by the regulations. And, has failed to introduce any evidence into the record which would meet the Respondent's burden of justifying any mitigation of the assessed penalty.

Respondent, in addressing the amount of the penalty, in addition to its good faith efforts, raises a critical point in the series of events leading up to the instant Complaint and proposed civil penalty assessment, that point being that the EQB did not even respond to Respondent's initial submission of its Closure Plan for seven months after December 19, 1983, approximately

210 days, when the rules require some response within 90 days. The rule reads, as follows:

Rule I-805-A(3)(a) of RCHNSW provides in relevant part:

"3. Closure plans must be submitted and amended as follows:

a. The owner or operator must submit his closure plan to the board at least 180 days before the date he expects to begin closure. The Board will modify, approve, or disapprove the plan within ninety (90) days of receipt and after providing the owner or operator and the affected public (through a newspaper notice the opportunity to submit written comments.

b. The owner or operator may amend his closure plan at any time during the active life of the facility. . . ."

(Emphasis added by Respondent.) See also 40 CFR 265.112(c) and (d).

Thus, Complainant's own rules required more than simple receipt and inert follow-up of Respondent's Plan. Complainant was obligated to act upon receipt of the Plan.

Respondent has replied in detail to Complainant's statements on the Penalty Policy. Respondent asserts that by choosing to ignore facts that would mitigate against the basic penalty, Complainant has accomplished precisely what the Penalty Policy is intended to avoid -- an unreasonable penalty, totally unsupported by the facts.

At the outset, Respondent respectfully reminds the Court that it is not constrained to apply the EPA Penalty Policy at all. But, the Penalty Policy does present a reasonable and workable basis for determining a penalty and, if applied, based upon all of the facts of this case, could yield a fair and just result.

For the purposes of this Complaint, Complainant believes that it has reasonably applied the "Potential For Harm" and "Extent Of Deviation" components of the EPA Penalty Policy to the facts of this case. To leave the penalty assessment at that point without adequate consideration of the mitigating factors would result in a distorted application of the Penalty Policy.

Complainant has stated that it could have made an upward adjustment of the penalty in view of the economic benefit that Respondent received from noncompliance.

The truth is that Respondent received no economic benefit from its alleged violation. Costs incurred by Respondent in closing the former hazardous waste storage facility are the same costs that would have been incurred even if the 180 days limitation had been followed. Any notion that Respondent has received an economic benefit is illusory.

Complainant pays little regard to Respondent's initial and continuing efforts to comply with the regulatory requirements. Respondent respectfully disagrees. It is difficult to question the motives or good faith efforts of Respondent when its primary objective in relocating the hazardous waste storage facility was to provide an environmentally safer atmosphere for the storage of its hazardous waste. Obviously, there was no willfullness on Respondent's part to deliberately violate the hazardous waste regulations. Respondent's record of regulatory compliance supports this conclusion. For example, a review of Respondent's submissions to Complainant since the inception of the RCRA "cradle to grave" regulatory system will show that Respondent complied in a timely fashion with all reporting obligations of

that system including the annual financial requirement for liability and closure assurance.

The facts of this case and the actions of Respondent can only lead to one reasonable conclusion: That Respondent was prepared to comply with all applicable regulations.

Complainant suggests that Respondent's efforts to exhibit good faith should be discounted against the fact that Respondent never followed-up with the EQB on its original submission. Respondent submits that this is an attempt by Complainant to excuse its own failure to respond to the partial closure plan in a timely fashion as required by its own regulations. See Rule, supra.

For the regulatory system to function properly, there must be a meaningful exchange between the regulator and the regulated community. The regulatory system was not designed to work and, at best, is only marginally effective when the regulated community receives little or, as in this instance, no feedback from the regulator.

In this particular case, EQB, upon review of the partial closure plan should have contacted Respondent and brought the potential violation to the attention of Respondent. EQB did not notify Respondent of this violation until months after the Plan's submission, well beyond the time when any corrective action could have been taken. Respondent asserts that this type of action (or inaction) cannot be condoned. Respondent submitted its Plan in good faith and expected EQB to comment on it in a timely fashion.

What happened in this case can be summarized, as follows:

Respondent submitted a defective but curable Partial Closure Plan. Complainant received the Plan, detected the potential violation and, for some reason, did not notify Respondent in a timely manner.

On this set of facts, neither party is absolutely blameless.

Thus, to complete the exercise that Complainant started, respecting the penalty calculation, we must include downward adjustments for good faith, lack of willfullness, and unique factors.

Complainant is correct that Respondent has not submitted a Certificate of Closure. That does not mean, however, that Respondent is not prepared to do so. Since Complainant has chosen to pursue enforcement as its method for resolving this dispute, Respondent has decided to await the conclusion of these enforcement proceedings before it attempts any further administrative efforts concerning the Plan.

It is concluded that the proposed penalty of $17,500 should be reduced. Complainant has assigned the "Potential For Harm" as "Major" with the "Extent Of Deviation From Requirement" as "Moderate," with no Penalty Adjustments for "Good Faith," "Degree Of Willfullness And/or Negligence," "History Of Compliance," or "Other Unique Factors."

It is difficult for the Court to understand the reasoning in the Complaint for the major potential for harm. There does not appear in the record any evidence to justify a substantial or even signifcant likelihood of exposure to hazardous waste. Respondent did submit a plan, even though defective, which served as notice to EQB of its plans. EQB inspectors were on the premises on several occasions and found everything in order, even to the point of the

waste being stored properly in drums, diked, and in an approved waste facility. The action of Respondent, and possibly the inaction of EQB, have or may have a substantial adverse effect on the statutory or regulatory purposes or procedures for implementing the RCRA program.

There is no question that good faith is evident by Respondent; there is no willfullness and no previous history. These factors were not considered by Complainant in a determination of the amount of the civil penalty, but these are factors which the Court is permitted in its discretion to notice when assessing a civil penalty. The Court concludes, therefore, that the actions of Respondent are "Minor" for "Potential For Harm," and "Major" for "Extent Of Deviation From Requirement," resulting in a penalty of $2,500. The Penalty Policy also states that, ". . . Provision for this low range of penalties has been made because the assessment of low penalties has proven to be an effective compliance tool. . . ."

O R D E R [3/]

Pursuant to the Solid Waste Disposal Act, as amended §3008, 42 U.S.C. 6928, the following order is entered against Respondent Millipore Corporation:

I. (a.) A civil penalty of $2,500 is assessed against Respondent for violations of the Solid Waste Disposal Act found herein.

3/ Unless an appeal is taken pursuant to the Rules of Practice, 40 CFR 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. See 40 CFR 22.27(c).

(b.) Payment of the civil penalty shall be made by submitting a certified or cashier's check payable to the United States of America and mailed to:

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

Payment shall be made within sixty (60) days of the service of the final order unless prior thereto, upon application by Respondent, the Regional Administrator approves a delayed payment schedule or an installment plan, with interest, in which case payment shall be made according to said schedule or installment plan.

II. The following compliance order is entered against Respondent. Respondent shall, within thirty (30) days of receipt of this Order, submit to U. S. EPA and EQB, a certification of closure prepared by a professional engineer licensed to practice in Puerto Rico, confirming that the hazardous waste storage area, which is the subject of this Complaint, has been closed in accordance with the requirements of Rule 805 A of RCHNSW. Said certification shall specfically include, but not be limited to, a detailed chronology and explanation of how each requirement was satisfied, pursuant to Rule 805 A of RCHNSW.

It is so ordered.

Edward B. Finch

Edward B. Finch
Chief Administrative Law Judge

Dated: July 30, 1986
Washington, D. C.

CERTIFICATION

I hereby certify that the original of this Accelerated Decision was hand-delivered to the Hearing Clerk, U. S. EPA Headquarters, and three copies were sent by certified mail, return receipt requested, to the Regional Hearing Clerk, U. S. EPA, Region II, for distribution in accordance with 40 CFR 22.27(a).

Leanne B. Boisvert
Leanne B. Boisvert
Legal Staff Assistant

Dated: July 30, 1986