3/10/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:		
Grumman St. Augustine Corp.,		Docket No.: 87-18-R
Respondent.		**INITIAL DECISION**

1. RCRA-Violations: Where the record demonstrates that the Respondent admits the facts upon which the violations are based and attempts to defend such acts based upon clearly erroneous interpretations of the statute and regulations, finding of violations as alleged in the Complaint must be found.

2. RCRA-Penalty Calculations: Where a history of similar violations exist and Respondent's actions are found to be based upon reliance upon out-dated statutes and regulations evidencing a total ignorance of the requirements of the law and regulations, an upward adjustment of the base penalty is warranted.

3. RCRA-Penalty Calculations: Where the violations continue over an extended period of time during which no remedial action was performed by the Respondent, the imposition of an "economic benefit" adjustment is justified.

4. RCRA-Penalty Calculations: All of the above is especially true where, as here, we are dealing with a large sophisticated national corporation which should be intimately informed as to the law and regulations which govern it's handling of hazardous wastes.

APPEARANCES:

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Also Present: Mr. Anthony S. Able
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This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, (hereinafter RCRA), Section 3008, 42 USC 6928 (Supp. IV 1980), for the assessment of a civil penalty for alleged violations of the requirement of the Act and for an order directing compliance with those requirements. This proceeding was instituted by a Complaint and Compliance Order against Grumman St. Augustine Corporation (hereinafter Grumman or Respondent) issued by the United States Environmental Protection Agency, Region IV (hereinafter EPA or the Agency) on December 31, 1987.

The Respondent, Grumman St. Augustine Corporation, is a corporation organized and existing under the laws of the State of Florida with a principal place of business at US 1 North, St.

Augustine, Florida. The Respondent is a contractor with the U.S. Government involving the modification, structural repair, design and overhaul of military aircraft. The Respondent built a waste treatment facility at its plant in 1982 to treat and dispose of wastewater generated from the removal of paint from the aircraft which it repairs and overhauls. The major constituent of the paint stripper used in the removal of paint from the aircraft is methylene chloride. The wastewater from the stripping process is treated in one or more of the three (3) 6,000 gallon tanks by lowering the ph. The wastewater is then pumped into an aeration stream in the center of percolation pond. During the period from January 30, 1986, through September 30, 1987, the Respondent used in its operation of its facility, mixtures which contained 10% or more by volume of methylene chloride before use. The State of Florida is not authorized to administer the Hazardous Solid Waste Amendments of 1984 (HSWA). On April 30, 1985, EPA published a proposed rule change to expand the universe of regulated organic solvent mixtures. The effect of this proposal was to bring previously unregulated spent solvent mixtures under the purview of RCRA Subtitle C control. On December 31, 1985, EPA published a final rule announcing that the rule was to become effective 30 days after publication. Among the organic solvent mixtures that became regulated effective January 30, 1986, were mixtures of which contained 10% or more by volume of methylene chloride

before use. The Respondent did not submit a Part A Application by January 30, 1986. On February 19, 1986, an EPA inspection of Respondent's facility revealed Respondent was generating F002 and disposing it in a percolation pond without obtaining interim status. A Complaint and Compliance Order was issued against Respondent on May 22, 1986, as a result of the EPA inspection. The Respondent, Grumman St. Augustine Corporation and the EPA entered into a Consent Agreement and Final Order on November 12, 1986. Nothing contained in the Consent Agreement and Final Order issued would suggest that the Respondent's were excused from complying with any future statutory or regulatory requirements. Pursuant to the terms of the above-mentioned Consent Agreement and Final Order the Respondent was required to submit a groundwater quality assessment plan by May 28, 1987. The groundwater quality assessment plan was not submitted until August 5, 1987. The groundwater quality assessment plan submitted by the Respondent was according to EPA witnesses seriously deficient and inadequate when measured against the requirements of the regulations.

Although it was suggested by the Respondent that the EPA had granted to it an extension of time in which to submit the groundwater quality assessment plan, the record before me, in its entirety, suggests that this was not the case. The CAFO, hereinabove referred to as the Consent Agreement and Final Order, also

required the Respondent to submit a closure plan which it did on January 29, 1987, which, however, was seriously inadequate. The second closure plan submitted by the Respondent was according to EPA witnesses also seriously inadequate. Additionally the Respondent's third submittal of a closure plan was likewise seriously inadequate according to the EPA witnesses. The Agency alleges that as of August 25, 1988, the Respondent had not submitted an adequate closure plan. Additionally the Respondent has never filed for a final determination regarding the issuance of a permit commonly referred to as a Part B Application. Additionally the Respondent did not certify by January 30, 1987, that its facility was in compliance with all applicable ground-water monitoring and financial responsibility requirements.

The Complaint alleges that the Respondent did not submit a Part A Application by January 30, 1986, as required by the regulations for its surface impoundment and was therefore operating a hazardous waste management facility without interim status or a permit. The regulations however make such a entity as the Respondent subject to all 40 CFR Part 265 Interim Status Standards as required by 40 CFR Section 265.1(b). The February 19, 1986, inspection conducted by EPA of the Respondent's facility revealed that the Respondent had stored and disposed of F002 listed hazardous waste since January 30, 1986, in a surface impoundment without interim status or a permit. The above-

mentioned CAFO required the Respondent to implement a sampling plan designed to fulfill the requirements contained in 40 CFR Section 265.92(c)(1) and the sampling was to be completed and sent to EPA by January 30, 1987. The Respondent did not, however, certify compliance with the groundwater monitoring and financial responsibility requirements and did not submit a final permit application by the required date of January 30, 1987. The Complaint alleges therefore that Respondent's continued use of the hazardous waste surface impoundment beyond January 30, 1987, was in violation of Section 3005(e)(3) of RCRA.

On May 5, 1987, during an EPA comprehensive groundwater monitoring evaluation inspection, the EPA contractor Camp, Dresser and McKee personnel observed Respondent's continuing discharge into the impoundment. An employee of the Respondent advised EPA on July 8, 1987, that Grumman was continuing to discharge F002 listed hazardous wastes into an on-site surface impoundment without an operating permit. On October 8, 1987, EPA received a letter from Respondent stating that the surface impoundment had been taken out of operation on September 30, 1987, 246 days past the statutory deadline of January 30, 1987. The 1986 Consent Agreement required that the Respondent, pursuant to the requirements of 40 CFR Section 265 Subpart G, submit closure and post closure plans within 60 days of November 12, 1986. The Respondent did not adequately fulfill the requirements

within 60 days and therefore the Agency has charged the Respondent with violating the 1986 Consent Order and Section 3008(c) of RCRA.

40 CFR Section 265.93(d)(2) requires that within 15 days after the notification of significant change in the groundwater contamination parameters, the owner or operator must develop and submit to the Regional Administrator a specific plan for groundwater quality assessment at the facility. The Respondent notified EPA of the presence of groundwater contamination emanating from its percolation pond on or about March 2, 1987. The groundwater quality assessment plan was, however, not submitted to EPA until August 6, 1987, approximately 157 days after notification of the contamination to EPA. The Complaint therefore alleges that the Respondent's failure to implement the provisions of the above-cited regulation in a timely manner constitutes a violation of the regulation the 1986 Consent Order and Section 3008(c) of RCRA. In as much as the groundwater quality assessment program was not instituted in a timely manner the Respondent failed to determine the rate and extent of migration or concentration of the hazardous waste or hazardous waste constituents as required by regulation and therefore constitutes a violation of the regulation, the 1986 Consent Order and Section 3008(c) of RCRA. For these violations the Complaint proposed to assess a civil penalty of $137,751.00 against the Respondent, Grumman St.

Augustine Corporation.

In its Answer the Respondent essentially admitted the facts contained in the Complaint but argued that the provisions of RCRA, which the Agency suggested they violated, do not apply to it and that it had valid legal reasons for the violations as alleged and that they were not therefore guilty of violating the provisions of the regulations and RCRA as alleged in the Complaint.

Shortly before the hearing in this matter the Agency filed a Motion for an Accelerated Decision in its favor as to the culpability of the Respondent for the violations alleged and argued that the only matter left for decision was the amount of the civil penalty to be assessed. In as much as this motion was filed very close to the date for the hearing, the Motion was initially denied and the Court decided that, given the complex nature of the Respondent's defenses alleged in its Answer, it would be better to proceed with the hearing so the Court could understand precisely the nature of the Respondent's defenses to the allegations contained in the Complaint.

The hearing in this matter was held on August 24, 25 and 30, 1988, and following that hearing the parties filed initial and reply briefs and proposed findings of facts and conclusions of law which have been carefully considered by the Court in making its decision herein.

DISCUSSION

A most charitable description of the Respondent's defenses and arguments to support their actions in this matter could possibly be "disingenuous", "quaint" or "creative" were it not for the fact that they are propounded by a major national corporation which in this matter has exhibited an almost unbelievable lack of understanding or information about the federal laws and regulations that control the conduct of those who are engaged in the handling of hazardous waste.

One of the Respondent's more interesting arguments is that it is impossible for it to have violated the regulations concerning those who enjoy the position called interim status since they never obtained that position they therefore are not subject to the regulations which apply to such persons. This rather bizarre argument would lead one to the conclusion that it was Congress' intent to somehow confer special status on those who have elected to ignore or violate the requirements of RCRA and its regulations to the extent that they are excused therefore from any allegation that they violated such rules. Merely to express the argument is at the same time to dismiss it.

As any student of the history of RCRA ia aware, one of the purposes of the creation of interim status was to allow continued operation of those existing hazardous waste facilities, which due to the lengthy permitting process involved, have applications

pending but have not yet received final RCRA permits. Congress, in its infinite wisdom, recognizing the all too familiar bureaucratic red tape that is associated with any major federal undertaking allowed for the existence of a state called interim status which prevented persons who were engaged in the handling of hazardous waste from being totally unregulated while the federal agency involved had gathered sufficient information and data about the facilities operations so as to issue them a permit which reflected with some accuracy the activities that entity was involved in regarding handling of hazardous waste. This statutory scheme also allowed facilities to legally operate, pending the issuance of a final permit. The original version of this statute allowed the Agency to wait until it had generated sufficient data and information concerning a facility before it sent out a "call-in order" requiring the facility to submit its Part B application. The Part B application was a document which required the facility to describe in much greater detail than it ever had before, the exact nature and quality of the operations being carried on at its facility. Congress became aware that this process of calling-in the Part B applications was taking too much time and therefore it amended the Act and put therein statutory deadlines upon which all Part A applicants and those who enjoyed interim status to have such status terminated by act of statute if they had not by that date filed with EPA or its

authorized States a Part B application. This amendment is sometimes referred to as LOIS or loss of interim status. In furtherance of that notion the EPA promulgated detailed regulations appearing in 40 CFR Part 265 which set forth the obligations and responsibilities of those who had been granted interim status in order to continue to operate legally pending the application for and processing of their final or Part B permit application. A reading of the law and the regulations promulgated pursuant thereto make it very clear that the interim status regulations apply with equal vigor to those who have obtained interim status by the filings called for in the regulations and statutes as well as those who, through ignorance, inadvertence or disdain had failed to obtain such status. This situation is made abundantly clear by the language of 40 CFR Section 265.1(b) which states in part that:

> The standards of this Part apply to owners and operators of facilities that treat, store or dispose of hazardous waste who have fully complied with the requirements for interim status. . . and to those owners and operators of facilities in existence on November 19, 1980, who have failed to file timely notification . . . and/or failed to file Part A of the permit application [i.e., have failed to achieve interim status]. . .

In this case it is clear that upon the date specified in the regulations when the Agency expanded the universe of organic solvents to include methylene chloride, which the Respondent in this case uses, were required by the language of the regulations

to apply for an interim status permit within the time specified by the statute and regulations. When an EPA inspection revealed that the Respondent had failed to do this and was, in fact, operating a hazardous waste management facility without having first applied for a permit therefore the first Complaint and Compliance Order in this matter was issued. As indicated above, this Complaint resulted in the issuance and execution by the parties of a settlement document referred to as a Consent Agreement and Final Order or as it is referred to, a CAFO. The effect of the execution by the parties of this CAFO made it very clear to the Respondent that it was bound by the interim status regulations contained in 40 CFR Part 265 and specifically called for the Respondent to immediately proceed to take certain steps which would place it in conformity with the statute and regulations. The two (2) requirements specifically referred to in the Consent Order was the development and operation of a groundwater monitoring system in accordance with the requirements of the regulations and to certify the financial responsibility requirements as required by the Act. The failure of the Respondent to complete the required activities and submit proof thereof to the Agency on or before January 30, 1987, was a clear violation of Section 3005(e)(3) or the Act.

In its Answer, the Respondent also argued that since the Agency was required by statute to give it a six (6) months notice

of the Part B application and that EPA failed to do so. Therefore its failure to apply for a final permit cannot be a violation.

In support of the Respondent's argument its cites 40 CFR Section 270.10(e)(4) which states in pertinent part:

> Any owner or operator shall be allowed at least six (6) months from the date of request to submit Part B of the application. Any owner or operator of an existing HWM facility may voluntarily submit Part B of the application at any time. Notwithstanding the above, any owner or operator of an existing HWM facility must submit a Part B permit application in accordance with the dates specified in Section 270.73. Any owner or operator of a land disposal facility in existence on the effective date of statutory or regulatory amendments under this Act that render the facility subject to the requirement to have a RCRA permit must submit a Part B application in accordance with the dates specified in Section 270.73. (Emphasis added).

The Agency argues that the reliance by the Respondent on the language of this regulation is misplaced since the six (6) months requirement only applies to those facilities which have been ordered to submit a Part B application. In this case the record is clear that the Respondent was never asked by EPA to submit a Part B application and therefore it is subject to the regulations that apply another deadline in accordance with the congressional language in the regulations cited above. Apparently the Respondent, relying as it did, on outdated regulations and statutes was not aware of the new regulations that state in 40 CFR Section 270.73(d) that the deadline applicable to persons like the Respondent who became subject to the Act by regulatory or statutory

changes required the Part B application to be submitted one (1) year from the date on which it first became subject to the Act's requirements which in this case was January 30, 1986. Therefore the Respondent was required to submit such application by January 30, 1987, or it, by operation of law, lost its interim status and the continuing management of hazardous waste after that date became illegal.

Another intriguing defense offered by the Respondent in this case was that since the November 12, 1986, Consent Agreement and Final Order did not specifically require the Respondent to do that which the regulations and statute required, it was therefore excused from taking such steps and continued to operate on the notion that is was operating pursuant to the terms of the CAFO in addition to a permit issued to it by the State of Florida. It is the Respondent's position that the purpose of the CAFO was not only to address past violations but also operated prospectively to somehow excuse the Respondent from complying with other regulations and statutory requirements that might become applicable in the future. This argument is as illogical as the one just previously discussed. It was the uncontroverted testimony of several Agency witnesses including the one who had prepared the language of the CAFO in question that the purpose of the November 12, 1986, CAFO was to correct violations that existed at the time of the inspection and that future deadlines were not something

that EPA ever would address in a CAFO and to suggest otherwise is contrary to fundamental tenants of law and regulatory enforcement. In this regard see United States of America vs. Alegan Metal Finishing Company, Number K 86-441-CA4 (Western District of Michigan June 6, 1988). The illogic of the Respondent's position in this matter is amplified by the fact that the Agency, on several occasions both by phone and by letter, specifically warned the Respondent that it must comply with Section 3005(e)(3) of RCRA.

Based on the above-discussion, I am of the opinion that the argument proffered by the Respondent in this case which suggests that the language of the CAFO excused it from having to abide by other statutory or regulatory requirements, is rejected.

As noted above the Respondent also argues that it was legally operating its facility in reliance upon a temporary operating permit issued to it by the State of Florida. Specifically, the Respondent argues that a letter dated April 3, 1987, from the Florida Department of Environmental Regulation referring to a State Consent Order gave permission to operate until November 8, 1988.

The pertinent part of that letter states:

> after the above referenced Consent Order was executed, EPA determined that land disposal restrictions of F002 waste do not currently effect Grumman St. Augustine Corporation. Hence, this facility may qualify for a temporary operating permit (TOP) for operation of the surface impoundment until November 8, 1988, per current

State regulations.

This letter is identified as Respondent's exhibit number 8.

The Agency's response to this allegation of defense is essentially that the argument is irrelevant to the present case. They state that it is relevant only as to the State Consent Order and State regulations. The Respondent's own witness, a State regulatory employee, verifies that the letter refers to State regulations only. Section 3005(e)(3) of RCRA which the Respondent is arguing it was justified in ignoring is a HSWA provision which the State is not authorized to enforce. The Respondent's position in this matter is rendered even more blurry by the fact that in it's Answer it had admitted that the State had no authority to administer the provisions of HSWA but that somehow it was the duty of EPA to advise it that it was liable for violations of those provisions of RCRA. Obviously the Respondent's confusion and misunderstanding of the law and regulations, which unfortunately pervades its whole posture in this matter, cannot be an excuse for a violation of the clear language of the statute.

It should also be noted that the above-quoted April 1987 letter applies only to the limited issue of whether the F002 discharge is subject to land ban as pertaining to a State Consent Order, not whether the Respondent can disregard other applicable laws and regulations.

It is therefore my opinion that the defense proffered by the Respondent in this instance is devoid of any merit and must be disregarded.

Another defense raised by the Respondent was that it is exempt from EPA regulation pursuant to the language of 40 CFR Section 265.1. The particular portion of that regulation upon which the Respondent relies is contained in Section 265.1(c)(4) which provides an exemption for

> A person who treats, stores, or disposes of hazardous waste in a State with a RCRA Hazardous Waste Program authorized under Subpart A or B of Part 271 of this Chapter, except that the requirement of this part will continue to apply: . . .

The inapplicability of this regulatory statement is demonstrated by further reading of the same regulation contained in Subpart II of Subsection 4 which states that

> there is no exemption to a person who treats, stores, or disposes of hazardous waste in a state authorized facility under Subpart A or B of part 271 of this Chapter if the state has not authorized to carry out the requirements and prohibitions applicable to the treatment, storage, or disposal of hazardous waste at his facility which are imposed pursuant to the Hazardous and Solid Waste Act amendments of 1984. The requirements and prohibition that are applicable until the state receives authorization to carry them out include all federal program requirements identified in Section 271.1(j) . . .

Since the State of Florida has not yet been authorized to enforce the provisions of HSWA the claim of exemption pursuant to the above-quoted Section is not applicable to it and therefore this argument and defense must also be disregarded.

The Respondent also argues that it's activities are exempt from the provisions of RCRA by virtue of the language contained in 40 CFR Section 261.4 which indicates the existence of an exemption for "industrial wastewater discharges that are point source discharges subject to regulation under Section 402 of Clean Water Act as amended."

The Respondent in quoting the above regulation fails to mention "point source discharges". The exclusion in the above-quoted regulation clearly only applies to point source discharges. This is made additional clear by reference to the comment which is appended to that regulation which states that this exclusion applies only to the actual point source discharge and does not exclude industrial wastewaters while they are being collected, stored, or treated before discharge nor does it exclude sludges that are generated by industrial wastewater treatment.

As mentioned above in the brief discussion of the Respondent's facility, it is clear that the discharge by the Respondent to a percolation pond which is unlined and is based in a sand type soil cannot, by any stretch of the imagination, be considered a point source discharge. Not only is the Respondent's percolation pond not a point source discharge it is also not a facility that is operated pursuant to a permit issued under Section 402 of the Clean Water Act. This is true because the

State of Florida has not been authorized under the Clean Water Act to operate its own national disposal elimination permit system and the issuance of a state permit to the Respondent's is not a permit issued under the Federal Clean Water Act but rather purely a state authorized permit issuance. Once again the Respondent's ignorance of the applicable federal laws regarding the environment were aptly demonstrated in this portion of it's testimony wherein the Court asked the Respondent's National Environmental Director whether he was familiar with the term "authorized state" as it applies to the Clean Water Act and he expressed ignorance or that phrase and apparently was also not aware of the fact that not all states in the United States have been given authorization to implement and enforce the Clean Water Act. It should be noted that this witness was not an employee of the Grumman St. Augustine Corporation but was in fact an employee of the national Grumman Company of which Grumman St. Augustine is a wholly owned subsidiary. Therefore the argument that the Respondent's operations were exempt from the effects of RCRA based on the issuance of a state water control permit are clearly not applicable and must be disregarded in their entirety.

On the morning of the commencement of this hearing the Respondent raised for the first time a defense that it was exempt from regulation by virtue of the language of 40 CFR Section 261.3(a)(1)(iv). That regulation states in essence that certain

mixtures of solid waste and hazardous waste are not considered hazardous waste if the generator can demonstrate the mixture consists of wastewater, the discharge of which is subject to regulations under either Section 402 or Section 3067(b) of the Clean Water Act or in regard to certain spent solvents one of which being methylene chloride which are discharged into the head works of the facilities wastewater pretreatment system in a concentration which does not exceed 25 ppm. As discussed above in order for the Respondent to avail itself of this exemption it must show that it is the subject of Section 402 or 3067(b) of the Clean Water Act. As discussed above this facility is not subject to either of those Sections of the Clean Water Act and are only operating under a state permit issued by the State of Florida and not under the provisions of the federal water act. It was also testified by an EPA expert witness that at the time in question the wastewater discharge was not made into a publicly owned treatment works as required by Section 307(b) of the Act.

Since the Respondent's percolation pond is clearly not subject to regulation under any provision of the Clean Water Act it is not entitled to an exemption pursuant to the above-cited regulations contained in 40 CFR Part 261.3.

As to the other portion of the Respondent's argument that it's discharge to the pond is below 25 ppb this assertion was demonstrated to be likewise unavailable to the Respondent since

the expert proffered by the Respondent on this subject who made calculations which showed that the discharge was less than 25 ppm was completely unaware of a statutory rule which sets forth the proper formula for making such calculations. Once again the Respondent demonstrated a total ignorance of the appropriate and pertinent regulations and expressed great surprise when the witness was advised that the proper formula does not allow for dilution and that, therefore, his calculations in this regard was completely erroneous. When the calculation is done properly as it was by an EPA witness the resulting figure turned out to be much higher than 25 ppm and therefore the Respondent was not able to meet any of the pre-conditions for an exemption as set forth in 40 CFR Part 261.3. I am therefore of the opinion that these defenses are likewise not viable and must be dismissed and disregarded by the Court.

Since all of the defenses proffered by the Respondent in regard to this violation have been demonstrated to be inaccurate and inapplicable to this case the failure of the Respondent to certify compliance with groundwater monitoring and financial responsibility requirements and failure to file a final Part B application by January 30, 1987, as a matter of law amount to a violation of Section 3005(e)(3) of RCRA. It is also uncontroverted that Respondent continued to operate the percolation pond 242 days after it was required to terminate operations pursuant

to the above-cited Section of RCRA.

The Complaint additionally charges the Respondent with violation of the November 12, 1986, CAFO. Specifically, at issue in the present action this Respondent's violation of paragraphs 5 and 6 of the Final Order which state as follows:

> (5) Respondent shall fulfill the requirements contained 40 CFR Section 265 Subpart G within 60 days of the effective date of this order.
>
> (6) Respondent shall comply with all other applicable provisions of 40 CFR Part 265 within 30 days of the effective date of this order.

The above-quoted paragraphs refers to the closure and post-closure requirements of Section 265 Subpart G. Although the Complainant could have considered the Respondent's failure to comply with this paragraph of the CAFO as a separate violation and calculate separate penalties based thereon, it decided to use the Respondent's submittal of seriously inadequate closure plans as factors in assessing upward adjustments of the penalty as well as in the extent of deviation from compliance with Section 3005 (e)(3) of RCRA.

The record in this case and the testimony of the Agency's expert witnesses showed that the closure plans submitted were not only seriously inadequate but the second and third submittals contained the same inadequacies and repeated the same mistakes and ignored the comments made by EPA on the original submittal. This situation was also pointed out by one of the Respondent's

witnesses, a State of Florida employee who testified that as of August 25, 1988, the closure plan was still inadequate over 18 months after the January 12, 1987, deadline.

The record is uncontroverted as to the issue of whether or not the Respondent filed with the Agency either at the federal or state level an adequate closure plan. The 17 day delay which is uncontroverted was not a determining factor in the Agency's calculation of a penalty in regard to the closure plan nor was it a part of the deficiencies and violations cited in the Complaint. It is apparent that the Respondent does not understand the requirements of the regulations in that it attempted to file a closure plan indicating a clean closure which under the circumstances in this case is impossible in as much as their own sampling has indicated the migration of contaminants from the percolation pond to the groundwater. Under such circumstances it is necessary that the Respondent file a post-closure plan which addressed the efforts it will take to identify and possibly prevent any further contamination of the groundwater. This deficiency was pointed out to the Respondent in writing and despite that fact it took three (3) submittals before the Respondent finally understood that a post-closure plan was an essential part of it's overall closure plan. Under the facts of this case it is clear that the Respondent has violated the provisions of the Consent Order in regard to it's failure to file an adequate

closure plan for it's facility. Although the Respondent attempted to argue away the 17 day delay in submitting the closure plan by arguing it had been given an extension by the Agency to file it late, this issue is irrelevant since, as indicated above, the late filing was not a factor that was considered by the Agency when it calculated the penalty involving this violation. As stated by the Agency witnesses, had an adequate plan been submitted 17 days late they would probably not have even concerned themselves with this matter and proceeded to process the closure plan. It is also clear from the record that the Respondent's attitude regarding the Agency's eight (8) page filing of the plan's deficiencies were, for the most part, ignored by the Respondent and treated in a rather cavalier manner. The Respondent's behavior in this instance is once again an indication of it's misunderstanding of the rules and regulations and it's failure to advise itself of the requirements and the regulations of the statutes.

Concerning the violation of paragraph 6 of the CAFO cited above, that, is the Respondent's failure to timely submit a groundwater assessment plan, this failure is uncontroverted in the record in that the Respondent does not deny the fact that it's submittal was substantially out of time and also does not apparently contest the fact that the plan ultimately submitted was grossly inadequate. The Respondent's only defense to this

violation was that it was given oral permission by some person within EPA that it could file the plan late. No documentary evidence was submitted to substantiate this allegation and it is clear from the record that no one of the level of personnel that the Respondent was in touch in with EPA had the authority to grant such an extension had such an effort even been made.

Section 265.93(d)(1) of the regulations requires that an owner/operator provide written notice to the Regional Administrator within seven (7) days of the confirmation that a facility may be effecting groundwater quality. The records indicate that the Respondent detected contamination on February 27, 1987, and confirmed that situation on May 13, 1987. The regulations require the submission of a groundwater quality assessment plan within 15 days after the notification. Accepting the Respondent's May 13, 1987, date as the time upon which the confirmation of the groundwater contamination was verified, the groundwater quality assessment plan was required to be submitted on May 28, 1987. The record is uncontroverted that the plan was not submitted until August 5, 1987.

In addition to the plan being submitted in an untimely manner, it was seriously inadequate when it finally was submitted. The problems associated with this plan were several, one (1) of which it was improperly identified in its title as being a groundwater detection plan rather than a groundwater quality

assessment plan and it referred in it's text to the wrong regulations. Other major problems with the submitted plan included that there were no provisions to put wells into lower aquifers, no plans for pump test and that the implementation schedule did not contemplate assessment monitoring until September 1988, in face of the fact that it was imperative that the Respondent move quickly to assess the situation. The plan also erroneously discussed statistical comparisons for determining groundwater contamination which were irrelevant to this submittal since that comparison had to have been done in a prior exercise and ignored the fact that it intended to sample for specific parameters as required by the regulations. The plan also identified a clay layer underlying the percolation pond as a confining unit when the permiablities associated with this layer do not qualify it as a confining unit.

I am therefore of the opinion that the Respondent violated paragraphs five (5) and six (6) of the November 12, 1986, CAFO in that it did not submit adequate closure plans or groundwater quality assessment plans as required by the statute and the Consent Order.

Having determined that the Respondent has in fact violated the statutes and regulations as alleged in that Complaint, it is necessary to now address the question of the amount of an appropriate penalty to be assessed in this matter.

PENALTY CALCULATIONS

As indicated above, the Complaint in this case proposed a civil penalty in the amount of $137,751.00. The penalty was calculated by Mr. Tony Able pursuant to the provisions of the 1984 RCRA Civil Penalty Policy. It is clear from a reading of this policy as well as the congressional intent, that the levying of a civil penalty in these matters is to protect human health and the environment and to deter persons from committing violations of the Act. As noted earlier, the posture of this case is disturbing in as much as it involves a large national corporation which through it's ignorance and disregard of some of the major provisions of the Act would apparently call for sizable penalties which are of significant magnitude to punish the offender for the violations and to act as a deterrent to assure that it does not commit other violations in the future.

The Complaint alleges two (2) violations that is the violation of 3005(e)(3) of RCRA and violation of Subpart F of Section 265 of the regulations involving paragraph six (6) of the CAFO. The penalty policy directs that the seriousness of each violation be determined the potential for harm to the environment and the extent of deviation from statutory and regulatory requirements. In this matter the Agency in conformance with the direction of the penalty policy adjusted the base penalties upward, based upon lack of good faith, willfulness or negligence, and history of

non-compliance. In addition to these adjustments, the economic benefit of non-compliance was also considered in the Agency's calculations.

As to the element concerning the potential for harm the Agency determined that there was a major potential for harm to the environment resulting from the violations committed by the Respondent. It should also be observed that the penalty policy allows the Agency to find a potential for harm from either the likelihood of exposure to hazardous waste posed by the non-compliance or the adverse effect that non-compliance may have on the statutory/regulatory purposes for implementing the RCRA program. The Agency witness who testified on the issue of calculation of the penalty policy testified that he had found a major potential under both of these two (2) parameters. As noted, the language of the penalty policy allows a potential for harm if either of the two (2) factors noted above exist and it is not required that the Agency determine that both factors exist in order for it to determine the level for the potential for harm.

In regard to the likelihood of exposure to hazardous waste or, in other words, the potential aspect for harm of the violations, the Agency considered the following six (6) factors:

1. Approximately 6,000 gallons per day of wastewater containing F002 went into the percolation pond. (T. 191, lines 14-17; T. 480, lines 6-18);

2. Respondent's percolation pond is unlined. (T. 193, lines 5-6);

3. The upper aquifer beneath the percolation pond is a sand aquifer which would allow easy migration of contamination. (T. 191, lines 18-20; T. 613, lines 10-11, 19-25; T. 614, lines 1-18);

4. On May 13, 1987, Respondent confirmed that there was an increase of contamination in the groundwater near the percolation pond. (Complainant's Exhibit No. 19);

5. There are approximately 103 drinking water wells within a one-half (1/2) mile radius of the percolation pond. (T. 191, lines 21-25; T. 193, lines 1-3); and,

6. According to Respondent's Exhibit No. 15, the percolation pond was in close proximity to an area of waters that contained a shellfish harvesting industry. (T. 193, lines 16-18; T. 195, lines 7-18).

As to this factor, i.e. the potential of harm involved, the Respondent argued through it's expert witness Dr. William Tucker that the potential involved in this matter was actually very slight due to the concentration of hazardous waste actually contained in the percolation pond and the fact that by the time the pollutants reach open water its concentration of the involved waste would be so low as to not pose any hazardous to either the environment or the aquatic organisms existing in the surface waters adjacent to the facilities operation. The Respondent also argued that the drinking water wells identified by the Complainant are in fact upgradient from the percolation pond and therefore it is virtually impossible for the contaminants contained in the percolation pond to find their way into the groundwaters which supply these drinking wells. The Agency argues that the defenses suggested by the Respondent are unavailing since it

involves the application of hindsight which they allege is specifically prohibited by the language of the penalty policy, which does not require the identification of actual harm to the environment but merely the potential therefore. I disagree with the Agency in this regard in that the arguments put forth as to this violation by the Respondent address themselves to the potential for harm and do not attempt to argue against the level of potential harm found by saying that no actual harm to the environmental existed but rather on the potential aspect thereof the potential was extremely low. I am therefore of the opinion that the Agency's characterization of the potential for harm in regard to this facility as being in the major category, is not supported by the evidence. However, as noted above, the Agency also found that the adverse effect of the non-compliance found on the statutory/regulatory purposes of the Act was also in the major category and it is my opinion that the Agency sustained it's burden of proof on that issue and that disregarding the potential for harm aspects the violations are properly considered to be major on that axis of the matrix found in the penalty policy.

As to the violation concerning the failure to submit a Part B application the Agency's witnesses on this issue were very persuasive in their opinion that the permit application forms an essential part of the Agency's ability to regulate hazardous

waste in that it provides the Agency with the details that it needs as to what hazardous waste facility is handling, how much, in what fashion, and the ultimate fate of the hazardous waste on the facility in question. Without this vital information the Agency is severely hampered in its ability to operate a "cradle to grave" program which the statute and regulations require.

The above stated rational applies equally to the Respondent's violation of 265 Subpart F of the regulations in it's failure to timely an adequately file a groundwater quality assessment plan. Such a plan is mandated by the regulations when contamination of the groundwaters at the facility have already been identified. The purpose of the groundwater quality assessment plan is designed to demonstrate to the facility the type, extent and direction of the migration of hazardous waste once their presence has been identified in the groundwaters. Since this information is vital in determining the steps necessary in closure and post-closure situations, the absence of this data severely handicaps both the Agency and the facility operator in carrying out the mandates of the statute and regulations. In both these incidence I find that there is ample evidence to support a major violation on the potential for harm aspect of the matrix contained in the penalty policy.

The other factor in the matrix which must be evaluated by the Agency in determining the proper penalty to assess concerns

the amount of deviation from the requirements of the regulations or statute and in this matter the record clearly supports the Agency's finding that the violations hereinfound by the Respondent were clearly major deviations. One (1) of the more important of which was assessment of the violation of Section of 3005(e)(C) was the uncontroverted evidence that the Respondent kept it's percolation pond in operation for 240 days without a permit and after the time it was required by the law to close. Additionally the Respondent did not certify compliance with groundwater monitoring or financial responsibility requirements by January 30, 1987, and that the closure plan submittals were totally inadequate.

As to the Section 265 Subpart F violation, the Agency witness emphasized that a timely submittal of a groundwater quality assessment plan is important and that time is of the essence because at this time contamination has already been discovered on the facilities and information concerning its extent and direction is extremely important to both the Agency and the facility operator in order to, with some assurance, plan closing and post closure techniques.

I am therefore of the opinion that the record in this matter clearly demonstrates that the Agency's determination that there was a major extent of deviation as to the violations above specified and that its choice of a $25,000.00 penalty for these two

(2) violations was proper under the guidelines and examples set forth in the penalty policy.

The penalty policy also authorizes upward or downward adjustments of the base penalty found when one considers the factors set forth therein such as lack of good faith, degree of willfulness and/or negligence and history of non-compliance. In the instant case the Agency adjusted the base penalty upward 25% or $6,250.00 for each of the two (2) violations found.

In regard to the 3005(e)(3) violation the Agency found that lack of good faith was evidenced by the Respondent's failure to take action even after the Agency had on two (2) occasions advised the Respondent of the requirements of the Act. In addition to that failure the Agency also took into account the Respondent's inadequate closure plan which, even as of the date of the hearing, remained inadequate as a showing of lack of good faith. In regard to the negligence or willfulness aspect of the policy, the Agency took into account the Respondent's obvious unfamiliarity with the regulations and statutes and it didn't even understand the fact that they were required to do the same tasks as one who had obtained interim status pursuant to the Act. It did not take the steps required by the regulations for one who is considered to have interim status even though the Agency on several occasions advised the Respondent that they were in that position. The Respondent's failure to keep abreast of even the

most minimal requirements of the regulations and Act by acquiring up to date copies thereof was evident of their negligence. They also lacked understanding that the permit issued by the State of Florida was not considered a permit issued under the Clean Water Act and in their casual dismissal of the many written comments that the Agency made considering their closure plan. The Agency also considered the fact that the Respondent continued to operate it's facility 242 days after it was required to close. As to the history of non-compliance the Agency witness considered the five (5) previous EPA and State inspections of the Respondent's facility dating back to 1985, each of which showed Class 1 violations. The witness also considered the violations of the EPA and State 1987 Consent Orders and other notices of violation issued by the State of Florida. The Respondent's poor history of compliance with State regulations was confirmed by the Respondent's witness, Mr. Katsury, who was a State employee brought as a witness by the Respondent.

As to the upward adjustment of the Respondent's violation of Part 265 Subpart F of the regulations, the Agency felt that the lack of good faith by the failure of the Respondent to submit a groundwater quality assessment plan within the 15 days required by the regulations and the Respondent's acknowledgment that it failed to comply with this requirement and the submittal of a totally inadequate plan 69 days after the date that the regula-

tions require that it be submitted. Once again, as to the degree of negligence, the record is clear that the Respondent did not even know the proper title put on his groundwater assessment plan when it was submitted and that the plan even referred to the wrong regulations. As to the history of non-compliance, with this violation, it is the same as discussed above as to the violation concerning Section 3005(e)(3) of the Act.

The penalty policy permits the use of an upward adjustment of penalty based on any economic benefit that might have accrued to a facility owner/operator by virtue of any savings he might accrue due to his failure to meet the requirements of the regulations. The purpose of this adjustment is simply that the policy does not want anyone to enjoy a financial advantage by virtue of failing to comply with the regulations. On this factor of the penalty calculation, the Agency witness testified that his calculations as to economic benefit were based on the cost to treat 6,000 gallons of wastewater per day for 242 days and the cost of its transportation to the City of St. Augustine Treatment Works. The penalty policy contains specific formulas and forms to be used by the Agency in making these calculations and the Complainant's Exhibit Nos. 23 and 23-A demonstrates that the economic benefit was computed in accordance with the formula set forth in the penalty policy.

The Respondent argued that the Agency's calculations were in error because as an alternative to the scenario proposed by the Agency witness, the Respondent could have bought a truck and used one of it's own employees to drive it rather than hiring a transporter as was done by the Agency's witness. The Respondent did purchase a used truck some time later in this matter and presented in any event, no documentation to support it's claims that the Agency was clearly in error in calculating the economic benefit in the manner in which it did.

The regulations and the penalty policy are clear that if a Respondent wishes to contest the economic benefit adjustment provided by the Agency, that it has a burden to come forward with documentation to demonstrate how and in what particulars the Agency in error in its calculations. In this instance, the Respondent did not submit any documentation as to the actual savings that it may have had by it's failure to comply with the regulations and absent such documentation the Agency's calculations and estimates should be accepted unless there is some showing that they mis-applied the formula or requirements of the penalty policy.

Obviously, in the computation and calculation of a proposed penalty there is a great deal of discretion left to the Agency personnel which, absent some showing of clear error, will not disturb the calculations. In this instance, the Respondent at-

tempted to attack the Agency's use of discretion but that attack is a two-edged sword in that the record shows that had the Agency used other methods of calculation available to it under the regulations it could have come up with a defensible penalty greatly in excess of what it finally proposed. For example, a daily calculation of $25,000.00 per day, could have well been made rather than using a one (1) time violation as the Complainant actually did. Obviously a $25,000.00 per day calculation for the 242 days that the Respondent was in violation of the statute would have resulted in a fine orders of magnitudes higher than the one ultimately arrived at. Based on this record, I find nothing that would suggest that the Agency abused it's discretion in calculating the penalty it proposed in this proceeding.

In conclusion, I am therefore of the opinion that this record clearly shows that the Respondent violated the two (2) Sections and regulations identified in the Complaint and that the legal defenses put forth by the Respondent in opposition to such a finding are clearly inapplicable. I am also of the opinion that the penalty calculated by the Agency is consistent with the penalty policy and in view of the Respondent's rather shocking ignorance of the rules and regulations pertaining to the facility it operates and the manner in which it violated the regulations, justify an upward adjustment to the base penalty shown and that the $137,751.00 penalty calculated by the Agency is appropriate

given the record in it's entirety.

ORDER

Pursuant to Section 3008 of RCRa, 42 USC Section 6928, the following Final Order is entered against Respondent, Grumman St. Augustine Corporation:

1) A civil penalty in the amount of $137,751.00 is assessed against Respondent for it's violations of RCRA and regulations as set forth above.

2) The payment of the full amount of the civil penalty shall be made within sixty days of the receipt of the Final Order and the payment shall be made by forwarding a cashier's check to or a certified check in the amount of $137,751.00 payable to Treasurer, United States of America, at the following address:

U.S. Environmental Protection Agency
P.O. Box 100142
Atlanta, Georgia 30384

Date: 3/10/89

Thomas B. Yost
Administrative Law Judge