UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

In the Matter of:	:	
Kessel Lumber Supply, Inc. **HC 84 Box 4** **New Creek Drive** **Keyser, West Virginia 26726,** **Respondent,**	: : : :	**Docket No.: RCRA-03-2006-0059** **Proceeding under Section 3008(a) and (g), 42 U.S.C. § 6928(a) and (g) of the Resource Conservation and Recovery Act**
Kessel Lumber Supply, Inc. **New Creek Drive** **Keyser, West Virginia 26726,** **Facility**	: : :	

INITIAL DECISION AND DEFAULT ORDER

This Default Order is issued in a case brought under the authority of Section 3008(a) and (g) of the Resource Conservation and Recovery Act, *as amended,* 42 U.S.C. § 6928(a) and (g) (hereinafter "RCRA"). The Complaint, Compliance Order and Notice of Right to Request Hearing ("Complaint") alleged that the Respondent violated Subtitle C of RCRA, 42 U.S.C. §§ 6921 *et seq.,* and the authorized *West Virginia Hazardous Waste Management Regulations,* Title 33, Leg. Rule, Division of Environmental Protection, Office of Waste Management, Series 20, Parts 33-20-1 through 33-20-15 (hereinafter "WVHWMR").

The Motion for Default Order ("Motion for Default") filed by Complainant in this proceeding seeks an Order assessing a three hundred thirty-five thousand, eight hundred and sixteen dollar ($335,816.00) civil penalty against Respondent Kessel Lumber Supply, Inc., the owner and operator of a wood treatment drip pad located at New Creek Drive, Keyser, West Virginia.

FINDINGS OF FACT

Pursuant to 40 C.F.R. § 22.17 and based on the entire record, I make the following findings of fact:

1. As set forth in the Complaint, Respondent Kessel Lumber Supply, Inc. is a corporation incorporated in the State of West Virginia and is a "person" as defined by WVHWMR Section 33-20-2, which incorporates by reference 40 C.F.R. § 260.10, and RCRA Section 1004(15), 42 U.S.C. § 6903(15).

2. The Respondent's facility is located at New Creek Drive, Keyser, Mineral County, West Virginia (hereinafter, the "Facility").

3. On or about February 19, 1988, Respondent submitted a Notification of Hazardous Waste Activity ("Notification") for the Facility, pursuant to Section 3010 of RCRA, 42 U.S.C. § 6930, to the West Virginia Division of Environmental Protection ("WVDEP") identifying itself as a generator of 100 to 1,000 kilograms of hazardous waste, D004 and D007, per calendar month.

4. Respondent was subsequently assigned RCRA Identification Number WVD016087322.

5. On or about April 26, 1999, Respondent filed a subsequent Notification identifying itself as a generator of less than 100 kilograms of hazardous waste, D006, D008, D018, D027, D039 and D040, per calendar month.

6. On September 15, 2004 and on February 1, 2005, representatives of the U.S. Environmental Protection Agency ("EPA") and the WVDEP conducted RCRA Compliance Evaluation Inspections ("CEIs") at the Facility, pursuant to RCRA Section 3007(a), 42 U.S.C. § 6927(a).

7. During and after the above-referenced inspections, EPA determined that the Respondent

violated certain provisions of RCRA and of the authorized WVHWMR.

8. On September 12, 2006, an Administrative Complaint was issued to Respondent by the Associate Director for Enforcement, Waste & Chemicals Management Division (currently the Land & Chemicals Division), EPA Region III ("Complainant"), pursuant to Section 3008(a) and (g) of RCRA, 42 U.S.C. § 6928(a) and (g), in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Consolidated Rules").

9. The Complaint alleged, in thirteen counts, that Respondent violated RCRA and the authorized WVHWMR by:

   a. Operating a hazardous waste treatment, storage and/or disposal facility without a permit or interim status from at least January 1, 2004 through September 12, 2006, in violation of WVHWMR § 33-20-11, which incorporates by reference 40 C.F.R. § 270.1(b) and RCRA Section 3005(a) and (e), 42 U.S.C. § 6925(a) and (e);

   b. Failing to have a contingency plan which is designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water, from at least January 1, 2004 through September 12, 2006, as required by WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.51;

   c. Failing to have a written closure plan for the Facility, from at least January 1, 2004 through September 12, 2006, which meets the requirements specified in WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.112;

   d. Failing to prepare a contingent post-closure plan for an existing drip pad at the Facility that complied with the liner requirements of 40 C.F.R. § 264.573(b)(1), from at least January 1, 2004 through September 12, 2006, as required by WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.575(c)(1);

   e. Failing to prepare a contingent post-closure plan for a Facility tank system, which had secondary containment, that meets the requirements of 40 C.F.R. § 264.193(b) through (f), from at least January 1, 2004 through September 12,

2006, as required by WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.197(c);

f. Failing to prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the active portion of the Facility upon failing to make the demonstration to the Regional Administrator that is required by 40 C.F.R. § 264.14(a), and failing to fulfill the requirements of 40 C.F.R. § 264.14(b) and (c), from at least January 1, 2004 through September 12, 2006, as required by WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.14(a), (b) and (c);

g. Failing to establish or have financial assurance for the closure of the Facility by choosing one of the options of 40 C.F.R. § 264.143 (a) through (f), from at least January 1, 2004 through September 12, 2006, as required by WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.143;

h. Failing to have, for each of its two existing Facility tank systems that do not have secondary containment meeting the requirements of 40 C.F.R. § 264.193 and which were not exempt from such requirements under 40 C.F.R. § 264.193(g), from at least January 1, 2004 through September 12, 2006, a written assessment reviewed and certified by an independent, qualified, registered professional engineer in accordance with 40 C.F.R. § 270.11(d), that attests to each tank system's integrity, as required by WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.191(a) and (c);

i. Failing to evaluate the Facility drip pad and determine that it meets all of the requirements of 40 C.F.R. Part 264, Subpart W, obtain and keep on file at the Facility a written assessment of the drip pad, reviewed and certified by an independent, qualified, registered professional engineer that attests to the results of the evaluation, and to have such assessment reviewed, updated and re-certified annually until all upgrades, repairs or modifications necessary to achieve compliance with all of the standards of 40 C.F.R. § 264.573, are complete, from at least January 1, 2004 through September 12, 2006, as required by WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.571(a);

j. Failing to ensure the Facility drip pad had a hydraulic conductivity of 1×10^{-7} centimeters per second, from at least January 1, 2004 through September 12, 2006, as required by WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.573(a)(4)(i);

k. Failing to operate and maintain the Facility drip pad in a manner to minimize tracking of hazardous waste or hazardous waste constituents off the drip pad as a result of activities by personnel or equipment on September 15, 2004 and on February 1, 2005, as required by WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.573(j);

l. Failing to inspect the Facility drip pad weekly and after storms to detect evidence of any deterioration or cracking of the drip pad surface, from at least August 1, 2001 until January 1, 2004, as required by WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.574(b)(3); and

m. Storing land disposal restricted wastes in a manner which failed to meet the conditions of 40 C.F.R. § 262.34 from at least January 1, 2004 through September 12, 2006, in violation of WVHWMR § 33-20-10.1, which incorporates by reference 40 C.F.R. § 268.50(a).

10. The Complaint did not include a specific penalty proposal for the violations alleged therein, but instead proposed up to the statutory maximum penalty for each alleged violation.

11. In the Motion for Default, Complainant proposes the specific penalty of three hundred thirty-five thousand, eight hundred and sixteen dollars ($335,816.00) for the alleged violations.

12. 40 C.F.R. § 22.15(a) provides that the Respondent has a right to request a hearing and that, in order to avoid being in default, Respondent is required to file a response to the Complaint within thirty (30) days of service.

13. 40 C.F.R. § 22.17(a) further provides that an order of default may be issued "after motion, upon failure to file a timely answer to the complaint; . . . . Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations."

14. As stated in the Motion for Default and in the supporting Memorandum, on September 13, 2006 Complainant successfully served the Complaint upon the Respondent at the Respondent's corporate business address and at the address of Respondent's legal counsel via "a reliable commercial delivery service that provides written verification of delivery" within the meaning of 40 C.F.R. § 22.5(b)(1) (i.e., Federal Express, Overnight

Delivery), as evidenced by *Fedex Tracking Reports* confirming such deliveries.

15. Respondent did not file an Answer to the Complaint within thirty (30) days of service and has not, to date, filed an answer or other response to the Complaint.

16. On July 13, 2010, Complainant filed a Motion for Default stating that Respondent failed to file an Answer to the Complaint.

17. On July 13, 2010, the Motion for Default was mailed via certified mail, return receipt requested, to Respondent at Respondent's business address, and to Respondent's counsel of record at his business address.

18. The Respondent did not file a response to the Motion for Default.

CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. § 22.17 and based on the entire record, I make the following conclusions of law:

1. The Complaint in this action was lawfully and properly served upon Respondent in accordance with the Consolidated Rules. 40 C.F.R. § 22.5(b)(1)(ii)(A).

2. Respondent was required to file an Answer to the Complaint within thirty (30) days of service of the Complaint. 40 C.F.R. § 22.15(a).

3. Respondent failed to file an Answer to the Complaint and such failure to file an Answer to the Complaint, or otherwise respond to the Complaint, constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. § 22.17(a).

4. Complainant's Motion for Default was lawfully and properly served on Respondent. 40 C.F.R. § 22.7(c).

5. Respondent was required to file any response to the Motion for Default within fifteen (15) days of service. 40 C.F.R. §§ 22.7(c) and 22.16(b).

6. Respondent failed to respond to the Motion for Default and such failure to respond to the Motion for Default is deemed to be a waiver of any objection to the granting of the Motion. 40 C.F.R. § 22.16(b).

7. Respondent is a corporation incorporated in the State of West Virginia and is a "person" as defined by WVHWMR Section 33-20-2, which incorporates by reference 40 C.F.R. § 260.10, and RCRA Section 1004(15), 42 U.S.C. § 6903(15). Complaint ¶ 5.

8. At all times relevant to the allegations in the Complaint, "hazardous waste" has been "generated," "treated" and "stored" by Respondent at the Facility, as those terms are defined by WVHWMR § 33-20-2, which incorporates by reference Sections 1004(5), (6) and (33) of RCRA, 42 U.S.C. §§ 6903(5), (6), (33), and 40 C.F.R. §§ 260.10 and 261.3. Complaint ¶ 11.

9. The Facility is a hazardous waste "storage" "facility" as those terms are defined by WVHWMR § 33-20-2, which incorporates by reference 40 C.F.R. § 260.10. Complaint ¶ 12.

10. Respondent is and has been, at all times relevant to the allegations in the Complaint, the "owner" of the Facility as that term is defined by WVHWMR § 33-20-2, which incorporates by reference 40 C.F.R. § 260.10. Complaint ¶ 13.

11. Respondent is and has been, at all times relevant to the allegations in the Complaint, the "operator" of the Facility as that term is defined by WVHWMR § 33-20-2, which incorporates by reference 40 C.F.R. § 260.10. Complaint ¶ 14.

12. Respondent is and has been, at all times relevant to the allegations in the Complaint, a "generator" of, and has engaged in the "treatment", "storage" or "disposal" of "solid waste" and "hazardous waste", as those terms are defined by WVHWMR § 33-20-2, which incorporates by reference 40 C.F.R. § 260.10. Complaint ¶ 15.

13. RCRA Section 3005(a), 42 U.S.C. § 6925(a) provides, in pertinent part, that each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste is required to comply with the regulations promulgated by EPA concerning permitting requirements and that the treatment, storage, or disposal of hazardous waste or the construction of a new facility is prohibited unless in compliance with all applicable permitting requirements.

14. WVHWMR § 33-20-11, which incorporates by reference 40 C.F.R. § 270.1(b) and Sections 3005(a) and (e) of RCRA, 42 U.S.C. §§ 6925(a) and (e), provides, in pertinent part, that a person may not own or operate a hazardous waste storage, treatment or disposal facility unless the person has first obtained a permit or interim status for the facility from the WVDEP.

15. WVHWMR § 33-20-5, which incorporates by reference 40 C.F.R. § 262.34(a)(1)(ii), provides, in pertinent part, that a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status, provided that the waste is placed in tanks and the generator complies with Subpart J of 40 C.F.R. Part 265.

16. WVHWMR § 33-20-5, which incorporates by reference 40 C.F.R. § 262.34(a)(1)(iii), provides, in pertinent part, that a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status, provided that the waste is placed on drip pads and the generator complies with Subpart W of 40 C.F.R. Part 265

and maintains the following records at the facility: (A) a description of procedures that will be followed to ensure that all wastes are removed from the drip pad and associated collection system at least once every 90 days; and (B) documentation of each waste removal, including the quantity of waste removed from the drip pad and the sump or collection system and the date and time of removal.

17. Respondent generated and, from at least January 1, 2004 until August 29, 2005, was storing at the Facility, approximately five thousand gallons of hazardous waste chromated copper arsenate ("CCA"), EPA hazardous waste identification number F035, in an 8,000 gallon steel CCA solution tank that did not have secondary containment. Complaint ¶ 20.

18. Respondent generated and, from at least January 1, 2004 until October 11, 2005, was storing at the Facility, approximately three thousand gallons of F035 hazardous waste CCA in a 3,000 gallon steel CCA preservative tank that had secondary containment. Complaint ¶ 21.

19. Respondent generated and, from at least January 1, 2004 and continuously until August 29, 2005, was storing at the Facility, three hundred and fifty-three gallons of F035 hazardous waste CCA in a collection system tank that did not have secondary containment. Complaint ¶ 22.

20. Respondent generated and, from at least January 1, 2004, until August 29, 2005, was storing an undetermined amount of F035 hazardous waste CCA on the surface of the Facility's wood treatment drip pad. During this time period, Respondent was moving horse trailers and farm equipment on and off of the drip pad, causing tracking of F035

hazardous waste CCA off of the drip pad and the roof over the drip pad was leaking and allowing precipitation to fall onto the drip pad. Complaint ¶ 23.

Count I
Operating a Hazardous Waste Storage Facility Without a Permit

21. RCRA Section 3005(a), 42 U.S.C. § 6925(a) provides, in pertinent part, that each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste is required to comply with the regulations promulgated by EPA concerning permitting requirements and that the treatment, storage, or disposal of hazardous waste or the construction of a new facility is prohibited unless in compliance with all applicable permitting requirements.

22. WVHWMR § 33-20-11, which incorporates by reference 40 C.F.R. § 270.1(b), and Sections 3005(a) and (e) of RCRA, 42 U.S.C. §§ 6925(a) and (e), and 40 C.F.R. § 270.1(b), provides, in pertinent part, that a person may not own or operate a hazardous waste storage, treatment or disposal facility unless the person has first obtained a permit or interim status for the facility from the WVDEP.

23. WVHWMR § 33-20-5, which incorporates by reference 40 C.F.R. § 262.34(a)(1)(iii), provides, in pertinent part, that a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status, provided that the waste is placed on drip pads and the generator complies with Subpart W of 40 C.F.R. Part 265 and maintains the following records at the facility: (A) a description of procedures that will be followed to ensure that all wastes are removed from the drip pad and associated collection system at least once every 90 days; and (B) documentation of each waste

removal, including the quantity of waste removed from the drip pad and the sump or collection system and the date and time of removal.

24. From at least January 1, 2004 until October 11, 2005, Respondent stored hazardous waste, as described in Paragraphs 17 through 20, above, for greater than 90 days without a permit or without having interim status, and failed to maintain the following records: (A) a description of procedures that will be followed to ensure that all wastes are removed from the drip pad and associated collection system at least once every 90 days; and (B) documentation of each waste removal, including the quantity of waste removed from the drip pad and the sump or collection system and the date and time of removal. Complaint ¶ 30.

25. WVHWMR § 33-20-5, which incorporates by reference 40 C.F.R. § 262.34(a)(4), provides, in pertinent part, that a generator may accumulate hazardous waste on-site without a permit for 90 days or less, provided that the generator complies with the requirements of 40 C.F.R. Part 265, Subpart C, relating to preparedness and prevention, and Subpart D, relating to contingency plan and emergency procedures.

26. 40 C.F.R. Part 265, Subpart D, includes 40 C.F.R.§ 265.51(a), which provides that each owner or operator must have a contingency plan for his facility and that the contingency plan must be designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water.

27. From at least January 1, 2004 through September 12, 2006, Respondent failed to have an adequate contingency plan for the Facility as required by WVHWMR § 33-20-7.2,

which incorporates by reference 40 C.F.R. § 262.34(a)(4) and 40 C.F.R. § 265.51(a). Complaint ¶ 33.

28. WVHWMR § 33-20-5, which incorporates by reference 40 C.F.R. § 262.34(a)(1)(ii), provides, in pertinent part, that a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status, provided that the waste is placed in tanks and the generator complies with Subpart J of 40 C.F.R. Part 265.

29. 40 C.F.R. Part 265, Subpart J, includes the requirements of 40 C.F.R. § 265.190(c), which provides, in pertinent part, that tanks, sumps, and other collection devices used in conjunction with drip pads, as defined in § 260.10 of this chapter and regulated under 40 C.F.R. Part 265, Subpart W, must meet the requirements of 40 C.F.R. Part 265, Subpart J.

30. 40 C.F.R. Part 265, Subpart J, includes the requirements of 40 C.F.R. § 265.191(a) and (c), which provide, in pertinent part, that for each existing tank system that does not have secondary containment meeting the requirements of 40 C.F.R. § 265.193, the owner or operator must determine that the tank system is not leaking or unfit for use, and keep on file at the facility a written assessment reviewed and certified by an independent, qualified, registered professional engineer in accordance with 40 C.F.R. § 270.11(d), that attests to the tank system's integrity, and that tank systems that store or treat materials that become hazardous wastes subsequent to July 14, 1986 must conduct this assessment within 12 months after the date that the waste becomes a hazardous waste.

31. From at least January 1, 2004 through September 12, 2006, Respondent did not have written assessments, as described more fully in Paragraph 30, above, for the 8,000 gallon tank and the associated collection system tank at the Facility. Complaint ¶ 36.

32. 40 C.F.R. Part 265, Subpart J includes the requirements of 40 C.F.R. § 265.197(c), which provide that if an owner or operator has a tank system which does not have secondary containment that meets the requirements of 40 C.F.R. § 265.193(b) through (f) and which is not exempt from the secondary containment requirements in accordance with 40 C.F.R. § 265.193(g), then: (1) the closure plan for the tank system must include both a plan for complying with 40 C.F.R. § 265.197(a) and a contingent plan for complying with 40 C.F.R. § 265.197(b); and (2) a contingent post-closure plan for complying with 40 C.F.R. § 265.197(b) must be prepared and submitted as part of the permit application.

33. From at least January 1, 2004 through September 12, 2006, Respondent had two tank systems which did not have secondary containment that met the requirements of 40 C.F.R. § 265.193(b) through (f), and which were not exempt from the secondary containment requirements in accordance with 40 C.F.R. § 265.193(g), while failing to have a closure plan for the tank systems that included both a plan for complying with 40 C.F.R. § 265.197(a) and a contingent plan for complying with 40 C.F.R. § 265.197(b). Complaint ¶ 38.

34. As noted in paragraph 23, above, WVHWMR § 33-20-5 incorporates by reference 40 C.F.R. § 262.34(a)(1)(iii) and provides, in pertinent part, that a generator may accumulate hazardous waste on-site for 90 days or less without a permit or without

having interim status, provided that the waste is placed on drip pads and the generator complies with Subpart W of 40 C.F.R. Part 265.

35. 40 C.F.R. Part 265, Subpart W, includes the requirements of 40 C.F.R. § 265.441, which provide, in pertinent part, that for each existing drip pad as defined in 40 C.F.R. § 265.440 of Subpart W, the owner or operator must: evaluate the drip pad and determine that it meets all of the requirements of 40 C.F.R. Part 265, Subpart W, except the requirements for liners and leak detection systems of 40 C.F.R. § 265.443(b); obtain and keep on file at the Facility, a written assessment of the drip pad, reviewed and certified by an independent, qualified, registered professional engineer that attests to the results of the evaluation, and such assessment must be reviewed, updated and re-certified annually until all upgrades, repairs or modifications necessary to achieve compliance with all of the standards of 40 C.F.R. § 265.443 of Subpart W are complete.

36. From at least January 1, 2004 through September 12, 2006, Respondent did not evaluate the drip pad and determine that it met all of the requirements of 40 C.F.R. Part 265, Subpart W, except the requirements for liners and leak detection systems of 40 C.F.R. § 265.443(b); obtain and keep on file at the Facility, a written assessment of the drip pad, reviewed and certified by an independent, qualified, registered professional engineer that attests to the results of the evaluation, and failed to have such assessment reviewed, updated and re-certified annually until all upgrades, repairs or modifications necessary to achieve compliance with all of the standards of 40 C.F.R. § 265.443 are complete as required by 40 C.F.R. § 265.441. Complaint ¶ 40.

37. 40 C.F.R. Part 265, Subpart W includes the requirements of 40 C.F.R. § 265.443(a)(4)(i), which provide, in pertinent part, that drip pads must have a hydraulic

conductivity of less than or equal to 1 x 10^{-7} centimeters per second, as further described in such regulation.

38. From at least January 1, 2004 through September 12, 2006, the Facility drip pad did not have a hydraulic conductivity of less than or equal to 1 x 10^{-7} centimeters per second, as further described in 40 C.F.R. § 265.443(a)(4)(i). Complaint ¶ 42.

39. 40 C.F.R. Part 265, Subpart W, includes the requirements of 40 C.F.R. § 265.443(j), which provide, in pertinent part, that a drip pad must be operated and maintained in a manner to minimize tracking of hazardous waste or hazardous waste constituents off the drip pad as a result of activities by personnel or equipment.

40. On September 15, 2004, and on February 1, 2005, Respondent failed to operate and maintain the drip pad in a manner to minimize tracking of hazardous waste or hazardous waste constituents off the drip pad as a result of activities by personnel or equipment, as required by 40 C.F.R. § 265.443(j). Complaint ¶ 44.

41. 40 C.F.R. Part 265, Subpart W includes the requirements of 40 C.F.R. § 265.443(i), which provide, in pertinent part, that the drip pad surface must be cleaned thoroughly in a manner and frequency such that accumulated residues of hazardous waste or other materials are removed, with residues being properly managed as hazardous waste, so as to allow weekly inspections of the entire drip pad surface without interference or hindrance from accumulated residues of hazardous waste or other materials on the drip pad. The owner or operator must document the date and time of each cleaning and the cleaning procedure used in the facility's operating log.

42. From at least January 1, 2004 through September 12, 2006, Respondent failed to thoroughly clean the drip pad surface in accordance with 40 C.F.R. § 265.443(i), and

failed to document the date and time of each cleaning and the cleaning procedure used in the facility's operating log as required by 40 C.F.R. § 265.443(i). Complaint ¶ 46.

43. 40 C.F.R. Part 265, Subpart W includes the requirements of 40 C.F.R. § 265.445(c)(1), which provide that the owner operator of an existing drip pad, as defined in 40 C.F.R. § 265.443(b)(1) that does not comply with the liner requirements of 40 C.F.R. § 443(b)(1), must: (i) include in the closure plan for the drip pad under 40 C.F.R. § 265.112 both a plan for complying with 40 C.F.R. § 265.445(a) and a contingent plan for complying with 40 C.F.R. § 265.445(b) in case not all contaminated soils can be practicably removed at closure; and (ii) prepare a contingent post-closure plan under 40 C.F.R. § 265.118 for complying with 40 C.F.R. § 265.445(b) in case not all contaminated soils can practicably be removed at closure.

44. From January 1, 2004 through at least September 12, 2006, Respondent did not have a closure plan for the drip pad and therefore failed to: (i) include in the closure plan for the drip pad under 40 C.F.R. § 265.112 both a plan for complying with 40 C.F.R. § 265.445(a) and a contingent plan for complying with 40 C.F.R. § 265.445(b) in case not all contaminated soils can be practicably removed at closure; and (ii) prepare a contingent post-closure plan under 40 C.F.R. § 265.118 for complying with 40 C.F.R. § 265.445(b) in case not all contaminated soils can practicably be removed at closure as required by 40 C.F.R. § 265.443(c). Complaint ¶ 48.

45. At the times of the violations alleged herein, Respondent did not have a permit to treat, store or dispose of hazardous waste at the Facility, as required by WVHWMR § 33-20-11, which incorporates by reference 40 C.F.R. § 270.1(b), and Section 3005(a) of RCRA, 42 U.S.C. § 6925(a). Complaint ¶ 49.

46. Respondent did not qualify for the exemptions from the permitting requirement set forth in WVHWMR § 33-20-5, which incorporates by reference 40 C.F.R. § 262.34(a). Complaint ¶ 50.

47. The Facility is, and at the time of the violations alleged was, a hazardous waste management facility and Respondent was required to have a permit or interim status for the treatment, storage and/or disposal activities described above. Complaint ¶ 51.

48. Respondent violated WVHWMR § 33-20-11, which incorporates by reference 40 C.F.R. § 270.1(b), and RCRA § 3005(a) and (e), 42 U.S.C. § 6925(a) and (e), by operating a hazardous waste treatment, storage and/or disposal facility without a permit or interim status from at least January 1, 2004 through September 12, 2006.

Count II
Failure to Have a Contingency Plan

49. WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.51, provides that the owner and operator of a facility must have a contingency plan which is designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water at the facility.

50. From at least January 1, 2004 through September 12, 2006, Respondent did not have a contingency plan which satisfied the requirements of WVHWMR § 33-20-7.2. Complaint ¶ 55.

51. Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.51, from at least January 1, 2004 through September 12, 2006, by failing to have the required contingency plan for the Facility.

Count III
Failure to Have a Closure Plan for the Facility

52. WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.112, provides, in pertinent part, that the owner or operator of a hazardous waste management facility must have a written closure plan which meets the requirements specified in 40 C.F.R. Part 264, Subpart G (closure and post closure), 40 C.F.R. § 264.197 (tank closure) and 40 C.F.R. § 264.575 (drip pad closure).

53. From at least January 1, 2004 through September 12, 2006, Respondent did not have a written closure plan for the Facility, as required by WVHWMR § 33-20-7.2. Complaint ¶ 59.

54. Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.112, from at least January 1, 2004 through September 12, 2006, by failing to have a closure plan for the Facility which meets the requirements specified in 40 C.F.R. Part 264, Subpart G (closure and post closure), 40 C.F.R. § 264.197 (tank closure) and 40 C.F.R. § 264.575 (drip pad closure).

Count IV
Failure to Prepare a Contingent Post-Closure Plan for the Drip Pad

55. WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.575(c)(1), provides that the owner or operator of an existing drip pad, as defined in 40 C.F.R. § 264.570, that does not comply with the liner requirements of 40 C.F.R. § 264.573(b)(1) must: (i) include in the closure plan for the drip pad under 40 C.F.R. § 264.112 both a plan for complying with 40 C.F.R. § 264.575(b) in case not all contaminated subsoils can be practicably removed at closure; and (ii) prepare a contingent post-closure plan under 40 C.F.R. § 264.118 for complying with 40 C.F.R.

§ 264.575(b) in case not all contaminated subsoils can be practicably removed at closure.

56. From January 1, 2004 through September 12, 2006, Respondent's existing drip pad did not comply with the liner requirements of 40 C.F.R. § 264.573(b)(1) and Respondent did not prepare a contingent post-closure plan under 40 C.F.R. § 264.118 for complying with § 264.575(b) in case not all contaminated subsoils can be practicably removed from the Facility drip pad at closure. Complaint ¶ 63.

57. Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.575(c)(1), by failing to prepare a contingent post-closure plan under 40 C.F.R. § 264.118 for complying with 40 C.F.R. § 264.575(b) in case not all contaminated subsoils can be practicably removed from the Facility drip pad at closure.

Count V
Failure to Prepare a Contingent Post-Closure Plan for the
8,000 Gallon Tank and the Associated Collection System (Tank) for the Drip Pad

58. WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.197(c), provides that if an owner or operator has a tank system which does not have secondary containment that meets the requirements of 40 C.F.R. § 264.193(b) through (f) and which is not exempt from the secondary containment requirements in accordance with 40 C.F.R. § 264.193(g), then: (1) the closure plan for the tank system must include both a plan for complying with 40 C.F.R. § 264.197(a) and a contingent plan for complying with 40 C.F.R. § 264.197(b); and (2) a contingent post-closure plan for complying with 40 C.F.R. § 265.197(b) must be prepared and submitted as part of the permit application.

59. From January 1, 2004 through September 12, 2006, Respondent did not prepare a contingent post-closure plan for complying with 40 C.F.R. § 264.197(b) for the 8,000

gallon tank and associated collection system tank for the drip pad at the Facility, which did not have secondary containment and were not exempt under 40 C.F.R. § 264.193(g). Complaint ¶ 67.

60. Respondent violated WVHWMR § 33-20-7.2 by failing to prepare a contingent post-closure plan for complying with 40 C.F.R. § 264.197(b) for the 8,000 gallon tank and the associated collection system (tank) for the drip pad at the Facility, which did not have secondary containment and were not exempt under 40 C.F.R. § 264.193(g).

Count VI
Failure to Provide Site Security

61. WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.14(a), provides, in pertinent part, that the owner or operator of a hazardous waste management facility must prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the active portion of his facility, unless he can demonstrate to the Regional Administrator that: (1) physical contact with the waste, structures, or equipment within the active portion of the facility will not injure unknowing or unauthorized persons or livestock which may enter the active portion of a facility; and (2) disturbance of the waste or equipment, by the unknowing or unauthorized entry of persons or livestock onto the active portion of a facility, will not cause a violation of the requirements of this part.

62. WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.14(b) and (c), provides, in pertinent part, that unless the owner or operator has made a successful demonstration to the Regional Administrator pursuant to 40 C.F.R. § 264.14(a), a facility must have a 24-hour surveillance system which continuously monitors and controls entry onto the active portion of the facility or an artificial or natural barrier

which completely surrounds the active portion of the facility, a means to control entry at all times though the gates or other entrances to the active portion of the facility, and a facility must post a sign with the legend, "Danger–Unauthorized Personnel Keep Out", at each entrance to the active portion of a facility, and at other locations in sufficient numbers to be seen from any approach to the active portion of the facility.

63. Respondent did not make a demonstration to the Regional Administrator pursuant to 40 C.F.R. § 264.14(a)(1) and (2) and, from at least January 1, 2004 through September 12, 2006, Respondent failed to prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the active portion of the Facility pursuant to the requirements of 40 C.F.R. § 264.14(a); and, failed to fulfill the additional requirements of 40 C.F.R. § 264.14(b) and (c). Complaint ¶¶ 72, 73.

64. Respondent violated WVHWMR § 33-20-7.2, from at least January 1, 2004 through September 12, 2006, by failing to prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the active portion of the Facility, as required pursuant to 40 C.F.R. § 264.14(a), and by failing to fulfill the additional requirements of 40 C.F.R. § 264.14(b) and (c), after failing to make a demonstration to the Regional Administrator pursuant to 40 C.F.R. § 264.14(a)(1) and (2).

Count VII
Failure to Establish Financial Assurance

65. WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.143, provides, in pertinent part, that the owner or operator of a hazardous waste management facility must establish or have financial assurance for the closure of the facility by choosing from the options of 40 C.F.R. § 264.143 (a) through (f).

66. From at least January 1, 2004 through September 12, 2006, Respondent did not establish or have financial assurance for the closure of the Facility as required by WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.143. Complaint ¶ 76.

67. Respondent violated WVHWMR § 33-20-7.2 from at least January 1, 2004 through September 12, 2006 by failing to establish financial assurance for the closure of the Facility by not choosing from one of the options of 40 C.F.R. § 264.143 (a) through (f).

Count VIII
Failure to Obtain Written Assessments for
Two Tanks that did not have Secondary Containment

68. WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.191(a) and (c) provides, in pertinent part, that for each existing tank system that does not have secondary containment meeting the requirements of 40 C.F.R. § 264.193, the owner or operator must determine that the tank system is not leaking or unfit for use, and keep on file at the facility a written assessment reviewed and certified by an independent, qualified, registered professional engineer in accordance with 40 C.F.R. § 270.11(d), that attests to the tank system's integrity, and that the owner or operator of the tank systems that store or treat materials that become hazardous wastes subsequent to July 14, 1986 must conduct this assessment within 12 months after the date that the waste becomes a hazardous waste.

69. From January 1, 2004 through September 12, 2006, Respondent did not have written assessments described in 40 C.F.R. § 264.191(a) and (c) for the 8,000 gallon tank system and the associated collection system tank for the drip pad, at the Facility, which did not have secondary containment and were not exempt from such requirements pursuant to 40 C.F.R. § 264.193(g). Complaint ¶ 80.

70. Respondent violated WVHWMR § 33-20-7.2 by failing to have a written assessment, as described in 40 C.F.R. § 264.191(a) and (c), for the Facility's 8,000 gallon tank system and the associated collection system tank for the drip pad which did not have secondary containment and were not exempt from such requirements pursuant to 40 C.F.R. § 264.193(g).

Count IX
Failure to Obtain a Written Assessment for the Drip Pad

71. WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.571, provides, in pertinent part, that for each existing drip pad as defined in 40 C.F.R. § 264.570, the owner or operator must evaluate the drip pad and determine that it meets all of the requirements of 40 C.F.R. Part 264, Subpart W, except the requirements for liners and leak detection systems of 40 C.F.R. § 264.573(b); and obtain and keep on file at the Facility, a written assessment of the drip pad, reviewed and certified by an independent, qualified registered professional engineer that attests to the results of the evaluation, and such assessment must be reviewed, updated and re-certified annually until all upgrades, repairs or modifications necessary to achieve compliance with all of the standards of 40 C.F.R. § 264.573 are complete.

72. From January 1, 2004 through September 12, 2006, Respondent did not evaluate the Facility drip pad and determine that it met all of the relevant requirements of 40 C.F.R. Part 264, Subpart W; obtain and keep on file at the Facility, a written assessment of the Facility drip pad, reviewed and certified by an independent, qualified registered professional engineer that attested to the results of the evaluation, or have such a written assessment reviewed, updated and re-certified annually until all upgrades, repairs or modifications necessary to achieve compliance with all of the standards of 40 C.F.R.

§ 264.573, were complete, as required by WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.571(a). Complaint ¶ 84.

73. Respondent violated WVHWMR § 33-20-7.2 from January 1, 2004 through September 12, 2006 by failing to evaluate the Facility drip pad and determine that it met all of the requirements of 40 C.F.R. Part 264, Subpart W, except the requirements for liners and leak detection systems of 40 C.F.R. § 264.573(b); obtain and keep on file at the Facility, a written assessment of the Facility drip pad, reviewed and certified by an independent, qualified registered professional engineer that attested to the results of the evaluation; and have such a written assessment reviewed, updated and re-certified annually until all upgrades, repairs or modifications necessary to achieve compliance with all of the standards of 40 C.F.R. § 264.573, were complete.

Count X
Failure to Meet the Hydraulic Conductivity Requirement for the Drip Pad

74. WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.573(a)(4)(i), provides, in pertinent part, that drip pads must have a hydraulic conductivity of less than or equal to 1×10^{-7} centimeters per second, as further described in such regulation.

75. From at least January 1, 2004 through September 12, 2006, the Facility drip pad did not have a hydraulic conductivity of less than or equal to 1×10^{-7} centimeters per second, as further described in WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.573(a)(4)(i). Complaint ¶ 88.

76. Respondent violated WVHWMR § 33-20-7.2 from at least January 1, 2004 through September 12, 2006 by failing to have, for the Facility drip pad, a hydraulic conductivity

of less than or equal to 1×10^{-7} centimeters per second, as further described in 40 C.F.R. § 264.573(a)(4)(i).

Count XI
Failure to Minimize Tracking of Hazardous Waste from the Drip Pad

77. WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.573(j), provides, in pertinent part, that drip pads must be operated and maintained in a manner to minimize tracking of hazardous waste or hazardous waste constituents off the drip pad as a result of activities by personnel or equipment.

78. On September 15, 2004 and on February 1, 2005, Respondent failed to operate and maintain the Facility drip pad in a manner to minimize tracking of hazardous waste or hazardous waste constituents off the drip pad as a result of activities by personnel or equipment, as required by WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.573(j). Complaint ¶ 92.

79. Respondent violated WVHWMR § 33-20-7.2 on September 15, 2004 and on February 1, 2005, by failing to operate and maintain the Facility drip pad so as to minimize the tracking of hazardous waste or hazardous waste constituents off the drip pad as a result of activities by personnel or equipment.

Count XII
Failure to Inspect the Drip Pad Weekly

80. WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.574(b)(3), provides that while a drip pad is in operation, it must be inspected weekly and after storms to detect evidence of any deterioration or cracking of the drip pad surface.

81. From at least August 1, 2001 until January 1, 2004, Respondent failed to inspect the drip pad at the Facility weekly as required by WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.574(b)(3). Complaint ¶ 96.

82. Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.574(b), by failing to inspect the drip pad at the Facility weekly to detect evidence of any deterioration or cracking of the drip pad surface.

Count XIII
Failure to Properly Store Land-Disposal Restricted Waste

83. WVHWMR § 33-20-10.1 which incorporates by reference 40 C.F.R. § 268.50(a), provides, in pertinent part, that:

> Except as provided in this section, the storage of hazardous waste restricted from land disposal under [40 C.F.R. Part 268, Subpart C or] RCRA Section 3004 is prohibited unless the following conditions are met: (1) a generator stores such waste in tanks, containers or containment buildings on-site for the purpose of the accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment, or disposal, and the generator complies with the requirements in [40 C.F.R.] § 262.34 and [40 C.F.R.] Parts 264 and 265.

84. The hazardous waste referred to in Paragraphs 17 through 20, above, is, and at the time of its storage at the Facility was, land-disposal restricted hazardous waste within the meaning of WVHWMR § 33-20-10.1, which incorporates by reference 40 C.F.R. § 268.50(a). Complaint ¶ 100.

85. The land-disposal restricted waste referred to in Paragraphs 17 through 20, above, did not meet the applicable treatment standards or prohibition levels under WVHWMR § 33-20-10.1, which incorporates by reference 40 C.F.R. § 268.50, at the time of their storage at the Facility. Complaint ¶ 101.

86. The Facility drip pad is not and, at the time of the violations alleged herein was not, a container, tank or containment building. Complaint ¶ 102.

87. Respondent failed to comply with the requirements of 40 C.F.R. § 262.34 and 40 C.F.R. Parts 264 and 265 with respect to the hazardous waste storage described in Paragraphs 17 through 20, above. Complaint ¶ 103.

88. Respondent violated WVHWMR § 33-20-10.1 from at least January 1, 2004 through September 12, 2006 by storing land disposal restricted wastes in a manner which failed to meet the conditions set forth in 40 C.F.R. § 262.34.

RESPONDENT'S CIVIL PENALTY LIABILITY

89. Respondent's failure to comply with the requirements of 40 C.F.R. § 262.34 and 40 C.F.R. Parts 264 and 265 are violations of RCRA Subtitle C, 42 U.S.C. §§ 6921-6939e, for which Respondent is liable for civil penalties under Section 3008(a) and (g) of RCRA, 42 U.S.C. § 6928(a) and (g).

90. Respondent's failure to file a timely Answer to the Complaint or otherwise respond to the Complaint is grounds for the entry of a default order against the Respondent assessing a civil penalty for the violations described above. 40 C.F.R. § 22.17(a).

91. Respondent's failure to file a response to Complainant's Motion for Default is deemed a waiver of Respondent's right to object to the issuance of this Order. 40 C.F.R. § 22.16(b).

DETERMINATION OF CIVIL PENALTY AMOUNT

Complainant requests the assessment of a civil penalty in the amount of three hundred thirty-five thousand eight hundred and sixteen dollars ($335,816.00) for the RCRA violations alleged in the Complaint. The proposed penalty is based upon Complainant's consideration of the statutory penalty factors set forth in Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), which include the seriousness of the violation and any good faith efforts to comply with the

applicable requirements. See Complainant's Exhibit 5. These factors were applied by the Complainant to the particular facts and circumstances of this case with specific reference to EPA's October, 1990 RCRA Civil Penalty Policy, as revised in June, 2003 ("*RCRA Civil Penalty Policy*"), which reflects the statutory penalty criteria and factors set forth at Section 3008(a)(3) and (g) of RCRA, 42 U.S.C. §§ 6928(a)(3) and (g), the appropriate *Adjustment of Civil Monetary Penalties for Inflation,* pursuant to 40 C.F.R. Part 19 and the September 21, 2004 memorandum by Acting EPA Assistant Administrator Thomas V. Skinner entitled, *Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule* (" Skinner Memorandum"). Pursuant to 40 C.F.R. Part 19, and as provided in the Skinner Memorandum and in the *RCRA Civil Penalty Policy*, penalties for RCRA violations occurring after January 30, 1997 were increased by 10% to account for inflation, not to exceed a $27,500.00 per violation statutory maximum penalty. Pursuant to 40 C.F.R. Part 19, and as provided in the Skinner Memorandum, penalties for RCRA violations occurring after March 15, 2004 and before January 13, 2009[1] have been increased by an additional 17.23% to account for subsequent inflation, not to exceed a $32,500.00 per violation statutory maximum penalty.

The *RCRA Civil Penalty Policy* provides a rational, consistent and equitable methodology for applying the statutory penalty factors enumerated above to the specific facts and circumstances of this case. Under the *RCRA Civil Penalty Policy*, an initial gravity-based penalty was calculated for each violation based on two components: the potential for harm of the violation and the extent of deviation from the applicable requirement. The results of that analysis were used to select corresponding penalty values for single day and multi-day

[1] *See* the December 29, 2008 EPA implementing Memorandum, entitled "*Amendments to EPA Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009).*

violations from the penalty matrices published in the *RCRA Civil Penalty Policy*. The initial penalty for each violation may be adjusted in accordance with the *RCRA Civil Penalty Policy* to account for other factors including any good faith efforts to comply with the applicable requirements, and any willfulness or negligence. In addition to the gravity-based penalty, the *RCRA Civil Penalty Policy* requires that penalty assessments capture any significant economic benefit that Respondent realized as a result of noncompliance.

As a basis for calculating a specific penalty pursuant to 40 C.F.R. § 22.19(a)(4), Complainant has considered, among other factors, facts or circumstances that were unknown to Complainant at the time of issuance of the Complaint that become known to Complainant after the Complaint was issued. Complainant further considered Respondent's ability to pay a penalty as a factor in determining the proposed civil penalty. However, the burden of raising and presenting evidence regarding any inability to pay a particular penalty rests with the Respondent, and in the instant case, Respondent failed to provide all necessary and requested information for making such a determination.

Compliance with RCRA regulations requires a financial commitment which all generators are required to undertake. Successful implementation of the RCRA program depends on the compliance and accountability of all hazardous waste facilities and involves costs that must be shared equitably among all regulated entities to prevent any violator from enjoying a competitive advantage by avoiding or delaying hazardous waste management expenses. Pursuant to the *RCRA Civil Penalty Policy,* the economic benefit of noncompliance may be included in the assessed penalty to ensure that a violator does not gain an economic advantage through its violations.

The penalty proposed by Complainant in this matter was based upon the Respondent's

failure to comply with certain provisions of the WVHWMR regarding the treatment, storage and/or disposal of CCA (F035) hazardous waste. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), Complainant provided an explanation of the number and severity of the violations in the Complaint. As an attachment to the Motion for Default, Complainant further provided specific penalty proposals for the violations alleged in each Count of the Complaint. See Complainant's Exhibit 5. These explanations and associated penalty proposals are as follows:

Count I: *Respondent violated WVHWMR § 33-20-11, which incorporates by reference 40 C.F.R. § 270.1(b), and RCRA § 3005(a) and (e), 42 U.S.C. § 6925(a) and (e), by operating a hazardous waste treatment, storage and/or disposal facility without a permit or interim status from at least January 1, 2004 through September 12, 2006.*

With respect to the Count I allegations, a gravity-based penalty component of "moderate" potential for harm and a "major" extent of deviation were assessed for Respondent's failure to obtain a permit or interim status prior to storage of hazardous waste. From at least January 1, 2004 until August 29, 2005, Respondent was storing hazardous waste, F035, in an 8,000 gallon tank and on the drip pad, and in an associated collection system tank for the drip pad, at the Facility. From at least January 1, 2004 until October 11, 2005, Respondent was storing hazardous waste, F035, in a 3,000 gallon tank at the Facility. Because Respondent was not complying with the regulatory conditions to qualify for exemption from a permit on January 1, 2004, and because Respondent stored wastes for a period of time exceeding the time allowed by the hazardous waste accumulation exemption specified in 40 C.F.R. § 262.34(a)(1)(iii), Respondent was required to have a hazardous waste storage permit or interim status. The permitting process is the backbone of the RCRA program and ensures that facilities that manage hazardous waste handle such waste in such a manner as to minimize risk to human health or the environment presented by such waste. However, the RCRA program exempts generators from the permitting requirements as long as the generator complies with the requirements of 40 C.F.R. Part 262, Subpart C, to ensure proper management of hazardous waste. Failure to comply with the regulatory generator accumulation exemption requirements or to obtain a permit or interim status prior to the treatment, storage, and/or disposal of hazardous waste indicates that the Facility is not instituting proper procedures and practices as required by RCRA for the safe management and handling of hazardous waste.

The violations of the permit requirement were significant and extended for a significant period of time. Operating a hazardous waste treatment, storage or disposal facility without a permit or qualifying for the 90-day accumulation exemption represents a significant violation. The extent of deviation initially is mitigated by Respondent's removal of some of the hazardous waste in August or September of 2005. However, Respondent thereafter left residual CCA (F035) hazardous waste in seven large tanks at the Facility and additionally left a large pressure vessel at the Facility two-thirds full of CCA hazardous waste as of September, 2008.

Respondent's actions necessitated hazardous waste removal activities by EPA (hereinafter, "Removal Action") pursuant to a Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). The potential for harm associated with this violation and the extent of deviation from the regulatory requirement each are considered to be "moderate." The foregoing justifies a gravity-based penalty in the moderate-moderate range of the *RCRA Civil Penalty Policy* matrix. Complainant has determined the alleged violations began on or about January 1, 2004 and continued in excess of 180 days, the time period at which penalties for such violations may be capped under the *RCRA Civil Penalty Policy.* With a "moderate" potential for harm and "moderate" extent of deviation, a multi-day penalty is presumed appropriate under the *RCRA Civil Penalty Policy.*

Penalty:	Potential for Harm:	Moderate	
	Extent of Deviation:	Moderate	$ 8,000.00
	Multi-Day for 179 Days	@ $350.00 per day	$ 62,650.00
	Total		**$ 70,650.00**

Count II: *Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.51, from at least January 1, 2004 through* September 12, 2006, *by failing to have a contingency plan for the Facility.*

With respect to the Count II allegations, a "major" potential for harm and a "major" extent of deviation are assessed. On January 1, 2004, Respondent became a large quantity generator of hazardous waste and the owner and/or operator of a hazardous waste management facility. As such, Respondent was required to comply with the emergency preparedness requirements of RCRA, which include the requirement to have a contingency plan for the Facility. The purpose of a contingency plan is to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water. The provisions of the plan must be carried out immediately whenever there is a fire, explosion or release which could threaten human health or the environment.

The failure to have such a plan could lead to ineffective or dangerous responses during an emergency. If Respondent fails to respond appropriately during an emergency event, human health and the environment may be placed at significant risk. Consequently, such a violation has a "major" potential for harm. From at least January 1, 2004 through September 12, 2006, Respondent failed to have a contingency plan for the Facility. This violation represents a substantial "major" deviation from the regulatory requirement.

Penalty:	Potential for Harm:	Major	
	Extent of Deviation:	Major	$ 23,000.00
	Total		**$ 23,000.00**

Count III: *Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.112, from at least January 1, 2004 through September 12, 2006, by failing to have a closure plan for the Facility which meets the requirements specified in 40 C.F.R. Part 264, Subpart G (closure and post closure), 40 C.F.R.*

§ 264.197 (tank closure) and 40 C.F.R. § 264.575 (drip pad closure).

With respect to the Count III allegations, a "major" potential for harm and a "major" extent of deviation from the requirement to have a closure plan for the Facility were assessed. Respondent owns a drip pad, an associated collection system (tank) for the drip pad, and both an 8,000 gallon tank and a 3,000 gallon tank which held F035 hazardous waste at its Facility. Respondent ceased wood treatment operations at the Facility at the end of December 2003. Although Respondent has removed a large portion of the hazardous waste from these four hazardous waste management units in August and October of 2005, Respondent is required to have a written closure plan for the Facility. A written closure plan identifies the steps which must be taken to perform partial or final closure of a facility. The plan must describe how the hazardous waste management units at the facility will be closed in accordance with the RCRA regulations including, but not limited to, a description of how the hazardous waste will be removed or disposed of. In the instant case, the Facility has ceased operating and some hazardous waste has been left on site with no plan to remove the remaining waste or to determine whether contamination from the hazardous waste management units is present in soil, surface water or ground water. Failure to have a closure plan places human health and the environment at substantial risk.

In this case, Respondent ceased to operate the Facility and abandoned hazardous waste on site without any plan to remove remaining hazardous waste or to determine whether contamination from the hazardous waste management units at the Facility was present in soil, surface water or ground water. EPA thereafter excavated, removed and transported numerous tractor trailer loads of CCA contaminated soil and contaminated wastewater from the Facility to a hazardous waste disposal facility in another State. Respondent's failure to have a closure plan in place for the Facility's drip pad, associated collection system and tanks from at least January 1, 2004 through September 12, 2006 placed human health and the environment at substantial risk and presented a major potential for harm and a substantial and "major" deviation from the regulatory requirements.

Penalty:	Potential for Harm:	Major	
	Extent of Deviation:	Major	$ 26,000.00
	Total		**$ 26,000.00**

Count IV: *Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.575(c)(1), by failing to prepare a contingent post-closure plan under 40 C.F.R. § 264.118 for complying with 40 C.F.R. § 264.575(b) in case not all contaminated subsoils can be removed from the Facility drip pad at closure.*

With respect to the Count IV allegations, a "major" potential for harm and a "major" extent of deviation from the requirement to have a written contingent post-closure plan for the Facility's drip pad were assessed. Respondent owns a drip pad which was used for wood treatment operations until the end of December 2003. During wood treatment operations, F035 hazardous waste was placed onto the drip pad. Such waste was not removed from the drip pad when the Facility ceased operations. In addition, the roof over the drip pad has leaked, resulting

in precipitation falling onto the drip pad. Because closure of the drip pad has not yet occurred, and due to the possibility that contaminated subsoils which may not be able to be practicably removed at closure are present, Respondent should have prepared a written contingent post-closure plan. A written contingent post-closure plan identifies the steps that will be taken if contaminated subsoils are present at the Facility which cannot be practicably removed after closure activities for the drip pad have been implemented. The contingent post-closure plan must describe planned monitoring and maintenance activities to be utilized to ensure the integrity of the containment system during the post-closure care period.

The Respondent's failure to have a contingent post-closure plan has the potential to put human health and the environment at substantial risk. Therefore, such a violation presents a "major" potential for harm. From at least January 1, 2004 through September 12, 2006, Respondent failed to have a written contingent post-closure plan for the Facility's drip pad. This is a substantial and "major" deviation from the regulatory requirements.

Penalty:	Potential for Harm:	Major	
	Extent of Deviation:	Major	$ 23,000.00
	Total		**$ 23,000.00**

Count V: *Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.197(c), by failing to prepare a contingent post-closure plan for complying with 40 C.F.R. § 264.197(b) for the 8,000 gallon tank and the associated collection system (tank) for the Facility drip pad, which did not have secondary containment and were not exempt under 40 C.F.R. § 264.193(g).*

With respect to Count V alleged in the Complaint, a "major" potential for harm and a "major" extent of deviation from the requirement to prepare a contingent post-closure plan for two tanks which do not have secondary containment were assessed. Respondent owns and operates an 8,000 gallon tank and an associated collection system (tank) for the drip pad at the Facility. The tanks at the Facility did not have secondary containment and were used to store CCA (F035) hazardous waste from at least January 1, 2004 until August 29, 2005. Respondent did not perform a RCRA closure of such tanks and ceased operations at the Facility leaving residual hazardous waste in the tanks and hazardous waste contaminated subsoils on site at the Facility. A required written contingent post-closure plan is supposed to identify the steps to be taken if contaminated subsoils are present at the Facility which cannot be practicably removed or decontaminated after closure activities for the Facility tanks have been implemented. The contingent post-closure plan must describe planned monitoring and maintenance activities to be utilized to ensure the integrity of the containment system during the post-closure care period.

Given the Respondent's actions and the EPA Removal Action activities at the Facility to remove, transport and dispose of CCA contamination at the Facility drip pad and in soils surrounding and beneath the pad, the Respondent's failure to prepare a contingent post-closure plan had the clear potential to put human health and the environment at substantial risk. Therefore, such a violation presents a "major" potential for harm and a "major" deviation from the regulatory requirements.

Penalty:	Potential for Harm:	Major	
	Extent of Deviation:	Major	$ 23,000.00
	Total		**$ 23,000.00**

Count VI: *Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.14(a)-(c), from at least January 1, 2004 through September 12, 2006, by failing to prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the active portion of the Facility, as required pursuant to 40 C.F.R. § 264.14(a), and by failing to fulfill the additional requirements of 40 C.F.R. § 264.14(b) and (c), after failing to make a demonstration to the Regional Administrator pursuant to 40 C.F.R. § 264.14(a)(1) and (2).*

With respect to the Count VI allegations, a "minor" potential for harm and a "major" extent of deviation from the requirement were assessed for Respondent's failure to provide site security. An owner or operator of a hazardous waste storage facility must prevent the unknowing entry and minimize the possibility for the unauthorized entry of persons or livestock onto the active portion of his facility unless he makes a demonstration to the Regional Administrator in accordance with the RCRA regulation at 40 C.F.R. § 264.14(a). Respondent failed to provide security and failed to make a demonstration as required. The potential for harm is characterized as "minor" due to the particular location of the Facility at issue, however the extent of deviation is "major." From at least January 1, 2004 through September 12, 2006, Respondent failed to provide site security for the hazardous waste storage Facility, substantially deviating from the regulatory requirement. Assessment of a multi-day penalty for a "minor"/"major" penalty is appropriate upon consideration of the specific facts of this violation, particularly the need for EPA to take independent actions to secure and restrict access to the Facility during subsequent CERCLA Removal Action activities.

Penalty:	Potential for Harm:	Minor	
	Extent of Deviation:	Major	$ 2,500.00
	Multi-Day for 179 Days	@ $150.00 per day	$ 26,850.00
	Total		**$ 29,350.00**

Count VII: *Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.143, from at least January 1, 2004 through September 12, 2006 by failing to establish financial assurance for the closure of the Facility by not choosing from one of the options of 40 C.F.R. § 264.143 (a) through (f).*

With respect to the Count VII allegations, a "major" potential for harm and a "major" extent of deviation were assessed for Respondent's failure to have financial assurance for the Facility. Respondent owns a wood treatment Facility with a drip pad, an associated collection system and two tanks. Respondent ceased wood treatment operations at the end of December 2003. While a large quantity of hazardous waste was removed from the site in August and October of 2005, there are four hazardous waste units which remain on site. Respondent does not have financial assurance for closure of the Facility, which was required on at least January 1, 2004 when Respondent became the owner and/or operator of a hazardous waste management

facility.

An owner/operator of a hazardous waste management facility must establish financial assurance for the closure of the facility. Financial assurance provides a financial mechanism to perform RCRA closure of a hazardous waste management facility. The potential for harm is "major" because Respondent has informed representatives of EPA that it intends to file a petition for bankruptcy in the immediate future, and that Respondent is unable to remove the hazardous waste on site and to remove any contamination which may be present from past wood treatment operations. Failure to have financial assurance to perform closure places human health and the environment at substantial risk. The deviation from the requirement is "major" because Respondent failed to establish any financial assurance, and Respondent has ceased operations and left hazardous waste remaining on site. These characterizations are supported by the EPA's need to expend significant funds in performing a CERCLA Removal Action at the Facility in order to properly secure the Facility and excavate, remove and transport large quantities of hazardous waste contaminated soil, debris and liquids off site for disposal.

Penalty:	Potential for Harm:	Major	
	Extent of Deviation:	Major	$ 27,000.00
	Total		**$ 27,000.00**

Count VIII: *Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.191(a) and (c), by failing to have a written assessment, as described in 40 C.F.R. § 264.191(a) and (c), for the 8,000 gallon tank system and the associated collection system tank for the drip pad at the Facility, which tank systems did not have secondary containment and were not exempt from such requirements pursuant to 40 C.F.R. § 264.193(g).*

With respect to the Count VIII in the allegations, a "major" potential for harm, and a "major" extent of deviation from the requirement were assessed for Respondent's failure to obtain a written assessment for two hazardous waste storage tanks which do not have secondary containment. Respondent owns two hazardous waste tanks: an 8,000 gallon tank and an associated collection system tank for the drip pad. Each tank was used by the Respondent to store F035 hazardous waste from at least January 1, 2004 until August 29, 2005. The two hazardous waste tanks are existing tank systems which do not have secondary containment. Respondent must obtain and keep on file, at the Facility, a written assessment that attests to the integrity of each tank system. The purpose of requiring a written assessment for tank systems which do not have secondary containment is to determine that the tank systems are not leaking or unfit for use. The written assessment, which must be kept at the facility, must be reviewed and certified by an independent, qualified, registered professional engineer.

The failure to have a written assessment of Respondent's two tank systems has the potential to put human health and the environment at substantial risk. Such a violation presents a "major" potential for harm. From at least January 1, 2004 through September 12, 2006, Respondent failed to obtain and keep on file at the Facility a written assessment of the 8,000 gallon tank and the associated collection system tank for the drip pad. This is a substantial and "major" deviation from the regulatory requirements. As a result of its noncompliance,

Respondent also avoided the associated cost of obtaining the required written assessment. Therefore, the assessed penalty appropriately should recuperate the economic benefit realized by the Respondent for such avoided costs.

Penalty:	Potential for Harm:	Major	
	Extent of Deviation:	Major	$ 25,000.00
	Economic Benefit (Avoided Cost)	$1,500.00 x 60.5%	$ 908.00
	Total		**$ 25,908.00**

Count IX: *Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.571, from January 1, 2004 to through September 12, 2006, by failing to: evaluate the Facility drip pad and determine that it met all of the applicable requirements of 40 C.F.R. Part 264, Subpart W; obtain and keep on file at the Facility a written assessment of the drip pad, reviewed and certified by an independent, qualified registered professional engineer that attested to the results of the evaluation; and, review, update and re-certify annually such required assessment until all upgrades, repairs or modifications necessary to achieve compliance with all of the standards of 40 C.F.R. Part 264, Subpart W, are complete.*

With respect to the Count IX allegations, a "major" potential for harm, and a "major" extent of deviation from the requirement were assessed for Respondent's failure to obtain a written assessment for the drip pad. The Facility drip pad was constructed prior to October 1990 and is defined in 40 C.F.R. § 264.570 as an "existing" drip pad. As the owner/operator of an existing drip pad, Respondent was required to evaluate the drip pad and determine that it met all of the requirements of Subpart W, except the requirements for liners and leak detection systems. Respondent was required to obtain and keep on file at the Facility a written assessment of the drip pad, reviewed and certified by an independent, qualified registered professional engineer that attested to the results of the evaluation. Respondent was required to have such assessment reviewed, updated and re-certified annually until all upgrades, repairs or modifications are completed to achieve compliance. From at least January 1, 2004 through September 12, 2006, Respondent failed to obtain and keep on file at the Facility an evaluation of the drip pad, as required. The *"potential for harm"* resulting from Respondent's failure to obtain a written assessment of the drip pad is "major." Subpart W drip pads are hazardous waste management units that are unique to the wood preserving industry. Drip pads are used to accumulate and manage excess wood preserving formulations following the treatment of virgin timber. The nature of wood preserving wastes and the manner in which they are generated (*i.e.*, over a very large surface area), are very unique. To accommodate this uniqueness and to ensure proper and consistent waste management, EPA developed specific standards for the design, installation, operation, and closure of hazardous waste drip pads by recognizing drip pads as a new type of hazardous waste management unit under RCRA. One of the key elements of the existing drip pad regulations is the annual evaluation requirement. The purpose of the annual drip pad evaluation is to make sure a facility's drip pad meets all the design and operating requirements. If a drip pad is not designed and operated properly, it will be unable to properly perform its primary function of capturing and accumulating spent wood preservative, potentially

resulting in the release of hazardous waste or hazardous waste constituents into the environment.

CERCLA Removal Action activities that EPA subsequently found it necessary to perform at the drip pad and at the adjacent and surrounding areas of the Facility lend particular validity to the characterization of the potential for harm from Respondent's failure to perform the required written assessment of the Facility's drip pad to be "major." For the entire time period alleged, Respondent failed to obtain and keep on file a written evaluation for the Facility's drip pad. This is a substantial deviation from the regulatory requirements and the extent of deviation from the regulatory requirements properly is characterized "major." As a result of its noncompliance, Respondent also avoided the associated cost of obtaining the required written assessment. Therefore, the assessed penalty appropriately should recuperate the economic benefit realized by the Respondent for such avoided costs.

Penalty:	Potential for Harm:	Major	
	Extent of Deviation:	Major	$ 25,000.00
	Economic Benefit (Avoided Cost)	$1,500.00 x 60.5%	$ 908.00
	Total		**$ 25,908.00**

Count X: *Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.573(a)(4)(i), from at least January 1, 2004 through September 12, 2006, by failing to have, for the Facility drip pad, a hydraulic conductivity of less than or equal to 1 x 10^{-7} centimeters per second, as further described in 40 C.F.R. § 264.573(a)(4)(i).*

With respect to the Count X allegations, a "major" potential for harm and a "major" extent of deviation from the requirement were assessed for Respondent's failure to meet the hydraulic conductivity design requirement for the Facility drip pad. From at least January 1, 2004 through September 12, 2006, the Facility drip pad did not have a hydraulic conductivity of less than or equal to 1 x 10^{-7} centimeters per second (e.g., existing concrete drip pads must be sealed, coated, or covered with a surface material with a hydraulic conductivity of less than or equal to 1 x 10^{-7} centimeters per second such that the entire surface where drippage occurs or may run across is capable of containing such drippage and mixtures of drippage and precipitation, materials, or other wastes while being routed to an associated collection system). The *"potential for harm"* resulting from the Respondent's failure to properly seal or coat the Facility's drip pad to meet the hydraulic conductivity requirement is "major."

One of the main goals of the drip pad design standards is to prevent the migration of waste from the drip pad to the surrounding environment. During EPA's September 2004 and February 2005 CEIs the inspector observed CCA hazardous waste preservative being stored on the Respondent's concrete drip pad and associated collection system. CCA is a water-borne preservative formulation consisting of water, arsenic acid, chromic acid, and copper oxide. CCA is highly toxic and can damage mucous membranes and tissues of the respiratory system and cause chemical burns on the skin and even skin lesions. CCA has also been determined to be a possible carcinogen. Given such CCA storage activities, the addition of a sealant or

coating to Respondent's Facility drip pad was necessary, as the Facility drip pad and associated collection system are constructed of concrete, which is inherently porous. Without the addition of a sealant or coating to the drip pad surface and associated collection system, there was no way to prevent hazardous wastes from seeping through the drip pad and/or associated collection system into the surrounding environment. Furthermore, the Facility drip pad is an "existing" drip pad and was constructed without a liner and leakage detection system, such that Respondent would have no way of determining whether a release had occurred in the event that CCA preservative did seep through the Facility drip pad or associated collection system.

EPA subsequently undertook extensive CERCLA Removal Action activities at the Facility drip pad and at the adjacent and surrounding areas of the Facility. These actions lend particular validity to the characterization of the potential harm from Respondent's failure to meet the required hydraulic conductivity design requirement for the Facility's drip pad to be "major." Based upon the relevant facts, Respondent's failure to properly coat or seal the Facility drip pad created a substantial potential for harm to human health, the environment, and to the RCRA Program. Respondent's *"extent of deviation"* from the regulatory requirement also was "major." By failing to apply a sealant or coating to the Facility's drip pad and associated collection system, Respondent completely failed to meet the regulatory requirement, resulting in a substantial extent of deviation.

Penalty:	Potential for Harm:	Major	
	Extent of Deviation:	Major	$ 25,000.00
	Total		**$ 25,000.00**

Count XI: *Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.573(j), on September 15, 2004, and on February 1, 2005, by failing to operate and maintain the Facility drip pad to minimize the tracking of hazardous waste or hazardous waste constituents off the drip pad as a result of activities by personnel or equipment.*

With respect to the Count XI allegations, a "major" potential for harm and a "major" extent of deviation from the requirement were assessed for Respondent's failure to minimize tracking of hazardous waste from the drip pad. During EPA's September 15, 2004 and February 1, 2005 CEIs, Respondent was using the Facility's drip pad, which was contaminated with CCA, as a storage area for farm equipment, a horse trailer and a car trailer (as evidenced by photographs taken during the CEIs). Drip pads must be operated and maintained in a manner to minimize tracking of hazardous waste or hazardous waste constituents off the drip pad as a result of activities by personnel or equipment. By moving and storing farm equipment and horse/car trailers on and off of the CCA contaminated drip pad, Respondent failed to minimize the tracking of hazardous waste off of the drip pad as required. The *"potential for harm"* arising from the Respondent's failure to minimize the tracking of hazardous waste and hazardous waste constituents off of the Facility drip pad is "major." The primary reason behind RCRA's preservative containment requirements is to keep preservative chemicals out of the ground and surface waters. Contamination of soil and groundwater is a serious problem because it can move considerable distances as it is picked up by water moving through the soil and the water table. Because there are few, if any, naturally occurring organisms in the

environment that can readily break down these chemicals, once the contamination enters the ground it has the potential to linger for long periods of time and cause extensive contamination to surrounding subsurface environments. Respondent uses a preservative formulation of CCA, which is highly toxic due to the presence of chromium and arsenic and is a possible carcinogen. The farm equipment is clearly used in applications where it regularly comes into contact with soil, while the horse/car trailers are used for travel on public roadways. Based on these facts and observations, Respondent's actions and regulatory failures created a substantial potential for harm to human health, the environment, and to the RCRA Program. Respondent's *"extent of deviation"* associated with this violation is also "major" as Respondent substantially deviated from the regulatory requirements by failing to operate and maintain the Facility drip pad in a manner to minimize the tracking of hazardous waste or hazardous waste constituents off the drip pad as a result of activities by personnel or equipment.

Penalty:	Potential for Harm:	Major	
	Extent of Deviation:	Major	$ 25,000.00
	Multi-Day	1 Day @ $2,000	$ 2,000.00
	Total		**$ 27,000.00**

Count XII: *Respondent violated WVHWMR § 33-20-7.2, which incorporates by reference 40 C.F.R. § 264.574(b), by failing to inspect the drip pad at the Facility weekly and after storms to detect evidence of any deterioration or cracking of the drip pad surface.*

With respect to the Count XII allegations, a "moderate" potential for harm and a "major" extent of deviation from the regulatory requirement were assessed for Respondent's failure to inspect the Facility drip pad weekly and after storms. From at least August 1, 2001 until January 1, 2004, Respondent failed to inspect the Facility drip pad weekly and after storms to detect evidence of any deterioration or cracking of the drip pad surface. The *"potential for harm"* is "moderate" due to the fact the wood treating operations were minimal and the drip pad was covered. In making this determination, Complainant considered the design of the Facility's drip pad and the nature of the activities conducted by Respondent. The Facility's drip pad was constructed prior to October 24, 1990 and is defined as an "existing" drip pad, having been constructed without a synthetic liner or leakage detection system. The Facility drip pad is contaminated with CCA, which contains toxic constituents that have the potential to cause skin, eye, and respiratory irritation as well as more serious ailments in humans. CCA is considered a possible carcinogen, is water soluble and is highly mobile. The primary reason behind the weekly inspection requirement is to keep deterioration of the drip pad from occurring so that preservative chemicals do not contaminate ground and surface waters. Contamination of soil and groundwater is a serious problem because it can move considerable distances as it is picked up by water moving through the soil and the water table. Because there are few, if any, naturally occurring organisms in the environment that can readily break down these chemicals, once the contamination enters the ground it has the potential to linger for long periods of time and cause extensive contamination to surrounding subsurface environments.

At the time of EPA's September 2004 and February 2005 CEIs, there was a noticeable

residue of CCA and CCA contaminated debris covering a majority of the Facility's drip pad surface. This, and the CERCLA Removal Action activities at the Facility drip pad and at the adjacent and surrounding areas of the Facility as a direct result of Respondent's noncompliance with regulatory requirements, support the characterization of Respondent's failure to inspect the Facility drip pad weekly and after storms for deterioration or cracking of the drip pad surface as one that created a significant potential for harm to human health, the environment, and to the RCRA Program. The *"extent of deviation"* associated with this violation also is determined to be "major," as the Respondent completely failed to comply with the regulatory requirements.

Penalty:	Potential for Harm:	Moderate	
	Extent of Deviation:	Major	$ 10,000.00
	Total		**$ 10,000.00**

Count XIII: *Respondent violated WVHWMR § 33-20-10.1, which incorporates by reference 40 C.F.R. § 268.50(a), from at least January 1, 2004 through September 12, 2006, by storing land disposal restricted wastes in a manner which failed to meet the conditions set forth in 40 C.F.R. § 262.34.*

With regard to Count XIII alleged in the Complaint, Respondent unlawfully stored land disposal restricted wastes. Because the Count XIII allegations arose from the same set of facts and activities as those alleged in Count I, a separate penalty was not assessed for Count XIII.

Penalty:	Potential for Harm:	Moderate		
	Extent of Deviation:	Moderate	$	0.00
	Multi-Day for 179 Days		$	0.00
	Total		**$**	**0.00**

Respondent's Ability to Pay:

Although Complainant received some financial information from the Respondent during prefiling negotiations pertaining to this matter, Complainant's counsel requested additional financial information which Respondent failed to provide. Complainant's counsel thereafter learned that the Respondent had provided additional financial information to EPA Region III's Hazardous Site Cleanup Division in response to an October, 2007 information request letter issued to Kessel Lumber Supply Inc. under the authority of Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. Section 9604(e). Complainant indicates that such

information no longer is current and that, upon review, Complainant was unable to determine what assets the Respondent may have available to pay the proposed civil penalty of $335,816.00. See Complainant's Exhibits 6, 7, and 8. The information necessary to make such a determination resides exclusively within Respondent's control.

The burden to raise and prove an inability to pay a penalty rests with the Respondent. "If the Respondent has not met its burden of going forward regarding its inability to pay a civil penalty, the complainant carries no burden on this issue; the respondent will be deemed able to pay the maximum statutory penalty." 56 Fed. Reg. 29996, 30006 (July 1, 1991). See also, *In the Matter of: Mr. William J. Fabrick, 3225 Old Westminster Pike, Finksburg, Maryland 21048*, No. CWA-III-208, 2000 WL 166091 (E.P.A. Apr. 25, 2000). The Environmental Appeals Board ("EAB") consistently has held that a respondent's ability to pay a proposed penalty may be presumed until it is put at issue by a respondent and that where a respondent does not raise its ability to pay as an issue in an answer to a complaint and does not produce any evidence to support such a claim, complainant may properly argue, and the presiding officer may conclude, that any objection to the penalty based upon ability to pay has been waived and that no penalty reduction is warranted. *In re Spitzer Great Lakes Ltd.*, 9 E.A.D. 302, 319-21 (EAB 2000); *In re Chempace Corp.*, 9 E.A.D. 119, 113 n.20 (EAB 2000); *In re Antkiewicz*, 8 E.A.D. 218, 219-40 (EAB 1999); *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 541-542 (EAB. 1994).

The official record is devoid of any information submitted by Respondent raising inability to pay the penalty assessed in this matter. Since any financial information otherwise contained in the record is insufficient, I find that Respondent is able to pay.

CONCLUSION

Complainant proposes a penalty of $335,816.00 against Respondent for the violations alleged in the Complaint in accordance with the statutory factors set forth at Section 3008(a) and (g) of RCRA, 42 U.S.C. § 6928(a) and (g), which requires EPA to take into account the seriousness of the violation and any good faith efforts by Respondent to comply with the applicable requirements, and the *RCRA Civil Penalty Policy*.

I have determined that the penalty amount of $335,816.00 proposed by Complainant and requested in the Motion for Default is not inconsistent with RCRA and the record in this proceeding and is appropriate based on the record and on Section 3008(a) and (g) of RCRA.

ORDER

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. § 22.17, Complainant's Motion for Default is hereby GRANTED and Respondent is hereby ORDERED as follows:

1. Respondent, Kessel Lumber Supply, Inc., is hereby assessed a civil penalty in the amount of three hundred thirty-five thousand, eight hundred and sixteen dollars ($335,816.00), and ordered to pay the civil penalty as directed in this Order.

2. Respondent shall pay the civil penalty to the "**United States Treasury**" within thirty (30) days after this Default Order has become final. See ¶ 7 below. Respondent may use the following means for penalty payment:

   a. All payments made by check and sent by Regular U.S. Postal Service Mail shall be addressed and mailed to:

      U.S. Environmental Protection Agency
      Fines and Penalties
      Cincinnati Finance Center
      P.O. Box 979077

St. Louis, MO 63197-9000

Contact: Craig Steffen - (513-487-2091)
Eric Volck - (513-487-2105)

b. All payments made by check and sent by Private Commercial Overnight Delivery service shall be addressed and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, MO 63101

Contact: Craig Steffen - (513-487-2091)
Eric Volck - (513-487-2105)

c. All payments made by electronic wire transfer shall be directed to:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

(Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency")

d. All electronic payments made through the automated clearinghouse (ACH), also known as Remittance Express (REX), shall be directed to:

US Treasury REX / Cashlink ACH Receiver
ABA = 051036706
Account No.: 310006, Environmental Protection Agency
CTX Format
Transaction Code 22 - Checking

Physical location of U.S. Treasury facility:
5700 Rivertech Court
Riverdale, MD 20737

Contact for ACH: John Schmid - (202-874-7026)

e. On-Line Payment Option:

WWW.PAY.GOV

Enter sfo 1.1 in the search field.

Open form and complete required fields.

3. At the same time that payment is made, Respondent shall mail copies of any corresponding check, or written notification confirming any electronic fund transfer or online payment, as applicable, to:

Ms. Lydia Guy
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region III (Mail Code 3RC00)
1650 Arch Street
Philadelphia, PA 19103-2029

and

A.J. D'Angelo
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III (Mail Code 3RC30)
1650 Arch Street
Philadelphia, PA 19103-2029

4. Along with its civil penalty remittance made pursuant to ¶ 2, above, and with the copy of the check or written notification (confirming any electronic fund transfer or online payment) sent pursuant to ¶ 3, immediately above, Respondent shall include a transmittal letter identifying the caption (In the Matter of: Kessel Lumber Supply, Inc.) and the docket number (RCRA-03-2006-0059) of this action.

5. In the event of failure by Respondent to make payment as directed above, this matter may be referred to a United States Attorney for recovery by appropriate action in United States District Court.

6. Pursuant to the Debt Collection Act, 31 U.S.C. § 3717, EPA is entitled to assess interest

and penalties on debt owed to the United States and a charge to cover the cost of processing and handling a delinquent claim.

7. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. §§ 22.17(c) and 22.27(a). This Initial Decision shall become a Final Order forty-five (45) days after it is served upon the Complainant and Respondent unless (1) a party appeals this Initial Decision to the EPA Environmental Appeals Board in accordance with 40 C.F.R. § 22.30,[2] (2) a party moves to set aside the Default Order that constitutes this Initial Decision, or (3) the Environmental Appeals Board elects to review the Initial Decision on its own initiative.

IT IS SO ORDERED.

August 11, 2011
Date

Renée Sarajian
Renée Sarajian
Regional Judicial Officer/Presiding Officer
U.S. EPA, Region III

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[2] Under 40 C.F.R. § 22.30, any party may appeal this Order by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board within thirty (30) days after this Initial Decision is served upon the parties.

CERTIFICATE OF SERVICE

This Initial Decision and Default Order (Docket No.: RCRA-03-2006-0059) was served on the date below, by the manner indicated, to the following people:

VIA HAND DELIVERY:

A.J. D'Angelo (3RC30)
Senior Assistant Regional Counsel
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

VIA CERTIFIED MAIL/
RETURN RECEIPT REQUESTED:

Stephen Shuman, Esq.
Reeder & Shuman
256 High Street
Morgantown, WV 26507

and

Lawrence Kessel
HC 84 Box 4
New Creek Drive
Keyser, WV 26726

VIA EPA POUCH:

Eurika Durr
Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

AUG 11 2011
Date

Lydia Guy
Regional Hearing Clerk (3RC00)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029