#0995

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	)	
	)	
K Industries, Inc.,	)	
Apache, OK	)	Docket No. RCRA-06-2003-0915
	)	
EPA I.D.: OKR000018317	)	
	)	
Respondent.	)	

DEFAULT ORDER AND INITIAL DECISION

This is a proceeding under Section 3008(a) of the Resource Conservation and Recovery Act ("RCRA" or "the Act"), 42 U.S.C. § 6928(a). The proceeding is governed by procedures set forth in the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules") codified at 40 C.F.R. Part 22. Complainant, Director of the Compliance Assurance and Enforcement Division of United States Environmental Protection Agency Region 6, has filed a Motion for Default Order ("Motion"). In its Motion, Complainant seeks a default order finding Respondent, K Industries, Inc., liable for the violations of RCRA alleged in the Complaint, Compliance Order and Notice of Opportunity for Hearing ("Complaint") filed in this matter. Subsequent to the filing of its Motion, Complainant withdrew, with prejudice, Count II of the Complaint. To the extent that Complainant's Motion seeks a finding that Respondent is liable for the violation alleged in Count II, the issue is moot. Complainant also requests that Respondent be ordered to comply with the provisions of the Compliance Order in the Complaint and assessed a civil penalty in the amount of $380,071.00. To the extent that Complainant's

Motion requests that a penalty be assessed and injunctive relief be ordered in connection with Count II, the issues are moot.

Respondent is found to be in default because of its failure to file an answer to the Complaint. Such default by Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. Respondent is found to have violated Sections 3005(a) and 3010(a) of RCRA, 42 U.S.C. §§ 6925(a) and 6930(a). The injunctive relief proposed, as it relates to Count I, is consistent with the record of this proceeding and the Act. A penalty of $158,256.00 for Count I is consistent with the record in this proceeding and the Act.

BACKGROUND

Complainant filed the Complaint on September 8, 2003. Section VII of the Complaint, entitled "Notice of Opportunity to Request a Hearing," provides information concerning Respondent's obligations with respect to responding to the Complaint. The last sentence of the second paragraph of Section VII of the Complaint specifically states that "Failure of Respondent to admit, deny, or explain any material factual allegation in the Complaint constitutes an admission of the allegation." Section VIII of the Complaint, entitled "Default Order," states that "If Respondent fails to file an Answer within thirty (30) days of the filing date of this Complaint, it may be found to be in default pursuant to 40 C.F.R. § 22.17."

According to the Certificate of Service attached to the Complaint, the Complaint was mailed to Respondent's agent for service of process on September 8, 2003. In its Memorandum of Law Supporting Complainant's Motion for Default Order ("Complainant's Memorandum"), Complainant acknowledges that it cannot prove by return receipt that Respondent received the

Complaint as a result of the September 8, 2003 mailing. Complainant's Memorandum states that a second copy of the Complaint was sent to the Respondent's agent for service of process and refers to an attached copy of a certified mail return receipt (also known as a "green card") as evidence that the Complaint was received by Respondent as a result of the second mailing. The original of the subject green card was filed with the Regional Hearing Clerk. Upon examining the green card and the Complaint, including the certificate of service attached to the Complaint, the Presiding Officer was unable to establish a connection between the proffered green card and the Complaint. On July 13, 2004, the Presiding Officer issued an Order to Supplement and Clarify providing Complainant with an opportunity to file additional information supplementing and clarifying the information relating to Respondent's receipt of the Complaint. The Order specifically provided that Respondent would have 15 days after service of Complainant's response to the order to file its response, if any, to Complainant's filing. On July 27, 2004, Complainant filed Complainant's Response to Order to Supplement and Clarify ("Complainant's Response") with the Regional Hearing Clerk and served it upon the Respondent.

In a declaration attached to Complainant's Response, Jeanette Morgan, who identifies herself as the Secretary for the Hazardous Waste Enforcement Branch in the Compliance and Enforcement Division of U.S. Environmental Protection Agency Region 6, states that she mailed a copy of the Complaint to Mr. James Barlow, Esq., by certified mail, return receipt requested, on December 10, 2003. Based upon a copy of the return receipt accompanying the Complaint that she retained for her records, Ms. Morgan states that the receipt number was 7000 0520 0022 2562 2782. This number matches the article number on the green card filed with the Regional Hearing Clerk and establishes that the green card in the Regional Hearing Clerk's file shows

proper service of the Complaint upon the Respondent. The green card shows a date of delivery of December 12, 2003. A properly executed return receipt constitutes proof of service of the Complaint. Nothing in the return receipt in the present case suggests that it was not properly executed, thus proper service of the Complaint on the Respondent on December 12, 2003, may be presumed under the rules. As of the date of this Order, Respondent has not filed an answer or other response to the Complaint, to the Motion, or to Complainant's Response.

FINDINGS OF FACT

Pursuant to sections 22.17(c) and 22.27(a) of the Consolidated Rules, 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record in this case, I make the following findings of fact:

1. Respondent is a corporation incorporated in and under the laws of the State of Oklahoma on February 7, 2002.

2. Respondent began operating on July 1, 2002.

3. Respondents' registered agent for service in the State of Oklahoma is James W. Barlow, Esq., P.O. Box 521035, Tulsa, OK 74152.

4. Respondent's place of business is located at 108 North Pine Street, Apache, Oklahoma.

5. Respondent's business consists of a warehouse, a dumpster, and several trailers.

6. The land occupied by Respondent's business is held in trust for the Apache Tribe of Oklahoma.

7. The building occupied by Respondent's business is owned by the Apache Tribe of Oklahoma.

8. On or about August 1, 2002, Respondent obtained a Solid Waste Transfer, Recycle, and Processing permit from the Apache Tribe of Oklahoma to operate the business at 108 North Pine Street, Apache, Oklahoma.

9. On November 5, 2002, EPA received complaints from the City of Apache, Oklahoma, Police and Fire Department and the Oklahoma Department of Environmental Quality alleging improper storage of potentially hazardous wastes at Respondent's business.

10. On November 6, 2002, EPA representatives from the Emergency Response and Prevention Branch and the Hazardous Waste Enforcement Branch conducted a visual site assessment of Respondent's business.

11. During the site assessment, hundreds of drums of waste were observed and photographed being stored in Respondent's warehouse.

12. On November 8, 2002, EPA issued a request for information ("Request") to Respondent pursuant to Section 3007(a) of RCRA, 42 U.S.C. § 6927(a).

13. On November 20, 2002, Respondent submitted a response ("Response") to EPA's Request.

14. In the Response, Respondent stated that it does not generate any waste at its business.

15. According to the Response, waste being stored at the facility was generated by Respondent's customers and shipped to Respondent for subsequent disposal and/or recycling.

16. The Response also indicated that the facility was being used for temporary storage and consolidation of non-hazardous industrial solid wastes and RCRA-exempt household hazardous wastes prior to shipment off-site for disposal or recycling.

17. On February 12 and 13, 2003, EPA representatives conducted a compliance evaluation inspection ("Inspection") at Respondent's business pursuant to section 3007(a) of RCRA, 42 U.S.C. § 6927(a).

18. At the time of the Inspection, EPA representatives observed and photographed approximately 400 containers of waste, consisting of 55-gallon drums, 30-gallon drums, 250-gallon tote containers, and a 500-gallon poly-container/tank.

19. EPA's representatives collected 25 samples, including three (3) duplicated samples for quality assurance/quality control purposes, from various waste storage containers at the facility.

20. Containers that were sampled during the inspection included: two (2) 30-gallon steel drums labeled "Whitney Solids"; a 55-gallon steel drum that was not labeled; a 55-gallon plastic drum that was not labeled; a 55-gallon steel drum that was labeled "Oil"; a 55–gallon steel drum labeled "Sandblast."

21. The samples collected by EPA's representatives were analyzed for the Characteristics of Hazardous Waste identified in 40 C.F.R. Part 261 Subpart C as prescribed in 40 C.F.R. § 260.11 by the Toxicity Characteristic Leaching Procedure ("TCLP") referenced in Appendices II and III of 40 C.F.R. Part 261.

22. The results of the analyses indicated that the sample taken from one of the 30-gallon drums identified in paragraph 20 contained the pesticide methoxychlor at a concentration of 64 mg/L.

23. The results of the analyses indicated that the sample taken from the other 30-gallon drum identified in paragraph 20 contained chromium at a concentration of 6.5 mg/L.

24. The results of the analyses indicated that the sample taken from the unlabeled 55-gallon steel drum identified in paragraph 20 contained selenium at a concentration of 1.8 mg/L.

25. The results of the analyses indicated that the sample taken from the unlabeled 55-gallon plastic drum identified in paragraph 20 contained chromium at a concentration of 319 mg/L and benzene at a concentration of 3.4 mg/L.

26. The results of the analyses indicated that the sample taken from the 55-gallon drum labeled "Oil" identified in paragraph 20 contained lead at a concentration of 13.8 mg/L and selenium at a concentration of 1.1 mg/L.

27. The results of the analyses indicated that the two (2) individual samples taken from the 55-gallon drum labeled "Sandblast" identified in paragraph 20 contained cadmium at concentrations of 8.0 mg/L and 7.9 mg/L.

28. According to Respondent's representatives present at the time of the inspection and sampling, none of the containers identified in paragraph 20 contained RCRA-exempt household hazardous waste.

29. Respondent has not submitted a notification as a hazardous waste treatment, storage, or disposal facility.

30. Respondent does not have interim status and has not applied for, or received, a permit to treat, store, or dispose of hazardous waste.

31. The Complaint was filed with the Regional Hearing Clerk on September 8, 2003.

32. A copy of the Complaint was mailed to Mr. James Barlow, Esq., by certified mail, return receipt requested, on December 10, 2003.

33. The number on the return receipt for the Complaint was 7000 0520 0022 2562 2782.

34. The certified mail return receipt for the Complaint, no. 7000 0520 0022 2562 2782, was signed for at Mr. Barlow's address on December 12, 2003.

35. Respondent did not file an answer to the Complaint within 30 days of receipt and has not filed an answer as of the date of this Order.

36. On May 12, 2004, Complainant filed its Motion for Default and Memorandum of Law Supporting Complainant's Motion for Default Order and served them on the Respondent.

37. Respondent has not filed a response to Complainant's Motion for Default and Memorandum of Law Supporting Complainant's Motion for Default Order as of the date of this Order.

38. On July 27, 2004, Complainant filed Complainant's Response to Order to Supplement and Clarify and served it on the Respondent.

39. Respondent has not filed a response to Complainant's Response to Order to Supplement and Clarify as of the date of this Order.

40. On February 18, 2005, Complainant withdrew, with prejudice, Count II of the Complaint.

CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. §§ 22.17(c) and 22.27(a), and based on the entire record, I reach the following conclusions of law:

41. Respondent is a "person" as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15) and 40 C.F.R. § 260.10.

42. The contents of the containers identified in paragraph 20 are "solid waste" as defined at 40 C.F.R. § 261.2.

43. The contents of one of the 30-gallon drums identified in paragraph 20 exhibits the characteristic of toxicity because the extract from a representative sample of the waste contains methoxychlor at a concentration equal to or greater than 10.0 mg/L. 40 C.F.R. § 261.24(a).

44. The contents of the other 30-gallon drum identified in paragraph 20 exhibits the characteristic of toxicity because the extract from a representative sample of the waste contains chromium at a concentration equal to or greater than 5.0 mg/L. 40 C.F.R. § 261.24(a).

45. The contents of the unlabeled 55-gallon steel drum identified in paragraph 20 exhibits the characteristic of toxicity because the extract from a representative sample of the waste contains selenium at a concentration equal to or greater than 1.0 mg/L. 40 C.F.R. § 261.24(a).

46. The contents of the unlabeled 55-gallon plastic drum identified in paragraph 20 exhibits the characteristic of toxicity because the extract from a representative sample of the waste contains benzene at a concentration equal to or greater than 0.5 mg/L and chromium at a concentration equal to or greater than 5.0 mg/L. 40 C.F.R. § 261.24(a).

47. The contents of the 55-gallon drum labeled "Oil" identified in paragraph 20 exhibits the characteristic of toxicity because the extract from a representative sample of the waste contains lead at a concentration equal to or greater than 5.0 mg/L and selenium at a concentration equal to or greater than 1.0 mg/L. 40 C.F.R. § 261.24(a).

48. The contents of the 55-gallon drum labeled "Sandblast" identified in paragraph 20 exhibits the characteristic of toxicity because the extract from a representative sample of the waste contains cadmium at a concentration equal to or greater than 1.0 mg/L. 40 C.F.R. § 261.24(a).

49. The contents of the containers identified in paragraph 20 are "hazardous waste" as defined at 40 C.F.R. § 261.3.

50. Respondent's business is a "facility" as that term is defined at 40 C.F.R. § 260.10.

51. Respondent is the "operator" of the facility as that term is defined at 40 C.F.R. § 260.10.

52. Respondent was engaged in "storage" of hazardous waste at the facility as that term is defined at 40 C.F.R. §§ 260.10 and 270.2.

53. Respondent violated Section 3010(a) of RCRA, 42 U.S.C. § 6930(a), by operating a facility for treatment, storage, or disposal of hazardous waste without filing with the Administrator a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by Respondent.

54. Respondent violated Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), by operating a facility for the treatment, storage, or disposal of hazardous waste without a permit or interim status.

55. Pursuant to section 3008(a) of RCRA, 42 U.S.C. § 6928(a), Respondent is liable for penalties of up to $27,500 for each day of continued noncompliance.

56. The Complaint in this proceeding was lawfully and properly served upon Respondent in accordance with 40 C.F.R. § 22(b)(1).

57. 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).

58. Respondent's failure to file an answer 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).

59. Complainant's Motion for Default Order was lawfully and properly served on Respondent. 40 C.F.R. § 22.5(b)(2).

60. Respondent was required to file any response to the motion with fifteen (15) days of service. 40 C.F.R. § 22.16(b).

61. Respondent's failure to respond to the motion is deemed to be a waiver of any objection to the granting of the motion. 40 C.F.R. § 22.16(b).

62. Complainant's Response to Order to Supplement and Clarify was lawfully and properly served on Respondent. 40 C.F.R. § 22.16(b).

63. Pursuant to the Presiding Officer's Order to Supplement and Clarify, Respondent was required to file any response to the Complainant's Response to Order to Supplement and Clarify within fifteen (15) days of service.

64. Respondent's failure to respond to the Complainant's Response to Order to Supplement and Clarify is deemed to be a waiver of any objection to the granting of the motion as supplemented and clarified.

65. Complainant's withdrawal of Count II was lawful and proper.

DETERMINATION OF REMEDY

According to 40 C.F.R. § 22.17(c), "[w]hen the Presiding Officer finds that default has occurred he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued." 40

C.F.R. § 22.17(c) also states, "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act."

In this case, the relief proposed in the Complaint and requested in the Motion includes the performance of the injunctive relief as follows:

> To take the following actions and provide evidence of compliance within the time periods specified below pursuant to section 3008(a) of RCRA, 42 U.S.C. § 6928(a):
>
> A. Within thirty (30) days of the effective date of this Default Order, Respondent shall remove all hazardous waste from the K Industries facility and store, treat, and/or dispose of all hazardous waste at a properly permitted facility.
>
> B. Within thirty (30) days of the effective date of this Default Order, Respondent shall make the necessary arrangements to have all used oil properly handled at a used oil recycling facility.
>
> C. For items A and B, Respondent shall provide EPA with a written submission within forty-five (45) days of the effective date of this Default Order, certifying compliance with the applicable regulations.
>
> D. In all instances in which this Default Order requires written submissions to EPA, each submission must be accompanied by the following certification signed by a "responsible official":
>
> "I certify that the information contained in or accompanying this submission is true, accurate and complete. As to those identified portions of this submission for which I cannot personally verify the truth and accuracy, I certify as the company official having supervisory responsibility for the person(s) who, acting upon my direct instructions, made the verification, that this information is true, accurate, and complete."
>
> For the purpose of this certification, a "responsible official" of a corporation means a president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function, or any other person who performs similar decision-making functions for the corporation.

E. Copies of all documentation required by this Default Order shall be sent to the following:

Carol D. Peters-Wagnon, Chief
ALONM Section(6EN-HS)
Hazardous Waste Enforcement Branch
Compliance Assurance and Enforcement Division
U.S. EPA - Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733
Attention: Melissa Smith

The injunctive relief proposed in paragraphs A, C (as it relates back to A), D, and E is consistent with the record of this proceeding and the Act and will be ordered. The injunctive relief proposed in paragraphs B and C (as it relates back to B) relates to Count II, which has been withdrawn with prejudice by the Complainant. Under the circumstances, the request for the injunctive relief proposed in paragraph B and C (as it relates back to B) is moot and the injunctive relief will not be ordered.

The relief proposed in the Complaint and requested in the Motion also includes the assessment of a penalty of $380,071.00. With respect to penalty, section 22.27(b) of the Consolidated Rules, 40 C.F.R. § 22.27(b) provides that the Presiding Officer shall determine the amount of the civil penalty

> ". . . based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act . . . If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing exchange, or the motion for default, whichever is less."

In the Complaint and in its Motion, Complainant proposed that Respondent be assessed a civil penalty of $380,071.00 for the violations alleged in the Complaint. Complainant based its

proposed penalty upon the facts alleged in the Complaint and upon those factors which EPA must consider pursuant to section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), and the "October 1990 RCRA Civil Penalty Policy" ("Penalty Policy"), including (1) the seriousness of the violations; (2) any good faith efforts by the Respondent to comply with applicable requirements; (3) the potential for harm to human health or the environment; (4) the extent to which the conduct of Respondent has deviated from the regulatory requirement; (5) the presence of multiple violation; (6) the number of days over which the violations occurred; and (7) the economic benefit accruing to the Respondent, as well as such other matters as justice may require.

Complainant based its proposed penalty on calculations it performed under the Penalty Policy and attached a declaration containing a narrative summary explaining the reasoning behind the penalty proposed for the violations alleged in the Complaint. See Exhibit B attached to Complainant's Motion.

Complainant's total proposed penalty includes $23,265.00 for the violation alleged in Count II, which has been withdrawn with prejudice by the Complainant. Under the circumstances, the request for the $23,265.00 penalty proposed in connection with Count II is moot and the penalty will not be ordered.

Complainant proposes a penalty of $356,806.00 for Count I. Complainant's calculation using the Penalty Policy formula is $24,750 (gravity-based component) + $293,700 (multi-day component) + $38,356 (economic benefit) = $356,806. Complainant made no adjustments for good faith or lack of good faith efforts to comply; degree of willfulness and/or negligence; or history of noncompliance. For the reasons set forth below, I find Complainant's proposed

penalty for Count I clearly inconsistent with the record in this case. I find a penalty of $158,256.00 appropriate for Count I and consistent with the record in this proceeding and the Act.

Under the Penalty Policy, two factors are considered in determining the gravity-based component, the potential for harm and the extent of deviation from a statutory or regulatory requirement. Each factor is assigned a value of major, moderate, or minor. A matrix then provides a penalty range for the gravity-based component. The matrix includes a range of penalties from a high of $27,500 for a violation that is found to be major/major to a low of $110 for a violation that is considered minor/minor.

In arriving at its assessment for the gravity-based component, Complainant reasonably found the potential for harm presented by Count I was major. Complainant's analysis concludes that Count I resulted in a substantial risk that humans or other environmental receptors would be exposed to hazardous waste or hazardous constituents and that it represented a substantial potential for harm to the regulatory program.

The Penalty Policy provides that evaluating the risk of exposure can be broken into two components, the probability of exposure and the potential seriousness of contamination. Some of the factors to consider in determining the probability of exposure include evidence of release, evidence of waste mismanagement, and adequacy of provisions for detecting and preventing a release. Some of the factors to consider in determining the potential seriousness of contamination include the quantity and toxicity of wastes potentially released, likelihood or fact of transport by way of environmental media, and the existence, size, and proximity of receptor populations and sensitive environmental media. In considering the risk of exposure, the

emphasis is placed on the potential for harm posed by a violation rather than on whether harm actually occurred.

In its analysis of the risk of exposure, Complainant considered that Respondent accepted and stored hazardous waste without meeting any of the requirements for a RCRA permitted storage facility, including conducting inspections and personnel training; maintaining security, aisle space, emergency equipment, and making arrangements with local emergency officials; establishing a contingency plan and emergency procedures. Complainant considered that Respondent was storing hundreds of drums of waste at its facility, that one-fourth of the drums sampled by EPA were found to contain hazardous waste, including high levels of pesticides, chromium, and lead, all of which are potentially very harmful to humans, especially children. Complainant also considered that the facility is in close proximity to a residential area and a day care facility. Finally, Complainant considered the likelihood that the hazardous waste would be disposed off-site at unpermitted facilities, posing an additional threat of exposure at other locations.

It should be noted that Complainant's analysis of the risk of exposure lacks important information. For example, Complainant relies on the observation that there were hundreds of drums a the facility and that one-fourth of the drums sampled by EPA contained hazardous waste as the only discussion of the quantity of hazardous waste. EPA sampled only about 24 drums. Only six of the sampled drums contained hazardous waste. There is no information in the record showing that either the six drums or the 24 drums were representative of the hundreds of drums. Nor is there other information showing that it would be reasonable to conclude that a similar ratio of hazardous to nonhazardous waste would be found if all of the drums were sampled.

Another example of the lack of information is Complainant's simple assertion that high levels of pesticides, chromium, and lead, are all potentially very harmful to humans, especially children as the only discussion of the toxicity of the hazardous waste. There is no information in the record showing potential health effects or relative toxicity (For example, would be a likelihood of immediate fatalities if there were a release, or would it take a long exposure to cause effects?). Finally, the only discussion of the potential receptor population is the statement that there is a residential neighborhood and a day care center in proximity to the facility. It would be useful to know the number of people and approximate distance from the facility in this analysis. While these information gaps are important, they do not change my conclusion that it is reasonable to consider the potential for harm in this case to be major. To the extent that the information gaps might have affected my analysis, they are overcome by the consideration of the potential for harm to the regulatory program in the next paragraph.

The Penalty Policy provides that in evaluating the potential for harm to the regulatory program it is to be considered that the violation of some requirements undermine the regulatory purposes or procedures for implementing the RCRA program to such a degree that substantial penalties are warranted. The Penalty Policy provides some examples of such violations, including failure to notify as an owner/operator of a hazardous waste facility pursuant to Section 3010 of RCRA and operating without a permit or interim status. In its analysis of the potential for harm to the regulatory program, Complainant considered that the Respondent was operating a hazardous waste facility without submitting any notification to EPA and that EPA was not aware of the facility's operation until citizen complaints were received. While not specifically

mentioned in Complainant's analysis, I have found that Respondent was operating without a permit or interim status.

In arriving at its assessment for the gravity-based component, Complainant reasonably found the extent of deviation from requirements was major. The Penalty Policy provides that the "extent of deviation" relates to the degree to which the violation renders inoperative the requirement violated. More specifically, the Penalty Policy states that where a violator deviates from the requirements of the regulation or statute to such an extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance, the extent of deviation should be classified a major. In its analysis of the extent of deviation, Complainant considers that Respondent was operating a hazardous waste facility without a permit, that Respondent had not notified EPA of its operations nor applied for a permit. Complainant also considers that Respondent did not meet any of the requirements for a RCRA permitted facility, and was in substantial noncompliance.

The Penalty Assessment Matrix in the Penalty Policy provides a penalty range from $22,000 to $27,500 for a violation with a potential for harm classified as major and an extent of deviation classified as major. Complainant chose $24,750 for the gravity-based component of the penalty for Count I. Complainant provided no rationale for its choice. According to the Penalty Policy, case-specific factors should be relied upon in selecting a dollar figure from the matrix range. Some factors to consider include the seriousness of the violation (relative to other violations falling within the same matrix cell), the environmental sensitivity of the areas potentially threatened by the violation, efforts at remediation or the degree of cooperation evidenced by the facility (to the extent his factor is not to be accounted for in subsequent

adjustments to the penalty amount), the size and sophistication of the violator, the number of days of violation, and other relevant information.

In the absence of an explanation from the Complainant, I have reviewed the record in this case. There is no evidence in the record of an actual release of hazardous substances in this case. Nor is there evidence that the hazardous substances involved are acutely toxic or otherwise represent an unusually significant or immediate threat to human health or the environment. There is a relatively small quantity of known hazardous waste at the facility. Under these circumstances, this is a below-average violation compared to other violations that would fall within the same matrix cell. There is no information in the record showing that the Respondent is large or sophisticated. The number of days of violation are accounted for in this case by the multi-day component of the penalty. There is no indication in the record that the Respondent acted in good faith to comply or in bad faith. There is no evidence in the record that Respondent acted willfully or was negligent. Under the circumstances, I find a gravity-based component of $24,750 clearly inconsistent with the record in this case. I find a gravity-based component of $22,000 is appropriate in this case.

Under the Penalty Policy, multi-day penalties are mandatory for days 2-180 for all violations which have a major/major gravity-based component. Complainant calculated its multi-day penalty amount based on information showing that at least three drums containing hazardous waste remained at the facility for at least 90 days. The Multi-Day Matrix of Minimum Daily Penalties in the Penalty Policy provides a penalty range from $1,100 to $5,500 for each day of violation for a violation with a potential for harm classified as major and an extent of deviation classified as major. Complainant chose $3,300, the middle of the range from the

matrix. Complainant calculated a total multi-day penalty component of $293,700 (89 x $3,300) for Count I. Complainant provided no rationale for its choice of $3,300 from penalty range provided by the matrix. In the absence of an explanation from the Complainant and after considering the record in this case, for the reasons stated above in the discussion of the calculation of the gravity-based component, I find a daily penalty of $3,300, for a total multi-day penalty component of $293,700, clearly inconsistent with the record in this case. I find a daily penalty of $1,100 for a total multi-day penalty component of $97,900 is appropriate in this case.

The Complainant included an amount in the proposed penalty for the economic benefit of the noncompliance to the Respondent. Complainant based this calculation on the avoided cost of applying for a permit. The cost was entered into the computer model designed to calculate the economic benefit of noncompliance as an avoided one-time capital expenditure. The computer calculated the economic benefit of noncompliance to the Respondent to be $38,356.

Complainant made no adjustments, up or down, in the penalty amount for other adjustment factors provided in the penalty policy, including good faith efforts to comply/lack of good faith; degree of willfulness or negligence; and history of noncompliance. I agree that the record in this case does not support making adjustments for the listed factors.

DEFAULT ORDER

Respondent is hereby **ORDERED** as follows:

1. Respondent is assessed a civil penalty in the amount of $158,256.00.

   a. Payment of the full amount of the civil penalty assessed shall be made within thirty (30) days after this default order becomes final under 40 C.F.R. § 22.27(c) by submitting a certified check or cashier's check payable to "Treasurer, United States of America," and mailed to:

      Regional Hearing Clerk
      EPA Region 6
      P.O. Box 360582M
      Pittsburgh, PA 15251

      A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address, shall accompany the check.

   b. Respondent shall mail a copy of the check to:

      Lorena S. Vaughn
      Regional Hearing Clerk (6RC)
      U.S. Environmental Protection Agency
      Region 6
      1445 Ross Avenue
      Dallas, TX 75202-2733

      and to:

      Carol D. Peters-Wagnon, Chief
      ALONM Section(6EN-HS)
      Hazardous Waste Enforcement Branch
      Compliance Assurance and Enforcement Division
      U.S. EPA - Region 6
      1445 Ross Avenue
      Dallas, Texas 75202-2733
      Attention: Melissa Smith

2. Respondent shall take the following actions and provide evidence of compliance within the time periods specified below pursuant to section 3008(a) of RCRA, 42 U.S.C. § 6928(a):

a. Within thirty (30) days of the effective date of this Default Order, Respondent shall remove all hazardous waste from the K Industries facility and store, treat, and/or dispose of all hazardous waste at a properly permitted facility.

b. For subparagraph a. above, Respondent shall provide EPA with a written submission within forty-five (45) days of the effective date of this Default Order, certifying compliance with the applicable regulations.

c. In all instances in which this Default Order requires written submissions to EPA, each submission must be accompanied by the following certification signed by a "responsible official":

> "I certify that the information contained in or accompanying this submission is true, accurate and complete. As to those identified portions of this submission for which I cannot personally verify the truth and accuracy, I certify as the company official having supervisory responsibility for the person(s) who, acting upon my direct instructions, made the verification, that this information is true, accurate, and complete."

For the purpose of this certification, a "responsible official" of a corporation means a president, secretary, treasurer, or vice-president of the

corporation in charge of a principal business function, or any other person who performs similar decision-making functions for the corporation.

d. Copies of all documentation required by this Default Order shall be sent to the following:

Carol D. Peters-Wagnon, Chief
ALONM Section(6EN-HS)
Hazardous Waste Enforcement Branch
Compliance Assurance and Enforcement Division
U.S. EPA - Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733
Attention: Melissa Smith

3. This Default Order constitutes an Initial Decision, as provided in 40 C.F.R. § 22.17(c). This Initial Decision shall become a final order unless (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceeding within thirty (30) days from the date of service provided in the certificate of service accompanying this order; (2) a party moves to set aside the Default Order, or (3) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision within forty-five (45) days after its service upon the parties.

IT IS SO ORDERED.

Dated this 2nd day of March 2005.

MICHAEL C. BARRA
REGIONAL JUDICIAL OFFICER

CERTIFICATE OF SERVICE

I, Lorena Vaughn, Regional Hearing Clerk, of the Environmental Protection Agency, hereby certify that a true and correct copy of the Default Order and Initial Decision in Docket No. RCRA 06-2003-0915, was served upon the parties or their counsel of record on the date and in the manner set forth below:

James W. Barlow
Registered Agent
P.O. Box 521035
Tulsa, Oklahoma 74152

U.S. FIRST CLASS MAIL
RETURN RECEIPT REQUEST

Terry Sykes
U.S. Environmental Protection Agency
1445 Ross Avenue
Dallas, Texas 75202

HAND-DELIVERED

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
MC 1103B
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

DATE: 3-2-05

Lorena Vaughn
Regional Hearing Clerk