UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	DOCKET NO. RCRA-VIII-83-1
WYOMING REFINING COMPANY	)	
	)	
Respondent	)	

1. Resource Conservation and Recovery Act - Failure to have in place an approved groundwater monitoring system or to have been granted a waiver therefore, by a person operating a hazardous waste treatment facility is a serious violation for which the imposition of a substantial penalty is appropriate.

2. Resource Conservation and Recovery Act - Failure to have an unsaturated zone monitoring plan in place is a violation in the same category as No. 1, supra.

3. Resource Conservation and Recovery Act - An operator of a hazardous waste treatment facility who has no closure/post-closure plan therefore and also lacks a proper record concerning the application dates, application rates, quantities and location of each hazardous waste placed in the facility, is assessed a penalty for such failures.

4. Resource Conservation and Recovery Act - In assessing penalties under this Act, no reduction in a proposed penalty is appropriate based upon monies expended by the operator, in the past, to comply with requirements of another statute.

5. Resource Conservation and Recovery Act - One who waits beyond the date on which a groundwater monitoring system was required to be installed, to file a waiver request for such system, must accept the risks attendant with the possibility that such request will be denied.

6. Resource Conservation and Recovery Act - It is no defense that an operator told the Agency of its intentions to perform an act which requires the submission of a plan therefore and the Agency's approval thereof, when the operator subsequently performs the act without the required plan.

Appearances:

For Respondent: Stanley K. Hathaway, Esquire
Rick A. Thompson, Esquire
Hathaway, Speight & Kunz
Cheyenne, Wyoming

For Complainant: Susan Manganiello, Esquire
Kent Connally, Esquire
U.S. Environmental Protection Agency
Denver, Colorado

INITIAL DECISION

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, (hereinafter "RCRA"), §3008, 42 U.S.C. 6928 (supp. IV, 1980), for assessment of a civil penalty for alleged violations of the requirements of the Act, and for an order directing compliance with those requirements.[1/] The proceeding was instituted by a complaint and compliance order against Wyoming Refining Company filed by the U.S. Environmental Protection Agency on December 30, 1982. The complaint alleges that the Respondent operates a crude oil refinery located on West Main Street, Newcastle, Wyoming; that the Respondent Company generates and stores hazardous wastes on its facility and that it enjoys interim status under the regulations.

1/ Pertinent provisions of Section 3008 are:

Section 3008(a)(1): "[W]henever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subtitle [C] the Administrator may issue an order requiring compliance immediately or within a specified time. . . ."

Section(g): "Any person who violates any requirement of this subtitle [C] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation."

Subtitle C of RCRA is codified in Subchapter III, 42 U.S.C. 6921-6931.

The complaint charges that the Respondent violated the Act and regulations by: (1) failing to have a groundwater monitoring system in place to determine the facility's impact on the quality of groundwater in violation of 40 C.F.R. 265.90; (2) that the Respondent did not have a written closure/post-closure plan, in violation of 40 C.F.R. 265.112 and 265.118; (3) that at the time of the EPA inspection, the Respondent did not have in writing and had not implemented an unsaturated zone and monitoring plan in violation of 40 C.F.R. 265.278; and (4) at the time of the EPA inspection, Respondent had not kept records of hazardous wastes placed in the land treatment facility since November 19, 1980 in violation of 40 C.F.R. 265.279. Shortly before the Hearing, on September 27, 1983 the Complainant filed a motion to amend its complaint by adding thereto a fifth count to the effect that on or about September 8, 1983, the Respondent excavated the area which consituted its hazardous waste treatment facility and transported the materials contained therein off-site and that the Respondent did not submit a closure plan to the Regional Administrator prior to performing these activities, therefore, violating 40 C.F.R. 265.112(c). This amendment also cited the Respondent with failure to carry out the closure in accordance with an approved plan as required by 40 C.F.R. 265.113(b) and failed to certify closure as required by 40 C.F.R. 265.115.

The complaint proposed civil penalties for the above-mentioned violations as follows: Count 1 - $22,500.00; Count 2 - $10,000.00; Count 3 - $22,500.00; Count 4 - $5,850.00; and for the fifth Count, sought to be added by the amendment to the complaint, $4,300.00.

The complaint also contained a compliance order which sought to have the Respondent correct all of the above-mentioned violations by installing a

groundwater monitoring system, preparing a written closure plan, implementing an unsaturated zone monitoring plan, and to keep records in accordance with the regulations concerning the hazardous wastes placed in its land treatment facility.

The compliance order also contained an alternative method of complying with the order, that being to close all hazardous wastes management facilities at the refinery in accordance with 40 C.F.R. 265 subpart G.

In its answer, the Respondent admitted many of the factual allegations of the complaint concerning the alleged violations but in many cases pled extenuating circumstances as a defense and urged that no civil penalty be assessed and that they be given sufficient time to correct any deficiencies still remaining on their facility. Following a pre-trial exchange of information and materials, a hearing was held in Newcastle, Wyoming commencing on October 12, 1983. Following the hearing, the parties submitted proposed findings of fact and conclusions of law, briefs in support thereof and proposed orders.

Factual Background

The refinery in question has been in operation in Newcastle, Wyoming for over 40 years and employs approximately 70 people. The refinery was purchased by its present owner, Wyoming Refining Company in October 1977 at a total cost of approximately $8 million. Since that time, Wyoming Refining Company has expended approximately $7.2 million for environmentally-related equipment for this refinery. It should be noted however that nothing in the record indicates that any of the $7.2 million previously expended by the Respondent were expended on matters relating to the violations cited by the Complainant

in this case. At the time the Respondent purchased the Newcastle refinery, the plant had been held to be in violation of its NPDES permit limitations, primarily having to do with phenolic wastes. After acquiring the refinery, the Respondent undertook to satisfy these notices of violation by making the capital investments referred to above. The improvements consisted primarily of constructing a containment pond, a french drain system, revising the cooling water system, and making various other improvements. These improvements apparently satisfied the environmental requirements of the State of Wyoming.

When the regulations concerning hazardous wastes came out in 1980, the Respondent felt that because of the extensive work which they had done with the State in correcting the previous problems, they believed that the refinery could be waived from the requirements of the Act concerning the installation and operation of a groundwater monitoring system.

In order to verify that opinion, the Respondent hired a professional consultant from South Dakota by the name of Dr. Paul Gries. Dr. Gries conducted a study with respect to possible water contamination. He directed the drilling of monitoring wells, took water samples from these wells, from the on-site refinery Madison well, and from various other areas. Dr. Gries was of the opinion that, based on his investigation, the refinery should be granted an exemption from groundwater monitoring requirements.

The Gries report was sent to EPA in December 1981 for its review as a request for a waiver under the regulations. In June 1982, seven months later, EPA responded to the waiver request by denying it and setting forth in some detail the deficiencies in the waiver request which the Agency had identified.

In the course of its business, the Respondent generates what are referred to as leaded tank bottoms which are listed as hazardous wastes in the regula-

tions and disposes of these wastes by spreading them on the ground and plowing them under with the expectation that the natural weathering process will treat the wastes and render them relatively innocuous. Apparently, this procedure is well-recognized in the industry and is approved by the American Petroleum Institute. The regulations applicable to the Respondent's facility require that anyone who operates a hazardous waste treatment facility on their property must, no later than November 19, 1981, install and have in operation an approved groundwater monitoring system which will permit the owner thereof to monitor for the presence of possible groundwater contamination by the hazardous wastes being treated, so as to protect other users of the groundwater from having their wells or water sources contaminated by the wastes contained in the treatment facility. Although this groundwater monitoring system was required to be in place in November 1981, the Respondent, apparently feeling very secure in its opinion that it would receive a waiver from this requirement, did not send in its waiver request until December 1981 approximately one month after the monitoring system was required to have been in place.

The EPA response to the waiver application also required that the Respondent come into compliance with the regulations within 15 days. Following some negotiations between the Respondent and the Complainant, the Respondent hired another consultant, Woodward and Clyde, to attempt to meet some of the objections to the previous waiver request which EPA had identified. Dr. Gries had previously retired and was no longer available for this function.

On November 3, 1982, the Respondent submitted an action plan to the Agency prepared by its consultant, Woodward and Clyde. The EPA representatives reviewed the action plan and suggested that certain modifications be

made to it. The Respondent immediately made the modifications and re-submitted the action plan for final approval on November 23, 1982. The Agency approved the plan in a letter to the Respondent dated December 15, 1982. The complaint in this matter was filed 19 days following the approval of the action plan on January 4, 1983.

The requirements for having a groundwater monitoring program in place is set forth in 40 C.F.R. 265.90. Subsection C of that section states that all or part of the groundwater monitoring requirements may be waived if the owner or operator can demonstrate that there is low potential for migration of hazardous wastes or hazardous wastes constituents from the facility, via the uppermost aquifer, to water supply wells (domestic, industrial or agricultural), or to surface waters. This demonstration must be in writing and must be kept at the facility. The demonstration must be certified by a qualified geologist or geotechnical engineer and must establish the potential for migration from the facility to the uppermost aquifer by an evaluation of water balance, precipitation, evapo-transporation, run-off and infiltration. The plan must also describe the unsaturated zone characteristics, in other words the geological materials, physical properties and depth to groundwater, and the potential for hazardous waste constituents which enter the upper-most aquifer to migrate to a water-supply well or surface water by evaluation of unsaturated zone characteristics, and the proximity of the facility to water supply wells surface water.

The document ultimately approved by the Agency was not really a demonstration satisfying these requirements, but merely a two-page scope of work which described what the consultant, Woodward and Clyde, had recommended to its

client, the Respondent, in order to develop the information required by the regulations. The approval therefore by the Agency of this scope of work provided by the Respondent did not, therefore, constitute an approved waiver plan, but merely an approval of the beginning of investigations and the drilling of appropriate wells which, would in the eyes of the Respondent, support its request for a waiver from the groundwater monitoring requirements, or failing that, provide the basis for an approvable groundwater monitoring system.

Apparently, there is some dispute between the parties as to whether or not the Woodward and Clyde report was in furtherance of the development of a groundwater monitoring system or a further attempt on the part of the Respondent to solicit a waiver of such requirements from the Agency. In any event, the record is clear that as of the date of the complaint and even as late as the date of the hearing, the Respondent did not have in place either a groundwater monitoring system or a waiver for such requirements from the Agency. Although the Respondent has criticized the Agency for taking seven months to give its opinion on the adequacy of the waiver request filed by them, the record also reflects that the request for a waiver was not even filed with the Agency until approximately one month after the regulations required that a groundwater monitoring system actually be in place and in use. The Respondent in this case gambled that its waiver would be granted and thus no groundwater monitoring system would be required. The record reflects that the Respondent lost this gamble. The Respondent must, therefore, bear full responsibility for its failure to have either a waiver on file or an approved groundwater monitoring system in place at the time the regulations so required.

Count III of the complaint alleges that the Respondent failed to implement an unsaturated zone monitoring plan designed to comply with 40 C.F.R. 265.278. The record in this matter is uncontested on this issue. The testimony of Respondent's witnesses did not specifically address this allegation, except to express their opinion as to the need therefore apparently based on a misunderstanding of the regulations to the effect that if they obtained a waiver from the groundwater monitoring provisions of the regulations such waiver would also apply to the unsaturated zone monitoring plan. There is nothing in either the law or regulations to support this reading and I am therefore of the opinion that the Respondent violated the provisions of the regulations having to do with an unsaturated zone monitoring plan.

Count II of the complaint alleges that 40 C.F.R. 265.112 requires that by May 26, 1981, the owner or operator of the regulated facility must have a written closure plan. He must keep a copy of the plan and all revisions to the plan at the facility until closure is completed and certified in accordance with 40 C.F.R. 265.115. This count also alleges that the Respondent violated 40 C.F.R. 265.118 which requires the owner or operator of a regulated facility to have a written post-closure plan as well. The requirements for this plan are similar to those for the closure plan and at the time of the inspection by EPA on August 4, 1982 Respondent did not have a written closure or post-closure plan. The answer filed by the Respondent admitted that they did not have a written closure or post-closure plan in existence or available for inspection at the facility and the record further reveals that even as of the date of the hearing this deficiency had not been corrected.

Count IV of the complaint alleges that 40 C.F.R. 265.279 requires that the owner or operator of a land-treatment facility such as the Respondent's must keep records of the application dates, application rates, quantities and location of each hazardous waste placed in the facility and in the operating record required in 40 C.F.R. 265.73. The complaint further alleges that at the time of the EPA inspection in August 1982, the Respondent had not kept records of hazardous wastes in its land-treatment facility since November 19, 1980 and that the failure to keep such records constitutes a violation of the above-mentioned regulation. In its answer, Respondent denied the accusatory portion of the count and at the hearing brought forth testimony to the effect that the information required by the regulation was capable of being accumulated but that it was not in a particular place nor under the format normally required by the regulations. The record reveals that what, in fact, happened was that a survey of older employees of the Respondent was undertaken and by accumulating the historic memories of these employees, an anecdotal history of the deposit of leaded tank bottoms and other hazardous wastes at the land-treatment portion of the facility was put together. This sort of accumulation of data, after the fact, clearly does not meet the requirements of the regulations and I am therefore of the opinion that the Respondent was in violation of the record-keeping requirements of the regulations as cited above.

As noted above, shortly before the date of the hearing the Complainant moved for leave to amend the complaint by adding thereto a fifth count having to do with the removal of the hazardous wastes from the Respondent's treatment facility without first having sought and received approval for a closure plan. The regulations require that a closure plan be submitted to the Regional Administrator some period of time before the anticipated closure and upon

review thereof the Administrator issues a public notice of the proposed closure and seeks comments from the public and then depending on the response thereto either a public hearing is held on the question or an approval of the closure plan is issued by the Regional Administrator, assuming, of course, the closure plan meets the requirements of the regulations. In this case the Respondent had no closure or post-closure plan as suggested above and in order to solve its primary problems with the Agency, that being the lack of a groundwater and saturated zone monitoring system, it removed the hazardous wastes from its premises to an approved disposal site in the State of Idaho. The Respondent did not deny that it had, in fact, removed the wastes from its facility and closed its land-treatment area without having a closure or post-closure plan, but in defense to this charge argued that during the course of settlement negotiations with the Agency preceding the hearing, they were under the impression that the EPA: (1) always knew that they intended to remove the wastes from the premises, and (2) that the Agency never advised them of the necessity for a closure plan, and (3) that during such negotiations they were led to believe by Agency representatives that it would not pursue or seek a penalty for such removal.

At the trial, all references by the Respondent to conversations had in the course of settlement negotiations were objected to by the Complainant as being inadmissable and improper. The Court, although agreeing with the Complainant's basic notion that settlement negotiations are inadmissable, nevertheless allowed a limited amount of testimony on this issue to assure itself that the Respondent was not misled by the representations of the Complainant to their subsequent detriment. In this regard, the Respondent moved to place into the record notes taken by one of its employees at the

settlement meeting which the Respondent felt bolstered its contention that the Agency indicated that it would not pursue any penalty for the removal of the wastes from the premises of the Respondent. My reading of those notes indicate that, although such a suggestion was made by the Complainant, as pointed out by counsel therefore, this observation by the Complainant's representatives on the question of whether or not it would pursue a penalty for the removal of the wastes from the Respondent's facility was made in the context of settlement negotiations having to do with the Respondent's coming into compliance with all of the requirements of the law and the regulations and paying a fine for such past violations in an amount never ultimately agreed upon. In addition to that observation, it should also be pointed out that the removal of the hazardous wastes from its facility by the Respondent was done prior to the meeting which was the subject of the above discussion and, therefore, could not have formed a defense for the Respondent's actions.

At the beginning of the trial when some preliminary matters were being discussed, the Court advised the parties that it would reserve its ruling on the motion to amend the complaint urged by the Complainant until after it had reviewed the entire record and since all of the witnesses who would be able to testify on the question of removal of the wastes from the facility were already there, it would pose no burden or be prejudicial to the interests of the Respondent. In view of the discussion above on this question, I am of the opinion to grant the Complainant's motion to amend the complaint to include the fifth count, and I am further of the opinion that the Respondent did, in fact, violate the regulations concerning the necessity for having a closure and post-closure plan in place prior to the removal of hazardous wastes from its facility and the closing of its treatment activities at the refinery.

Based on the record in this case and the briefs of the parties, as well as the exhibits, I am of the opinion that the Respondent did violate the Act and the regulations in the five areas identified in the complaint. Therefore the only task remaining is for me to determine an appropriate penalty for each of the violations herein found.

Discussion of Violations and Penalty

Count I in the complaint has to do with failure to have in place an approved groundwater monitoring system capable of detecting the migration of any hazardous wastes constituents from the treatment at site to wells, groundwater or streams. As discussed above, there is no doubt on the face of this record that the Respondent did not have such a system in place nor had they received a waiver from those requirements by the Agency as permitted by the regulations. Initially the Respondent hired a consultant, Dr. Gries who filed what the Respondent felt was an adequate waiver demonstration. The Agency found it to be insufficient and noted in great detail its failings in a memorandum to the Respondent dated June 24, 1982, which appears as Complainant's Exhibit No. 4 in the record, consisting of 8 pages of comments. By letter dated July 13, 1982, the Respondent advised EPA that the consultant, Dr. Gries, could not answer the questions raised in the Agency's letter and that, therefore, it would have to do more work to come into compliance with 40 C.F.R. 265.91 through 265.93. They said they would have to contract with a new consultant who is capable of developing such a program and advised the Agency that they would not be in compliance by the date required in the Agency's letter denying the waiver, which was 15 days. Despite the Respondent's observations and arguments to the contrary, this letter clearly indicates that

the Respondent intended to abandon its attempt to obtain a waiver and to come into compliance with the groundwater monitoring requirements. This is so because the Federal Register references cited in their letter had nothing whatsoever to do with waivers but only apply to the constituents of an approvable groundwater monitoring system. In was in this context that the Respondent hired the consulting firm of Woodward and Clyde which prepared the two page action plan which the Agency subsequently approved after some modification. The Respondent continued throughout the hearing and its brief to argue that the Agency never explained to them exactly what it was they were supposed to do in order to come into compliance and that they were constantly seeking advice from the Agency as to how to comply with its wishes. This argument is not well founded, since the Agency in its denial of the waiver request memorandum spelled out in great detail exactly what was wrong with the waiver request and what sort of information would be required to make it comply. So as to the waiver question, the Respondent's arguments are ill-founded. Secondly, the requirement for a suitable groundwater monitoring system are rather straightforward and the Woodward and Clyde plan of action which the Agency ultimately approved would have set in motion the sort of activities which the Agency felt would ultimately lead to compliance with the regulations had this activity been undertaken by the Respondent. Although it is not clear from this record why the Respondent abandoned its attempts to install a suitable groundwater monitoring system, apparently the filing of the complaint by the Agency had some bearing on this decision and, as indicated above, the ultimate result was that the Respondent dug up the treatment area and hauled the hazardous wastes off to an approved site in Idaho. In light of all this, it is very clear that the Agency was not reluctant to advise the

Respondent as to the particulars of the regulations' requirements, which in regard to the groundwater monitoring system, are not all that complex in the first place. So the arguments of the Respondent that somehow the Agency would never tell them what it wanted must fall upon deaf ears.

In computing the penalties in these cases, I, as well as several of my colleagues in the Agency, have cited with approvel a report developed by an EPA contractor entitled, "Framework for the Development of a Penalty Policy for RCRA", which was issued on December 8, 1980 and distributed to the Regions as the Agency's draft RCRA penalty policy. The Agency indicated in its brief and in its testimony that they used this penalty policy document for determining the penalties proposed in this matter.

This draft penalty policy, although not formally adopted by the Agency through the normal rule-making procedures, nevertheless is acceptable for the purposes for which it was designed and is consistent with the congressional intent and the mandate of the statute and regulations governing RCRA in general. I will therefore use this document in determining the appropriate civil penalty to be assessed in this case.

Failure to have in place an approved groundwater monitoring system is deemed by the Agency to be a serious violation which the draft policy identifies as a Class 1 violation. Essentially what the policy does is to classify the various violations possible under the Act and regulations into a Class 1, 2 and 3 and then to establish a penalty matrix to be associated with each of the classes consisting of a grid with actual or threatened damage comprising one axis and classification of Respondent's noncompliance with regulatory standards as the other axis. The grid is then subdivided into major, substantial and moderate violations on each of these axis.

The complaint proposed a penalty of $22,500.00 for this violation, which the Agency witnesses testified that they arrived at by reference to the matrix above mentioned. They considered both the level of the Respondent's non-compliance and the actual or potential damage involved to both being in a major category. Reference to the matrix would then disclose that the range of suitable penalties in this category would be from $20,000.00 to $25,000.00. The Agency witness, who testified on this question, said that he elected to go to the mid-point of these two numbers and thus came up with the figure of $22,500.00. The Agency has addressed the question of failure to have a ground monitoring system in several of its policy documents and in every case the seriousness with which the Agency views this failure is quite high. Therefore, I have no problem with the classification of the Respondent's failure as a Class 1 violation and that the degree of Respondent's non-compliance must also be considered major since they had in place no ground monitoring system at all that would meet the requirements of the regulations. Although certain test wells and other wells did exist on the Respondent's property, their location both in terms of groundwater flow and their proximity to the treatment area were totally inadequate under the terms of the regulations. So for all practical purposes, I will treat this situation as one in which no groundwater monitoring system at all exists.

The next element I must consider is the extent of actual or threatened damage to the environment or to the health of persons or livestock that such failure poses. The two hazardous constituents of the materials deposited by the Respondent are chromium and lead both of which are considered to be toxic by the regulations and Agency policy. The Respondent in an attempt to mitigate the seriousness of this violation argues that their tests have shown that the

permeability of the soil surrounding the treatment area is very low and that there is, therefore, an extremely small likelihood that any of the constituents of the wastes deposited thereon would ever find their way into the groundwater or to surface waters or wells. They also argue that their compliance with the State of Wyoming water quality standards and the fact that they have not recently been cited for any violation of their NPDES permit issued by that State is further evidence that no migration of the hazardous constituents have found their way into the two streams which border the facility. The Respondent also points out that when they removed the hazardous wastes from their facility to be transported to the approved site in Idaho, the consultant which oversaw this activity conducted a great many tests on the surrounding soils immediately adjacent to the disposal site and that no detectable evidence of the presence of either lead or chromium was found. In regard to that piece of evidence it should be noted that upon a motion of counsel for the Complainant, the report prepared by this consultant was deemed to be inadmissable for a variety of reasons not the least of which is that the testing methods and sampling methods utilized by the Respondent were not of such a nature as to be scientifically acceptable by the Agency or its consultants for the purpose of forming a valid conclusion. Although the Agency does agree that the permeability of the soils in and around the Respondent's waste treatment facility is of such a nature as to restrict the migration of the constituents comprising the hazardous wastes deposited therein, it is the real purpose of the groundwater monitoring system to determine and identify any actual migration that might occur. Given the nature of the soil in and around the treatment facility and the relatively small quantities* of materials deposited there, I am of the opinion that an appropriate penalty for this violation would be $11,000.00. This amount corresponds to the higher level of the moderate category on the potential damage axis.

*Tr. 75 indicates that since 1980, only 43.5 cu. yds. of material were deposited on the treatment site.

Count II of the complaint, having to do with the failure to have a closure or post-closure plan on file is considered by the Agency to also be a Class 1 violation. This lack was considered to be in the major conduct area and to pose a moderate threat in the damage category. The Agency proposed a penalty of $10,000.00. The Respondent had filed with the Agency financial assurance for closure cost (estimating them at $1 million) which insured that money would be available for proper closing of the hazardous waste management facility should the Respondent become financially incapable of doing so. Therefore, EPA could act to minimize the potential for damage should it become necessary for it to do so. The potential for damage could not be considered minor because of the toxicity of the wastes involved and the possibility that improper closure in-place or removal could occur in the absence of a closure/post-closure plan. The public notice and approval procedures required by the regulations underscores the importance which the Agency places on planning prior to performing activities crucial to controlling or preventing long-term problems. Assuming a major violation in the conduct axis in a moderate likelihood of damage the matrix suggests a penalty ranging from $8,800.00 to $11,000.00. As indicated, the Agency, in assessing this violation and considering the toxicity of the wastes involved, choose a figure in the upper range of this matrix that being $10,000.00. Since the Respondent had not just an inadequate closure/post-closure plan, but no plan at all I agree with the Agency that their conduct represented a major deviation from the requirements of the regulations and I find nothing in the record to persuade me that their evaluation of the potential damage being in the moderate range is inappropriate and, therefore, I agree with the Agency's assessment and will assess a penalty of $10,000.00 for this violation.

Count III addresses the Respondent's failure to have developed and implemented an unsaturated zone monitoring plan. The Agency policy indicates that this would be a Class 1 violation as well. The primary purpose of an unsaturated zone monitoring system is to assess the ability of the soil to attenuate the hazardous constituents of the wastes being treated before they reach the upper-most aquifer. Without this information, no one can determine whether land treatment of this waste is accomplishing its desired purpose. Considering the levels of lead and chromium indicated by the Respondent's testing to be present in the waste itself and the refinery's location near the confluence of two creeks, EPA considered the potential for harm to human health and the environment to be major in regard to this violation. As discussed above the Respondent did not deny that it did not have such a system in place, but rather argues that it felt that a waiver from the groundwater monitoring requirements would also apply to this requirement as well. The regulations are inopposite in this regard and it is relatively moot in any case since the Respondent did not receive a waiver for the groundwater monitoring requirements. Since the Respondent completely ignored the requirements of the regulations in regard to this violation, the Agency proposed a penalty of $22,500.00.

I find nothing in this record which would persuade me that the Agency's characteristics of the nature and seriousness of the violation were incorrect, however, for the reasons given above as to Count I, I will reduce the proposed penalty in this case from $22,500.00 to $11,000.00.

As to Count IV concerning the lack of an operating record for the land treatment facility as required by 40 C.F.R. 265.297 and 265.73, the Agency policy classifies this violation as a one in the Class 2 category. In its

complaint, the Agency proposed a penalty of $5,850.00 for this violation which was arrived at by assessing the potential for harm in the moderate category and the conduct axis as being in a major category. Reference to the matrix for Class 2 violations reveals a range of appropriate penalties to be from $5,200.00 to $6,500.00 for this violation. Although it is true that the Respondent had virtually no records in regard to the disposition of materials to the land treatment area in terms of rates of application, quantities applied, and the constituents thereof, they were able to put together a history of the use of the facility which revealed only occasional application of relatively small amounts of hazardous wastes to the site over a period of several years. Given all the facts surrounding this violation, I would be of the opinion to place the conduct portion in the moderate area, and also consider the potential for damage to, likewise , be moderate. Reference to the matrix given that assessment shows a range of proposed penalties from $4,000.00 to $5,000.00. I am of the opinion that a penalty of $4,000.00 is appropriate for this violation.

Count V, which is included in the amended complaint, has to do with the closure of the treatment facility without having first receiving approval from the Agency of a closure/post-closure plan. As I stated above, I am of the opinion that the Respondent's arguments in mitigation on this question are illconceived. I will, however, examine the way in which this closure was accomplished, even though during the hearing itself the Respondent continued to argue that no closure had actually taken place. That argument is, likewise, unfounded and must be rejected since what the Respondent did with this facility unquestionably constituted closure. They testified that they removed

all of the material therein and proposed never to use the facility in the future as a treatment operation but would transport whatever future hazardous wastes they would generate to the approved site in Idaho. In regard to this violation, the Agency in its amended complaint, proposed to assess a penalty of $4,300.00. The Agency arrived at this figure by assessing the potential for harm aspect to be in a minor category since the Respondent's actions consisted of excavating the hazardous wastes from the land facility and transporting them to an authorized disposal facility. Since the Respondent totally ignored the requirements of the regulations despite having been informed twice in writing of such requirements prior to its activities, the Agency determined that the Respondent's conduct was properly classified in a major category. Given a major violation in the conduct category and a minor violation in the damage category, resort to the matrix shows a range of suggested penalties from $3,800.00 to $4,800.00. The Agency chose the mid-point of this range in proposing a penalty in the amount of $4,300.00.

I have no reason to quarrel with the Agency's characterizations of nature of these violations both in the conduct and the potential for damage areas. Apparently, the Respondent hired a qualified consultant to oversee this closure and according to his testimony great care was taken in accomplishing the task. The testing results that he obtained, although subject to some question, indicate that a thorough job of excavating the material and transporting it to an approved site was accomplished. Furthermore, as indicated in the Complainant's brief, the method of closing this land treatment facility is somewhat unusual since it involved a complete removal from the premises of any hazardous wastes or their constituents and, therefore, the reason for having a closure and

post-closure plan are not as important in this situation as it would be in the usual case. I conclude that a penalty in the lower range suggested by the matrix would be more appropriate and, therefore, I assess a penalty of $3,800.00 for this violation.

Although in its answer, the Respondent alleged that the imposition of the requested fine might cause the closing of the refinery, the testimony of Respondent's witnesses suggest that although the refinery is currently operating at a loss, it has available to it a sizeable line of credit, in the neighborhood of $30 million, upon which it may draw for monies it needs to operate the refinery. The Respondent's witnesses further testified that current market and economic conditions are causing the refinery's lack of profits and that the imposition of the fine suggested in the complaint would not be a factor which would influence the company's officers in their decision whether or not to close the facility. Although the statute relative to the assessment of penalties under this complaint do not require that the financial ability of the Respondent be considered in assessing a fine, I have made the above discussion simply to point out that the Respondent has the funds to pay the penalty assessed herein and that there is no evidence to suggest that paying such a fine would cause the refinery to close.

All contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this Initial Decision are rejected.

Conclusion

It is concluded on the basis of the record and on the Respondent's own admissions, as well, that Wyoming Refining Company has violated the above-numerated provisions of the Act and the regulations promulgated pursuant

thereto. It is further concluded, for the reasons above stated, that $39,800.00 is an appropriate penalty for said violations and that a compliance order in the form hereinafter set forth should be issued.

ORDER 2/

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

1. A civil penalty of $39,800.00 is assessed against the Respondent for violations of the Solid Waste Disposal Act found herein.

2. Payment of the full amount of the civil penalty assessed shall be made within 60 days of the service of the Final Order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America.

3. Immediately upon service of the Final Order upon Respondent, Respondent shall, submit a closure plan in accordance with applicable provisions of subpart G of 40 C.F.R. Part 265 which demonstrates that evacuation of wastes in the land treatment facility meets the closure performance standards in 40 C.F.R. 265.111.

This plan should specifically address the following: (a) closure of the entire land treatment area identified in the Part A portion of the permit application (revision submitted 2/83), listed as being 1.1 acres in size; and (b) groundwater monitoring pursuant to the applicable provisions of subpart F of 40 C.F.R. 265 to verify whether wastes has migrated away from the immediate vacinity of the zone or the leaded tank bottoms were disposed of (existing monitoring wells may be used for this purpose).

4. Upon approval by EPA, implement the plans in accordance with paragraph 3. Upon completion, all activities shall be certified according to 40 C.F.R. 265.115.

Thomas B. Yost
Administrative Law Judge

DATED: March 5, 1984

2/ 40 C.F.R. 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its service upon the parties unless an appeal is taken by one of the parties herein or the Administrator elects to review the Initial Decision.

Section 22.30(a) provides for appeal herefrom within 20 days.