UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF	:	
Gary Development Company	:	**Docket No. RCRA-V-W-86-R-45**
Respondent	:	

DECISION AND ORDER

Resource Conservation and Recovery Act, §3008(a) 42 U.S.C. 6928(a).

Respondent's facility was held to have received hazardous wastes for storage, treatment, or disposal, and is therefore subject to hazardous waste regulation under RCRA and the Indiana Administrative Code.

Appearances:

Marc Radell, Esquire, Office of Regional Counsel, U. S. Environmental Protection Agency, Region V, 77 West Jackson Blvd., Chicago, IL 60604, for complainant.

Warren Krebs, Esquire, 1600 Market Tower Building, Ten West Market Street, Indianapolis, Indiana, for respondent.

Before: J. F. Greene
Administrative Law Judge

Decided April 8, 1996

This matter arises under the Resource Conservation and Recovery Act ["RCRA," or "the Act"] as amended, 42 U.S.C. §6901 et seq., and was brought pursuant to Section 3008 of RCRA, 42 U.S.C. §6928.

The complaint alleges that respondent owns and operates a hazardous waste facility by virtue of having received hazardous waste for storage, treatment, or disposal, and charges respondent with numerous violations of §§3004 and 3005 of the Act [42 U.S.C. §6924, 6925], duly promulgated regulations[1] at 40 CFR §§270.1(b) and 270.10(a), the Indiana Administrative Code [IAC],[2] and various regulations adopted by the Indiana Environmental Management Board [including Title 320 IAC 4.1-38-1, 4.1-34-1(a); 4.1-20-1(a), 4.1-20-2, 4.1-20-3(a)-(e), 4.1-20-4(a)-(f), 4.1-20-5, 4.1-22-24(a) and (b); 4.1-16-4; 4.1-17-3(a)-(e),4.1-18-2, 4.1-19-2(a)(1) and (5), 4.1-19-7, 4.1-19-4(b)(1) and (2), 4.1-16-6(d), 4.1-16-6(b)(1), 4.1-16-5(c), and 4.1-21-3(a)]. Specifically, the complaint alleges

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[1] See Section 3005 of RCRA, 42 U.S.C. §6925. Such regulations were published on May 19, 1980, and are codified at 40 CFR Parts 124, 270, and 271.

[2] Pursuant to Section 3006(b) of the Act, 42 U.S.C. §6926(b), the State of Indiana was granted "Phase I" interim authorization by EPA to administer a hazardous waste program in lieu of the federal program on August 18, 1982. 47 Fed. Reg. 357,970. In January, 1986, final authorization was granted, 51 Fed. Reg. 3953. As a result, facilities in Indiana which qualified for "interim status" to engage in hazardous waste activity were regulated as of that date under provisions of the IAC at 320 IAC 4.1 et. seq. rather than under federal regulations at 40 C.F.R. Part 265. EPA has authority to enforce State regulations in States which have been so authorized, provided that the State is properly notified [RCRA §3008(a)(2), 42 U.S.C. §6928(a)(2)]. The complaint asserts that the notice was provided (complaint at 2, last sentence).

that respondent had failed to comply with various ground-water monitoring requirements for a hazardous waste facility, including failure to implement a ground-water monitoring program capable of determining the facility's impact upon the quality of ground water in the uppermost aquifer underlying the facility; failure to install monitoring wells in a manner that maintained the integrity of the monitoring well bore holes; failed to develop, follow, and keep at the facility a ground-water sampling and analyses plan; failure to test ground-water for one year on a quarterly basis to establish background concentrations of certain specified parameters in samples obtained from monitoring wells and failure to obtain and analyze ground-water samples for parameters on an annual or semi-annual schedule; failure to evaluate ground-water surface elevations annually to determine whether the wells are properly located; failure to prepare an outline of a more comprehensive ground-water quality assessment program; failure to evaluate statistically any changes in parameters in downgradient wells compared to those of the upgradient wells; failure to keep various records throughout the active life of the facility, as required; and failure to report specified ground-water monitoring information to EPA and the Indiana Environmental Management Board.[3] The complaint also charged that respondent had violated various financial assurance requirements.[4] In the area of facility operations, the complaint alleged that respondent failed to have

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[3] Complaint, paragraph numbered 13, at 7-10.

[4] Complaint, paragraph numbered 14, at 10.

(1) general waste analyses on file for hazardous wastes received; (2) a general waste analysis plan on file; (3) a functional internal communications system; (4) telephones or two-way radio systems available to summon emergency assistance; (5) functional emergency equipment; (6) a contingency plan; (7) proper forms executed before unmanifested wastes were accepted; (8) records indicating the description and quantity of waste received and the dates wastes were received and disposed of; (9) records available to indicate disposal locations or quantities of each hazardous waste placed at locations within the facility; (10) inspection logs showing dates, times, and inspectors; (11) inspections of emergency equipment and security devices; and (12) "danger" signs.[5] Further, the complaint charged that respondent had not submitted proof of financial assurance for closure/post closure of the facility, or proof of liability coverage for sudden and non-sudden accidential occurrences.[6] The violations charged are based upon allegations in the complaint that respondent accepted hazardous waste for storage, treatment, of disposal after November 18, 1980, and was thus subject to hazardous waste regulation.[7]

In its answer to the complaint, respondent denied that it operates a hazardous waste facility and that federal or state hazardous waste regulations are applicable to the facility. Respondent asserts that its facility is a "sanitary landfill for

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[5] Id. Paragraph 15, at 10-12.

[6] Id. Paragraph 16, at 12.

[7] Id. Paragraph 10 at 5-6.

disposal of municipal and commercial waste."[8] Respondent further denied that it had accepted hazardous waste -- or waste that was hazardous -- for treatment, storage, or disposal[9] as alleged by the complaint. Subsequently, respondent moved to dismiss on the grounds of res judicata and collateral estoppel, and that complainant lacked authority to enforce State of Indiana hazardous waste regulations. This motion was denied.[10] Accordingly, the issue presented for determination is whether respondent's facility accepted hazardous waste for disposal, storage, or treatment thereby becoming subject to hazardous waste regulation.

Complainant's case rests upon allegations that the facility did in fact accept certain hazardous wastes -- EPA Hazardous Waste Numbers F005, D008, and K087,[11] for storage, treatment, or disposal, thereby becoming subject to regulation pursuant to RCRA. The evidence in this regard shows that respondent did accept some of those hazardous wastes for treatment or disposal at its facility, which renders it a hazardous waste treatment, storage and disposal ("TSD") facility subject to applicable requirements under

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[8] Answer and Responsive Pleading to Complaint and Compliance Order, at 1.

[9] Id. Paragraph 8, at 2-5.

[10] Opinion and Order Denying Motion to Dismiss, September 29, 1989.

[11] F005, listed at 40 CFR §261.31, Hazardous Waste from Non-Specific Sources, consists of certain spent non-halogenated solvents, including toluene, and methyl ethyl ketone. K087, listed at 40 C.F.R. § 261.32, Hazardous Waste from Specific Sources, is defined as decanter tank car sludge from coking operations. D008, lead, is classified as hazardous for having the characteristic of toxicity, as specified in 40 CFR § 261.24.

RCRA.

DISCUSSION

Respondent filed Part A of a hazardous waste permit application on November 18, 1980, identifying the hazardous waste management process at its facility as disposal in a landfill. Complainant's exhibit ("CX") 1. The waste codes listed in Part A of the RCRA permit application as being handled by the facility were F006, K087, F003 and F005. CX 1. However, no notification of hazardous waste activity was filed under RCRA § 3010(a). CX 2, 28; Respondent's exhibit ("RX") 3; Tr. 74, 177. Therefore, respondent did not have authority, by RCRA permit or interim status, to treat, store or dispose of hazardous waste.[12] CX 2, 3, 28; RX 3; Tr. 184. Generally, respondent does not dispute that it was not in compliance with the regulatory requirements referenced in the complaint.[13] The principal question in this proceeding is whether

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[12] RCRA Section 3005(e)(1), which governs interim status, provides in pertinent part:
Any person who--
(A) owns or operates a facility required to have a permit under this section which facility--
(i) was in existence on November 19, 1980, . . .
(B) has complied with the requirements of section 6930(a) of this title [RCRA § 3010(a)], and
(C) has made application for a permit under this section
shall be treated as having been issued a permit . . . .

Section 3010(a) of RCRA requires that a preliminary notification of hazardous waste activity be filed with EPA by any person owning or operating a facility for treatment, storage or disposal of hazardous waste, not later than 90 days after promulgation of regulations identifying the hazardous waste.

[13] In its answer, respondent denied that it failed to implement a groundwater monitoring program capable of determining the facility's impact on the quality of groundwater in the uppermost aquifer underlying the facility. This issue is discussed below.

respondent treated, stored or disposed of hazardous waste.

Certified annual reports sent to the Indiana Environmental Management Board ("EMB") from Indiana Harbor Works, which is a facility owned by Jones and Laughlin Steel Corporation ("J&L"), and from American Chemical Service, Inc. ("ACS"), state that they sent hazardous waste to respondent's facility during calendar year 1981. CX 26, 27. The complaint alleges that during an inspection by the Indiana State Board of Health ("ISBH"), a representative of respondent's facility stated that it accepted neutralized acid and broken battery casings delivered by U.S.S. Lead Refinery, Inc. ("USS Lead"). These wastes are alleged to be "possibly hazardous due to the characteristics of corrosivity (D002) and high concentrations of lead (D008)."

Complainant need prove only that one type of hazardous waste regulated under RCRA was treated, stored, or disposed of in respondent's facility in order to render it a hazardous waste facility which must comply with the applicable conditions for such facilities as set forth in RCRA and in Indiana's hazardous waste regulations.[14] EPA's burden of proof in that regard is to

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[14] Federal and State regulatory standards for hazardous waste facilities, set forth in 40 CFR Parts 264, 265 and 270, and in 320 IAC 4.1-15 through 4.1-32, are applicable to owners and operators of all facilities which treat, store or dispose of hazardous waste, with certain exceptions not relevant here. 40 CFR §§ 264.1(b), 264.3, 265.1(b), 270.1; 320 IAC 4.1-15-1(b).

The liability of respondent with regard to all three waste sources (ACS, USS Lead and J&L) will be analyzed for purposes of determining which, if any, statutory and regulatory provisions it has violated, and of assessing an appropriate penalty for any violations found.

demonstrate by a preponderance of the evidence that Respondent accepted hazardous waste for treatment, storage, or disposal at its facility.[15]

I. The Waste from ACS

There are three essential issues as to the shipments of waste from ACS that were disposed of at respondent's facility during 1981. First, was the waste a "listed" hazardous waste F005[16], or was it D001, which has the hazardous characteristic of ignitability? Second, if it was a D001 waste, did Respondent properly treat it prior to disposal, in order to render it nonhazardous? Third, is respondent nevertheless liable for the violations cited in the complaint, on the basis that it treated D001 hazardous waste?

Respondent's position is that the ACS waste was not F005 but instead was D001, which respondent treated to eliminate its ignitability, rendering it nonhazardous. The complaint did not cite as a violation the treatment or disposal of D001 waste.

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[15] 40 CFR § 22.24 provides, "The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty . . . is appropriate. . . . Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence."

[16] "Listed" hazardous wastes are those substances which are specifically listed by name in the regulations. "Characteristic" hazardous wastes, on the other hand, are those which are classified as hazardous on the basis of ignitability, corrosivity, reactivity or toxicity. 40 CFR Part 261 Subpart B.

Therefore, respondent argues, its facility may not be deemed a hazardous waste facility on the basis of having handled the ACS waste.

The evidence shows that between December 5, 1980 and November 16, 1981, ACS delivered at least 37 manifested shipments, in an amount of 2,750 gallons each, of waste designated on the shipping manifests as F005 paint sludge, or F005 "flammable liquid paint sludge." CX 22. However, no evidence has been presented of any chemical analysis of the waste.

Hazardous Waste Number F005 was described, at the time of the alleged violations, in 40 CFR 261.31 (1982) as "The following spent non-halogenated solvents: toluene, methyl ethyl ketone, carbon disulfide, isobutanol, and pyridine; and the still bottoms from the recovery of these solvents."[17]

ACS stated in correspondence to Jonathan Cooper, of the RCRA Enforcement Section, Waste Management Division, U.S. EPA Region V, "We are unable to document whether the waste shipped to Gary Development was correctly categorized as F005 . . . we received hazardous waste that had been categorized by our customers. . . . In subsequent years we discovered that [the waste] was generated by the use of various cleaning solvents containing F005 listed compounds. These solvent mixtures would have generated D001 waste,

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[17] The federal regulations apply here, because only after the alleged violations, on August 18, 1982, did the State of Indiana Phase I regulations begin to operate in lieu of federal regulations. The 1985 State regulations provided a description of F005, in 320 IAC 4.1-6-2, identical to that appearing in the Federal regulations during the time of the alleged violations.

not F005 waste." CX 22.

The president of ACS, Mr. James Tarpo, Jr., explained this statement in testimony on behalf of respondent. He testified that at the time of disposal of the wastes from the ACS facility, he had believed that the regulatory listing of F005 included mixtures of solvents. He did not realize until sometime in 1983 that F005 did not include such mixtures, but included only pure solvents.[18] Tr. 546, 549-550. As to the nature of the waste, Mr. Tarpo testified,

> The companies that we dealt with were using cleaning solvents, and they were shipping them to us spent. So the resulting waste that was that was being shipped to us was not an F-listed waste; and in reality, it was a D001 waste. Also, much of the waste was a paint waste, there was a residual paint. We would get thickened or solidified paint from those people, and they would ship it along with the regular material that we would get for reclamation.
> * * * *
> We knew the source of the generation of our material. We knew that it had been generated by paint materials and solvents that we had shipped to our customers; who had cleaned equipment, and then shipped back to us.
> * * * *
> But there were circumstances that caused us to do a very serious search of this in about 1983, and we made accurate determinations on what the waste was, based on the incoming manifest data that we had. And it is our belief that the waste generated in '80 and '81 was also a D001 waste.

Tr. 546, 547, 548.

Consequently, Part A of ACS's hazardous waste permit application was amended to correct the classification, according to Mr. Tarpo's testimony. Tr. 557. Furthermore, in a letter dated

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[18] Spent solvents such as F005 by definition include both solvent and contaminant. In the ACS waste, the contaminant is paint. Tr. 546.

July 3, 1985, responding to inquiry by Guinn Doyle of the ISBH, ACS acknowledged the inaccuracy in the F005 hazard code shown on the manifests, and asserted the belief that it should have been D001. RX 11, 12. Mr. Tarpo testified that he was advised in discussions thereafter with an EPA Region V inspector, Richard Shandross, that the waste was being mis-coded as an F-listed waste, and "should more properly be categorized as a D001 waste." Tr. 552-553.

A letter from Karl J. Klepitsch, Jr., Waste Management Branch Chief, EPA Region V, to John Kyle, III, an attorney who represented respondent at the time, also suggests that the wastes may have been a mixture of solvents:

> Our understanding of the process which generates the wastes leads us to believe that any of the hazardous waste types handled by American Chemical Service might be present in the wastes sent to Gary Development. This includes hazardous waste numbers F001, F002, F005, U147, U031, U112, U002, U154, D001 and F003.

CX 3; Tr. 327-328. It is observed that F001, F002, and F003 are spent solvents. 40 CFR § 261.31.

Complainant's witness Mr. Jonathan Cooper, a hydrologist at EPA Region V, in referring to that letter testified, "Any of those listed wastes could have been included within the waste manifested as F005 by American Chemical Services." Tr. 328.

The weight of the evidence shows that the waste was a mixture of solvents. As such, it was not properly classified as F005 according to the regulations in effect at the time of the disposal. In 1981, the classification of F005 in 40 CFR § 261.31 included only the particular solvents listed under that category, but not mixtures of solvents. Not until 1985 was the listing for F005

amended to include mixtures of F005 solvents. 50 Fed. Reg. 53318 (December 31, 1985). The amendment to the regulatory listing of F005 added the words, *inter alia,* "all spent solvent mixtures/blends containing, before use, a total of 10 percent or more (by volume) of one or more of the above non-halogenated solvents or those solvents listed in F001, F002, or F004."

EPA conceded that the rule prior to that amendment did not include mixtures of solvents. As stated in the preamble to the proposed amendment of the regulatory listings for F001 through F005: "EPA is concerned that the present interpretation of the solvent listings allows many toxic spent solvent wastes to remain unregulated." 50 Fed. Reg. 18378, 18380 (April 30, 1985). The preamble to the final rule stated, "Today's amendment will close a major regulatory loophole which allows toxic solvent mixtures to remain unregulated." 50 Fed. Reg. 53315, 53318 (December 31, 1985). The regulation became effective in thirty days from the date it appeared in the Federal Register. Id. Consistent with the general rule that regulations issued pursuant to agency rulemaking operate prospectively, the amendment does not operate retroactively. MCI Telecommunications Corp. v. FCC, 10 F.3d 842, 846 (D.C. Cir. 1993)(Agency rulemakings are generally prospective); Pope v. Shalala, 998 F.2d 473 (7th Cir. 1993) (rule changing the law is retroactively applied to events prior to its promulgation only if, at the very least, Congress expressly authorized retroactive rulemaking and the agency clearly intended that the rule have retroactive effect); Gersman v. Group Health Association,

Inc., 975 F.2d 886, 897 (D.C. Cir. 1992), *cert. denied*, 114 S.Ct. 1642 (generally, congressional amendments and administrative rules will not be construed to have retroactive effect unless their language requires that result), citing, Georgetown University Hospital v. Bowen, 821 F.2d 750 (D.C. Cir. 1987).

Therefore, it is concluded that the ACS waste which was disposed of at respondent's facility was not F005 hazardous waste.

The next question is whether, at the time of disposal at respondent's facility, the waste from the ACS facility was D001, hazardous on the basis of ignitability, as set forth in 40 CFR § 261.21. Respondent does not dispute that at the time the ACS sludge was received at its facility, it was D001 hazardous waste. However, respondent claims that it treated the waste prior to disposal, and thus did not dispose of hazardous waste.

Respondent's vice president, Mr. Lawrence Hagen, testified that respondent accepted the waste, although it was manifested as an F005 hazardous waste, because respondent rendered the waste nonflammable and thus no longer hazardous. Tr. 759. A large amount of sand existed on site at respondent's facility, because prior to its operation as a landfill, the site had been excavated to remove sand and gravel for use in constructing an adjacent tollroad. Tr. 699, 817-818. Consequently, before disposing of the waste, respondent mixed it with sand to render it nonflammable. Tr. 699-700. Mr. Hagen pointed out the danger of disposing ignitable waste at his facility, where a lot of "track-type" equipment was used, which generates sparks. Tr. 699.

Mr. Hagen also testified that respondent had written approval from the state environmental agency to dispose of the ACS waste (sludge) according to certain instructions. Tr. 748, 749. Specifically, he testified:

> We did have a cover letter for this material [ignitable waste] from Indiana State Board of Health then, saying you could take so many cubic yards, three times a week or whatever, whatever the stipulations were. And the only restrictions put on it was that it was to be mixed with incoming waste.

Tr. 700. He testified further, "We have a letter in our file that gave us specific instructions to accept the American Chemical waste from the hauler, Independent Waste, and tells how many loads per week." Tr. 749.

However, no such letter appears in the record. Moreover, the approval was prior to the effective date of RCRA, according to Mr. Hagen's belief. Tr. 749.

There is one item of evidence in the record which contradicts Mr. Hagen's testimony. The letter, dated February 8, 1984, from Mr. Klepitsch of EPA Region V, to respondent's attorney, Mr. Kyle, states: "[W]e discovered that the American Chemical Service wastes were not mixed with sand to eliminate ignitability, as your January 24, 1983 letter to George Garland states. The co-mixing of sand and wastes did not begin until late 1981 or early 1982." CX 3 p. 2.

There is no evidence to corroborate this statement. There is no letter dated January 24, 1983 in the record. Mr. Klepitsch could not be called as a witness to testify in this proceeding, due to the fact that he is deceased. CX 11; Tr. 325-326.

Considering the testimony and evidence of record, and the demeanor of Mr. Hagen on the witness stand, there is no reason to discredit Mr. Hagen's testimony and to rely instead upon the statement of Mr. Klepitsch. Thus, it is reasonable to find that respondent mixed with the ACS waste with sand prior to disposal.

That the mixing of D001 waste with sand renders it nonhazardous is not disputed by complainant. EPA's witness, Mr. Cooper, specifically testified that if a D001 waste was made to be non-ignitable by mixing it with sand (assuming it does not fit into any additional hazardous waste category) it would be a nonhazardous waste. Tr. 420-421, 509-510. This testimony is supported in the federal and state regulations. 40 CFR § 261.3(a)(2)(i); 40 CFR § 261.20; 40 CFR § 261.3(c) and (d); 320 IAC §§ 4.1-3-3, 4.1-5 (1985); 40 CFR § 265.281 (1983)(". . . ignitable or reactive waste must not be placed in a landfill, unless the waste is treated, rendered, or mixed before or immediately after placement in a landfill so that . . . [t]he resulting waste, mixture, or dissolution of material no longer meets the definition of ignitable or reactive waste . . . ."); 40 CFR § 265.312(a); 320 IAC 4.1-53-7(a) (1985)).[19] Therefore, under the regulations in effect in 1981, the ACS waste was not a hazardous waste under RCRA at the

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[19] Currently, wastes which are hazardous at the point of generation, but which no longer exhibit a characteristic at the point of land disposal, may be subject to the land disposal restrictions, 40 CFR Part 268, which were promulgated in 1986. 51 Fed. Reg. 40638 (Nov. 7, 1986); 40 CFR § 261.3(d)(1). Because the alleged violations preceded these provisions, they do not apply.

time it was disposed of in respondent's landfill.

Complainant's argument to the contrary, by virtue of application of the mixture rule, does not change this conclusion. The mixture rule was intended to prevent the conmingling of hazardous waste with other solid waste as a means of avoiding hazardous waste regulatory requirements. It provides:

> A solid waste, as defined in section 261.2, is a hazardous waste if:
> (2) It meets any of the following criteria:
> (ii) It is a mixture of a solid waste and one or more hazardous wastes listed in Subpart D . . . .

The mixture rule does not apply to D001, a "characteristic" waste, which is described in 40 CFR Part 261 Subpart C. The rule by its terms only applies if the waste is a "listed" waste, i.e. listed as a hazardous waste in 40 CFR Part 261 Subpart D.[20]

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[20] Moreover, assuming arguendo that the ACS waste was F005 and not D001, complainant's argument no longer has merit. The mixture rule was invalidated in 1991 for lack of compliance with the rulemaking requirements of the Administrative Procedure Act, 5 USC § 553, in Shell Oil Company v. EPA, 950 F.2d 741 (D.C. Cir. 1991). This invalidation has been held to operate retroactively in pending cases; that is, the rule was invalidated *ab initio*, as if the mixture rule had never been promulgated. United States v. Goodner Brothers Aircraft, 966 F.2d 380 (8th Cir. 1992), *cert. denied*, 113 S.Ct 967 (1993); United States v. Recticel Foam Corp., 858 F.Supp. 726, 733, 744 (E.D. Tenn. 1993)(The regulatory listing of F002, which is similar to that for F005, does not encompass post-use mixtures of spent solvents and other nonhazardous solid wastes, as such a mixture was intended to be covered by the now-invalidated mixture rule.)

A mixture of a listed waste and a solid waste is dependent upon the mixture rule in order to categorize it as a hazardous waste. As EPA stated in the preamble to the regulations promulgated in 1980: "Without the [mixture] rule, generators could evade Subtitle C requirements simply by conmingling listed wastes with nonhazardous solid waste . . . Obviously, this would leave a major loophole in the Subtitle C management system and create inconsistencies in how wastes must be managed under that system." 45 Fed. Reg. 33095 (May 19, 1980). The Court of Appeals for the

[Footnote continued on next page]

Respondent's handling of the ACS waste did not constitute hazardous waste disposal, and thus it cannot be held liable for the alleged violations on the basis of owning or operating a hazardous waste disposal facility. The question remains, however, as to liability for the violations cited in the complaint by virtue of respondent's treatment of the D001 waste.

Complainant argues that the mixing of waste with sand is not a defense to liability for the alleged violations, because treatment as well as disposal of D001 waste subjects respondent's facility to hazardous waste regulation under RCRA. Respondent counters that it was not charged in the complaint with treatment or disposal of D001 waste, and it did not receive proper notice of the issue.

"Treatment" is defined in the regulations as "any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste, . . . or so as to render such waste non-hazardous, or less hazardous; safer to transport, store, or dispose of . . . ." 40 CFR § 270.2; 320 IAC

[Footnote continued from previous page]
Seventh Circuit has noted, "EPA itself seems to concede that although it meant to include waste mixtures in the Subpart D listings, without a separate rule [i.e. the mixture rule] specifying that such wastes are hazardous, the language of the listing itself fails to reach such mixtures." United States v. Bethlehem Steel Corporation, 38 F.3d 862, 869 (7th Cir. 1994). Thus, the listing of F005 as it existed in the regulations in 1981 not only failed to include mixtures of solvents, it also did not include post-use mixtures of an F005 spent solvent with other nonhazardous solid wastes, such as sand.

4.1-1-7. There is no dispute that respondent treated the ACS waste. The question is whether such treatment provides a basis for respondent's liability for the violations alleged in the complaint.

Contrary to respondent's position, the charges in the complaint are not premised upon specific allegations that the ACS waste is F005 and that disposal of F005 waste subjects respondent to regulation under RCRA. In fact, the complaint specifically refers to D001 as potentially being present in the ACS waste.[21] The complaint merely alleges that ACS used hazardous waste number F005 to describe the waste.[22]

Respondent is alleged to have violated several regulatory requirements for hazardous waste treatment, storage and disposal facilities. These charges are premised upon the allegation that respondent owns or operates a hazardous waste management facility, which is defined as a facility which is used for treating, storing or disposing of hazardous waste.[23] The complaint cites several bases for that allegation, including Part A of the permit application, an annual generator's report that hazardous wastes were "sent" to respondent from ACS, and that ACS delivered shipments of waste to respondent for disposal.[24] The fact that some allegations in the complaint specifically refer to hazardous

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[21] Complaint, paragraph numbered 10.c.

[22] Complaint, paragraph 10.b.

[23] Complaint, paragraph numbered 1, at 3; 40 CFR § 270.2.

[24] Complaint, paragraphs numbered 7, 9, 10.a, 10.b.

waste disposal does not indicate that the entire complaint is premised only upon disposal of hazardous waste. The complaint was drafted broadly enough to encompass a finding that respondent treated D001 waste. Furthermore, the parties specifically addressed at the hearing the issues of whether the ACS waste was D001, whether respondent treated it by mixing it with sand, and whether such treatment requires a RCRA permit or compliance with interim status hazardous waste standards. Tr. 328-329, 419-421, 425, 699.

While many of the regulations cited in the complaint apply to facilities which treat, store or dispose of hazardous waste, the regulations which are relevant to implementing a groundwater monitoring program are not applicable to hazardous waste treatment. This point, however, need not be addressed because, as discussed below, respondent disposed of hazardous waste from USS Lead and J&L.

It is concluded that respondent's treatment of the ACS waste subjects it to hazardous waste regulation under RCRA and the Indiana Administrative Code.

II. The Waste from USS Lead

Complainant alleges that calcium sulfate waste, reverb slag and rubber battery chips (broken battery casings) were shipped from USS Lead to respondent's facility between November 20, 1980 and January 1983. They are alleged to be a hazardous waste, D008, based upon the toxicity characteristic of containing more than a

certain concentration of lead. 40 CFR § 261.24.

In support, complainant presented as evidence numerous documents entitled "Hazardous Waste Tracking Form,"[25] which identify the transporter of the waste as Industrial Disposal Corporation, the generator as USS Lead, and the disposal site as respondent's facility. CX 23. These documents were obtained from USS Lead pursuant to an information request issued by EPA under § 3007 of RCRA. Tr. 290. Of the 189 tracking forms for calcium sulfate waste, which account for a total of 762,000 gallons, 168 specify, under the heading "Special Handling Instructions (if any)," the words "Hazardous Waste Solid - Lead - D008" or "Hazardous Waste Solid - Lead." Of the 45 tracking forms for battery chips, which account for 880 cubic yards, 42 note under that heading "Hazardous Waste Solid - Lead." All of the 11 tracking forms for reverb slag, accounting for a total of 220 cubic yards, note "Hazardous Waste Solid" or "Hazardous Waste Solid - Lead" as special handling instructions. CX 23, 33.

The remaining 21 tracking forms for calcium sulfate, and the remaining 3 for battery chips, state "None" under that heading. However, these forms were for the earlier shipments of the waste, from November 1980 through June 1981.

The forms for wastes delivered after June 1981 included the

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[25] It is observed that at the time of the alleged violations, there were no standardized hazardous waste manifest forms. Therefore, the transporter made forms for shipping manifests, with its own letterhead and heading, viz., "Hazardous Waste Tracking Form." Tr. 510-511.

references to hazardous waste. On those forms, in the area for "description and quantity of waste shipment," the waste is described, for example, as "4,000 gal. calcium sulfate" or "1-20 yd Box Rubber Battery Chips" or "30 Cu. Yds. Battery Cases" or "1-20 Yd. Box Reverb Slag." Under that description a statement appears, certifying that the named materials are properly classified and described, *inter alia*, according to the applicable regulations of the Department of Transportation and EPA.

The cover letter accompanying these documents, from USS Lead, states that operations at that facility have been suspended and that it has no other information with regard to respondent, and certifies to the truth and authenticity of all statements contained in the documents. CX 23.[26]

Respondent admits that it received waste from USS Lead, but

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[26] USS Lead was out of business at the time of the hearing in this matter. Tr. 123. While all of the documents in complainant's exhibit 23 identify respondent's facility as the disposal site, and include signatures of the generator and transporter, none of them include a signature of the receiver at respondent's facility. Respondent contended the wastes arrived at its facility without manifests. Consequently, documents which appear to be the same tracking forms, except that they include signatures of the receiver at respondent's facility, were presented by EPA as Complainant's exhibit 33.

As authentication for the forms in Complainant's exhibit 33, Mr. Cooper merely testified that they were copied in 1987 at the USS Lead facility by another EPA employee, who is no longer employed by EPA. Tr. 875. On that basis, respondent strenuously objected to the admission of these forms. Tr. 331, 884-886. However, the forms in Complainant's exhibits 33 and 23, the latter of which were properly authenticated, appear identical except for the signature of the receiver at respondent's facility, and were admited into evidence. Tr. 936.

denies that the waste was hazardous. Tr. 760; Answer, ¶ 8(d). Respondent asserts that it received only waste tracking forms, which it did not save copies of, from USS Lead; and that it never received RCRA manifests from USS Lead for the wastes. Tr. 760-762, 938. At the time of the disposal of the USS Lead waste, the "Hazardous Waste Tracking Form" was used by the transporter not only for RCRA hazardous waste, but also for other waste, according to Mr. Dan McArtle, an employee of the transporter (Industrial Disposal Corporation), who had prepared the forms. Tr. 919, 928-929.

With regard to these forms, Mr. Hagen testified that in 1980, he would not have known the meaning of D008, and that the forms did not indicate any percentage of lead. Tr. 956. Mr. McArtle also testified that he did not know what D008 meant and that he was not involved in deciding or reviewing whether or not the waste he transported was a RCRA hazardous waste. Tr. 920, 932-934. Instead, he would "basically get permission" from the State of Indiana, through the generator, his customer, "on just about everything we haul." Tr. 930, 934.

Mr. Hagen testified that USS Lead told him that calcium sulfate sludge was "neutralized battery acid." Tr. 760-761. Specifically, "they" (a person not named by Mr. Hagen) told him that "the divider material between the cells in a battery -- not the lead plate, but the divider cells . . . came in contact with the acid" and it was "neutralized, run through some sort of router there and delivered to us [respondent] as a semi solid, as a normal waste, not as anything other than just a normal waste." Tr. 761.

Respondent asserts that the disposal of USS Lead waste at respondent's facility was approved by the State of Indiana. While there is no reference to reverb slag or battery chips, ISBH did approve the disposal of USS Lead's calcium sulfate waste by letter, dated March 14, 1977 to USS Lead, with a copy to respondent. RX 18; Tr. 922-923, 939-940. On the basis of that approval, Mr. Hagen testified, he accepted the USS Lead waste for disposal not as hazardous under RCRA, but as a "special waste" under Indiana State law. Tr. 940, 955; RX 4, p. 7 ¶ 8.[27]

Complainant's witness Ted Warner, an ISBH inspector, testified that he had conducted inspections at the USS Lead facility since 1983, and reviewed records there and reviewed analytical results from sampling conducted by EPA. Tr. 77, 78. He stated in correspondence to EPA that based upon a "working knowledge" of the broken battery cases and calcium sulfate sludge at USS Lead, the neutralized calcium sulfate waste is D008 hazardous waste due to lead content. CX 11.

However, there is no documentation of sampling results in evidence. In his correspondence with EPA, Mr. Warner did not specify that the battery cases or chips were hazardous wastes, and he did not refer to reverb slag. On cross-examination, Mr. Warner admitted that during his inspections and record review, he did not

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[27] In 1983, respondent entered into an Agreed Order with the State of Indiana, allowing respondent to accept "special waste" or "hazardous waste" as defined by 320 IAC § 5-2-1(19), but prohibiting respondent from accepting RCRA hazardous waste as defined by 320 IAC § 4-3. The wastes listed in the Agreed Order as permissible for respondent to continue receiving did not include any of the wastes at issue in this proceeding. RX 4 p. 7 ¶ 8.

see in USS Lead's records any hazardous waste manifests or other documents generated by USS Lead showing that it generated RCRA waste and shipped it to respondent's facility.[28] Tr. 122. Such manifests are required by law to be kept at the facilities of hazardous waste generators for three years. 40 CFR § 262.40(a).

The evidence of both parties is sparse on the question of whether the USS Lead waste was D008 hazardous waste. Mr. Hagen's testimony and other references in the record to the effect that the calcium sulfate waste was "neutralized" does not necessarily indicate that it did not contain lead. The word "neutralized" is not synonymous with the removal of metals, such as lead. Generally, it refers to balancing levels of acidity or alkalinity (pH).[29] This definition would be particularly applicable to the USS Lead waste, since it was described as neutralized battery acid.

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[28] There is also some unclear testimony from Mr. Warner. He admitted and then denied that enforcement actions had been brought against USS Lead for shipping for disposal hazardous waste without a manifest. Tr. 123-124.

[29] Neutralization is technically defined as "The reaction between hydrogen ion from an acid and hydroxyl ion from a base to produce water, or in nonaqueous solvents, the reaction between the positive and negative ions of the solvent to produce solvent and another salt-like compound" (The Condensed Chemical Dictionary, 612 (8th Ed. 1971)); "the chemical reaction between an acid and a base in such proportions that the characteristic properties of each disappear" (Concise Chemical and Technical Dictionary, 818 (Chemical Publishing Co., Inc., 4th enlarged ed. 1986)); "the reaction between equivalent amounts of an acid (acidic compound) and a base (alkaline compound) to form a salt" (Hampel, Clifford A. and Hawley, Gessner G. Glossary of Chemical Terms, 200 (Van Nostrand Reinhold Co., 2nd ed. 1982)). In common usage, however, it has a broader meaning: "To make chemically neutral; destroy the peculiar properties or effect thereof." Webster's Third New International Dictionary 1522 (1986).

Mr. Warner described the waste as neutralized, yet also as D008, containing lead. CX 11.

Nevertheless, it has been shown by a preponderance of the evidence that wastes disposed of at respondent's facility from USS Lead contained lead and were therefore D008 hazardous wastes. Documentation in the record shows that prior to disposal of the wastes, respondent was provided with notice, in the "special handling instructions" on the waste tracking forms, that the wastes were hazardous wastes, containing lead. The fact that some of the earlier tracking forms did not include such a designation in the special handling instructions is not persuasive on the issue of whether these wastes were hazardous.

The State's letter of approval, which predated RCRA, does not constitute a waiver or exception to the requirements of RCRA and the implementing regulations, with regard to disposal of hazardous wastes. Waste which contains lead was not specifically classified as a RCRA hazardous waste at the time the letter was issued, because it was prior to the effective date (May 19, 1980) of the Federal regulation listing it as a hazardous waste under RCRA. After that date, such waste was regulated under RCRA as hazardous, the 1977 approval letter notwithstanding. 40 CFR §§ 261.1(a), 264.1(b), 265.1(b). That is, after that date, the treatment, storage or disposal of any hazardous waste identified in the Federal regulations was prohibited except in accordance with a RCRA permit or pursuant to interim status requirements. RCRA § 3005(a) and (e). The requirements of RCRA and the implementing federal

regulations were effective in the State of Indiana during the time of the disposal of the USS Lead wastes. The fact that respondent may not have been aware of them at that time is of no avail. "Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents." Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384-385 (1947).

Referring to 40 CFR § 265.13(a), respondent points out that the generator failed to comply with its obligation to provide a chemical analysis to the disposal facility for hazardous waste it sends. It is observed, however, that it is respondent's duty, even as a sanitary landfill owner or operator, to accept only wastes which the landfill was designed to accept. It must ensure that no hazardous wastes are received by the facility unless specifically approved by the responsible agency. Such responsible agency was the EPA, with regard to hazardous wastes during the time of the alleged violations. The Federal regulations for owners and operators of solid waste land disposal facilities, 40 CFR Part 241, include the following requirements:

> In consultation with the responsible agencies the owner/operator shall determine what wastes shall be accepted and shall identify any special handling required. In general, only wastes for which the facility has been specifically designed shall be accepted; however, other wastes may be accepted if it has been demonstrated to the responsible agency that they can be satisfactorily disposed with the design capability of the facility or after appropriate facility modifications.
> * * * *
> Using information supplied by the waste generator/owner, the responsible agency and the disposal site owner/operator shall

> jointly determine specific wastes to be excluded and shall identify them in the plans. . . . The criteria used in considering whether a waste is unacceptible shall include . . . the chemical and biological characteristics of the waste . . . [and] environmental and health effects . . . .
> * * * *
> Under certain circumstances it may be necessary to accept special wastes at land disposal sites. The following special wastes require specific approval of the responsible agency for acceptance at the site: Hazardous wastes . . . . Where the use of the disposal site for such wastes is planned, a special assessment is required of the following items: The site characteristics, nature and quantities of the waste, and special design and operations precautions to be implemented to insure environmentally safe disposal.
> * * * *
> The owner/operator of the land disposal site shall maintain records and monitoring data to be provided, as required, to the responsible agency.
> * * * *

40 CFR §§ 241.200-1, 241-201-1, 241-201-2, 241.212-1; 39 Fed. Reg. 29333 (August 14, 1974).

That respondent may not knowingly have disposed of hazardous waste is not a defense to liability for noncompliance with the regulatory requirements. RCRA is a strict liability statute. In re Humko Products, An Operation of Kraft, Inc., RCRA Appeal No. 85-2, slip op. at 10 (Final Decision, December 16, 1988)("RCRA is a strict liability statute. . . and authorizes the imposition of a penalty even if the violation was unintended"); United States v. Allegan Metal Finishing Corp., 696 F. Supp. 275, 287 (W. D. Mich. 1988); United States v. Liviola, 605 F. Supp. 96, 100 (N. D. Ohio, 1985). Indeed, if a respondent knowingly disposes of hazardous waste without a permit or interim status, he may be subject to criminal enforcement. RCRA § 3008(d).

It is concluded that waste from USS Lead which was disposed of at respondent's facility was hazardous waste. Consequently,

respondent is subject to the requirements of Subtitle C of RCRA and of the Indiana Administrative Code for hazardous waste disposal facilities.[30]

III. The Waste from J&L

Complainant claims that respondent disposed of approximately 3,208,500 pounds of decanter tank tar sludge from coking operations ("tar decanter sludge"), a listed hazardous waste (K087), from J&L between November 1980 and March 1982. CX 20, 26; Tr. 270, 576; 40 CFR § 261.32. EPA supports that claim with an annual hazardous waste generator report for 1981 to ISBH from J&L, and with approximately 94 hazardous waste manifests submitted to EPA from J&L in response to an information request, under RCRA § 3007.[31] CX 20, 26; Tr. 256. These manifests are marked at the top with J&L's company name, and are labelled "Part A." They identify J&L as the generator of the tar decanter sludge, the waste as K087, and the disposal site as respondent's facility. They include signatures of the generator and transporter, but do not call for the signature of

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[30] "'Disposal facility' means a facility or part of a facility at which hazardous waste is intentionally placed into or on any land or water and at which waste will remain after closure." 320 IAC 4.1-1-7; 40 CFR § 270.2.

[31] It is noted that J&L was later renamed as LTV Steel. It is further noted that F006 hazardous waste was delisted, so J&L was granted a variance to allow that material to be disposed of at a solid waste disposal facility. RX 1, 2, 4. However, tar decanter sludge, which is classified as K087 waste, was not delisted. Nor was a variance granted for that waste. Tr. 446, 547.

the disposal facility. CX 20; Tr. 863.

During the hearing, complainant presented what appear to be the same manifests, except that they include a "Part B," which provides for the transporter's signature, dates of delivery and receipt, handling method code, and a signature for the treatment, storage or disposal facility. CX 31; Tr. 766-768. Part B does not specifically refer to "hazardous waste" or include any description of the waste. These manifests were obtained pursuant to EPA's request under RCRA § 3007 and certified as to authenticity by Carl Broman, Superintendent of Environmental Control at the J&L facility. CX 31; Tr. 771, 864-865.

Respondent denies that the hazardous waste manifests in evidence were signed by any employee of respondent. As with the USS Lead waste, respondent maintains that the waste sludge from J&L was not accepted for disposal by respondent as a hazardous waste. Mr. Hagen denied having seen Part A of the J&L manifests, asserting that respondent did not get the top part of the form (Part A), but only "signed the bottom part [Part B] of those forms" and "presumed they were waste tracking forms." Tr. 696, 948. He testified that J&L did not provide respondent with a waste analysis of its waste, as required for RCRA hazardous wastes, under 40 CFR § 265.13(a) (1983). Tr. 955. He had never even heard of the term "tar decanter sludge" at that time. Tr. 955. He testified that he kept copies of all manifests of incoming wastes, but that they were destroyed in a fire at the facility in November 1985. Tr. 758.

The manifests are perforated between Parts A and B. CX 31.

EPA's witness, Mr. Cooper, explained that on J&L's manifest forms, Part A was to be filled in by the generator, and Part B was for the signature of the disposal facility, to be returned to the generator upon receipt at the disposal facility. Tr. 894, 899-901. Mr. Broman, in a sworn statement certifying authenticity of the documents, explained that the original manifests consisted of three copies with both parts A and B. One copy of Part A remained with the generator. Part B of the first copy, plus the other two copies (Parts A and B), and were taken by the transporter with the shipment to the respondent's facility. Copy 1 of Part B was returned to the generator, and the second and third copy of Parts A and B were retained by the transporter and the disposal facility. CX 31.

Respondent asserts that Carl Broman had no personal, first-hand knowledge as to whether the waste identified as K087 was actually disposed of at respondent's facility. Tr. 374-375, 377. Furthermore, complainant did not take the opportunity at the hearing to question the respondent's witness Dan McArtle, an employee of the company which transported the tar decanter sludge, as to the procedure for obtaining manifest signatures for disposal of J&L's waste.

Because the manifests are in two separate parts, A and B, the disposer can sign for receipt of the waste without seeing what type of waste is being received, respondent asserts. Tr. 949, 953. There is no testimony or evidence in the record that Part A would ever be presented to the disposal facility, respondent contends.

Mr. Cooper admitted under oath that EPA had no information as to whether respondent ever received a copy of both parts. Tr. 901-904.

Mr. Hagen admitted that most, but not all, of the names which appear on Part B as the signatures for the disposal site were employees of respondent at the time of the alleged disposal, and that one manifest even had his own signature on it. Tr. 942-944, 948. However, he points to what he views as irregularities on the forms. As to the signatures of one employee, Brian Boyd, eight of the manifests have his name printed on the signature line for the disposal site, yet Brian Boyd never prints his signature, and his actual printing appears different from the printing on the forms. RX 19; Tr. 944-945, 951. Mr. Hagen emphasized that nineteen of the manifests have illegible signatures or missing information. Tr. 946-947.

The evidence shows that respondent accepted K087 tar decanter sludge from J&L for disposal and that representatives or employees of respondent's facility signed Part B on the majority of the J&L manifests. However, the evidence does not demonstrate that respondent knowingly accepted the waste as hazardous. That is, there is no direct evidence that respondent had notice from J&L that the waste being accepted from J&L was hazardous.

Assuming arguendo that respondent did not see Part A of the manifests, and was not otherwise informed that the waste was hazardous, the question is whether respondent may be held liable for hazardous waste disposal violations where it signed part of a

form for acceptance of waste without finding out what type of waste it was accepting. If there is a duty for a landfill disposal facility to ascertain whether a waste is hazardous prior to disposal, and the facility fails to meet that obligation, then it is clear that the facility may be held liable for any hazardous waste disposal violations.

The generator is obligated to provide the disposal facility with a copy of the hazardous waste manifest before disposal. 40 CFR §§ 262.20, 262.22. A hazardous waste disposal facility is required to obtain a chemical analysis of the waste prior to disposal of hazardous waste, and to inspect shipments received to determine whether it matches the identity of the waste specified on the manifest or shipping paper. 40 CFR §§ 265.13(a)(1) and (4). Even as a sanitary landfill owner and operator, respondent was obligated to obtain information regarding the type of waste prior to acceptance for disposal, as discussed above, *supra,* at 25-26.

Moreover, Part B of the manifests specifically suggested that respondent inspect or inquire as to the shipment being delivered. A section to be filled out by the treatment storage or disposal facility provides for "Indication of Any Differences Between Manifest and Shipment or Listing of Reasons For and Disposition of Rejected Materials." RX 19; CX 31. It may be assumed that this area is to be observed by the receiver at the disposal facility prior to signing Part B. This section was left blank on all of the manifests in evidence. CX 31. Clearly, respondent had a duty, and even was on notice of a duty, to inspect, and at least to inquire

as to incoming wastes to ensure that it only received wastes which were acceptable for disposal in its facility. Thus there is no merit to the argument that respondent did not know of the hazardous nature of the J&L waste.

Moreover, as noted above, RCRA is a strict liability statute, and acceptance of hazardous waste for disposal, whether knowingly or not, requires that all applicable regulatory requirements for hazardous waste disposal be met.

It is concluded that respondent disposed of K087 hazardous waste, rendering respondent's facility a hazardous waste disposal facility and subjecting respondent to the applicable hazardous waste requirements of RCRA Subtitle C and the Indiana Administrative Code.

As to the particular requirements referenced in the complaint, respondent has not refuted the findings in a report, submitted by complainant, which enumerated the groundwater monitoring violations alleged in the complaint. CX 4. While respondent points out that it monitored quarterly four monitoring wells installed at its facility, it has shown only that it had a groundwater monitoring program suitable for a sanitary landfill. Tr. 825-826. At the hearing, respondent's expert witness, Dr. Terry West, testified that the respondent's monitoring system was such as was required for a conventional landfill, and that he would assume that such system would not meet RCRA requirements for a groundwater monitoring system. Tr. 846-847.

Respondent did not contest the remaining violations, which

were based upon inspection reports. CX 9, 11. As there is no dispute that respondent was not in compliance with the statutory and regulatory requirements referenced in the complaint, it is further concluded that respondent violated the statutory and regulatory provisions alleged in the complaint.

THE PENALTY

Respondent contests the amount of penalty proposed in the complaint, $117,000, generally on the basis that there was no evidence of any environmental harm caused by its facility. Respondent questions the assessment of such a penalty merely for harm to the "RCRA program," where there was no showing of harm to the environment.

Complainant explains that respondent did not have wells that were capable of disclosing actual harm to the environment by measurement of RCRA parameters, so the harm to the RCRA program resulting from respondent's noncompliance was the major thrust of the penalty. Tr. 891-892, 906. The number and magnitude of the violations of the regulatory requirements were considered by complainant, but the types and specific quantities of hazardous waste were not figured into the calculation of the penalty. Tr. 890-891.

The State and Federal regulations which respondent violated implement Subtitle C of RCRA, and are thus requirements under that subchapter. A person who violates any such requirement is subject to a civil penalty under Section 3008(a) of RCRA, 42 USC § 6928.

The maximum civil penalty that may be assessed under RCRA is $25,000 per day of violation for each violation. The Act provides that in assessing such a penalty, the seriousness of the violation and any good faith efforts to comply shall be taken into account. RCRA § 3008(a)(3).

Under the applicable procedural rules, 40 CFR Part 22, penalty guidelines issued under the Act must be considered by the Presiding Officer. 40 CFR § 22.27(b). The 1984 RCRA Civil Penalty Policy ("Penalty Policy") was the basis for complainant's assessment of the penalty, according to which Mr. Cooper testified to the penalty calculation on EPA's behalf. CX 29; Tr. 358. It provides for the calculation of a "gravity-based penalty" by using a penalty matrix, with two axes representing "potential for harm" and "extent of deviation" from the requirements. Violations are categorized as major, moderate, or minor on each axis, and a gravity-based penalty amount is chosen from the penalty range indicated in the appropriate cell in the matrix. After calculation of the gravity-based penalty, adjustments may be made for any of the following factors: good faith efforts to comply, degree of willfulness or negligence, history of noncompliance, other unique factors, multi-day penalty, economic benefit of noncompliance, or ability to pay.

In this case, the violations were grouped for purposes of the penalty calculation as follows: failure to have a waste analysis plan, failure to post security signs, failure to comply with general inspection requirements, failure to have required

equipment, failure to have a contingency plan, failure to comply with manifest requirements, failure to have operating records, failure to prepare unmanifested waste report, failure to have an adequate groundwater monitoring system, failure to comply with financial responsibility requirements, accepting hazardous waste without a permit or interim status, and failure to submit Part B of the hazardous waste permit application. Each of these will be deemed hereinafter a "violation" and discussed separately.

No adjustments were made to the gravity-based penalties proposed for these violations, except the penalty proposed for the groundwater monitoring violation, which was adjusted upward to account for alleged economic benefit to respondent of noncompliance with the requirements. CX 29. The parties' arguments and the evidence presented at the hearing do not support any other adjustments for the factors listed in the Penalty Policy. Also, the record shows that respondent made no attempt to come into compliance with regulatory requirements pursuant to the ISBH inspection on June 17, 1985. CX 9, 15, 17.

1. Waste analysis plan

320 IAC § 4.1-16-4(a) and (b) [analogous to 40 CFR § 265.13(a) and (b)], requires the owner and operator of a facility to obtain a detailed physical and chemical analysis of each hazardous waste prior to storage, treatment or disposal; to inspect and if necessary analyze each hazardous waste movement received to determine whether it matches the identity specified on the shipping paper; and to develop, follow and maintain a written waste analysis

plan.

During the inspection, respondent had no general waste analysis plan or general waste analyses on file for hazardous wastes received. CX 9. For failure to comply with all of these requirements, Mr. Cooper evaluated the violation to be a "major" extent of deviation, which indicates substantial noncompliance. Mr. Cooper noted that no apparent effort was made to check the chemical contents of wastes in order to keep records of the wastes and decide whether to accept or reject disposal of the waste at the site.

The potential for harm indicates either adverse effect on human health or the environment, or the likelihood of an adverse effect on the RCRA program. Considering that mixing of incompatible wastes could occur inadvertently, that records of the hazardous waste could not have been maintained without proper waste analysis, and that the violation poses a significant likelihood of an adverse effect on the RCRA program, Mr. Cooper assessed the potential for harm as "moderate." He selected a penalty at the midpoint of the range indicated in the matrix cell, $9500. Tr. 464, 466, 891.

Testimony elicited at the hearing supports this assessment. Mr. Hagen admitted that respondent never reviewed any waste analysis but just accepted the USS Lead wastes, even though the words "hazardous waste" and EPA hazardous waste numbers appeared on shipping documents. Tr. 955-956. Mr. Hagen also admitted that he did not review any waste analyses for the J&L waste. Tr. 955. It

is concluded that $9500 is an appropriate penalty for respondent's failure to comply with 320 IAC § 4.1-16-4(a) and (b).

2. Security signs

Hazardous waste facilities are required to prevent and minimize unknowing or unauthorized entry onto the active portion of the facility by implementing three measures: a 24-hour surveillance system, a barrier and other means to control entry, and a "danger" signs posted in sufficient numbers to be seen from any approach to the active portion of the facility. 320 IAC 4.1-16-5. Respondent complied with two of those requirements, but failed to post any danger signs. CX 9. For this violation of 320 IAC 4.1.16-5(c) [analogous to 40 CFR § 265.14(c)], EPA proposes a penalty of $2,250.

The penalty proposal is based upon a minor "potential for harm," because entry of unauthorized persons is minimized by the fact that most of the site is surrounded by railroad tracks, the Grand Calumet River, and another facility, Vulcan Recycling Company. The "extent of deviation" is deemed by EPA to be major due to the fact that no signs were posted.

The "extent of deviation" is more appropriately assessed as moderate. The Penalty Policy explains that the "extent of deviation" reflects the degree of noncompliance with the requirements of the regulation -- it "relates to the degree to which the violation renders inoperative the requirement violated." Penalty Policy at 8. The moderate category is defined as the

situation in which "the violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended." Penalty Policy at 9. "Failure to maintain adequate security" is provided as an example of such a regulation. Total failure to supply any security systems would result in a classification as "major." Id. This is not the situation in this case.

Because respondent did comply with some of the security requirements of the regulation, 40 CFR § 265.14, the appropriate penalty is $1000, the midpoint of the matrix penalty range for minor "potential for harm" and moderate "extent of deviation."

3. General inspection requirements

320 IAC 4.1-16-6(b) [analogous to 40 CFR § 265.15(b)] requires a written schedule to be developed and followed for inspecting equipment that are important to preventing, detecting or responding to environmental or human health hazards. The inspections must be recorded and kept for three years, according to subparagraph (d) [40 CFR § 265.15(d)].

The "potential for harm" is considered by complainant as minor, and the "extent of deviation" as major, because no record was kept nor any inspection schedule written down. Respondent has not shown that the general inspection requirements set forth in section 4.1-16-6 were complied with to any significant degree. For failing to meet these requirements, EPA proposes a penalty of $2,250. Nothing in the record or Penalty Policy supports any different penalty assessment. Accordingly, the penalty for

respondent's violation of 320 IAC § 4.1-16(b) and (d) will be $2,250.

4. Required equipment

Unless the type of waste does not require certain equipment, hazardous waste facilities are required to be equipped with internal communications or alarm system; telephone or two-way radio; and decontamination, fire and spill control equipment. 320 IAC § 4.1-17-3 [40 CFR § 265.32]. Respondent's facility did not have such equipment during the June 17, 1985 ISBH inspection. CX 9. EPA calculates a penalty of $2,250 for this violation.

Upon review of the record and the Penalty Policy, the "potential for harm" was appropriately assessed be EPA as minor and the "extent of deviation" was also appropriately assessed as major. The penalty for this violation will be $2,250.

5. Contingency plan

Hazardous waste facilities must have on file a contingency plan designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned release of hazardous waste or hazardous waste constituents. 320 IAC § 4.1-18-2 [40 CFR § 265.51]. This plan is to be submitted to local police and fire departments, hospitals and State and local emergency response teams. A penalty of $9,500 was proposed for respondent's failure to have such a plan on file.

EPA's calculation of the penalty is based upon a major "extent of deviation," which reflects the lack of any contingency plan or coordination with local officials, and a moderate "potential for

harm." According to EPA, this assessment accounts for the possibility of an unplanned release of hazardous wastes to groundwater and the adjacent river. As complainant notes, a mixture of leachate, infiltrating groundwater and surface runoff has been pumped into the Grand Calumet River. RX 16, CX 4, Tr. 468.

The record shows that an unplanned sudden release of hazardous waste could result from a flood of the Grand Calumet River, such as the floods that occurred on July 5, 1983. Tr. 660, CX 4. The entire bottom of the site was covered with water, and thereafter the site received unacceptable inspection ratings by the Environmental Management Board. Tr. 661, CX 4. While there appears to be no evidence in the record of actual contamination of the river or groundwater with hazardous waste resulting from that flood, or the pumping of leachate, the possibility exists. Tr. 471, 663.

The record also shows that fires occurred at the respondent's facility in 1985 and 1989, and that as of 1990 respondent did not have a fire-fighting plan for controlling fires at the landfill. Tr. 758; RX 17. The fire that occurred in 1989 required 36 man-hours to extinguish. RX 17.

Respondent's violation of section 4.1-18-2 provides a significant likelihood of exposure to hazardous waste or a significant adverse effect upon the regulatory program. Nor has respondent shown that it has complied with any requirements with regard to the contingency plan. The penalty for this violation

will be $9,500.

6. Manifest requirements

Pursuant to 320 IAC § 4.1-19-2(a) (1) and (5) [40 CFR § 265.71(a)], if a facility receives hazardous waste accompanied by a manifest, a copy must be signed to certify that the hazardous waste was received, and retained for three years. Respondent disposed of hazardous wastes but presented no evidence that it had manifests on file with respect to the wastes at issue.

EPA evaluates respondent's failure to comply with the manifest system as having a minor "potential for harm," and having a moderate "extent of deviation" due to the fact that some requirements may have been implemented, but the inspector did not pursue respondent's claim that a search would turn up the required manifests. Applying the matrix in the Penalty Policy yields a proposed penalty of $1,000. CX 29.

Neither the record nor the Penalty Policy provide any reason to adjust the penalty proposed. Accordingly, respondent will be assessed a penalty for this violation in the amount of $1,000.

7. Operating records

Certain operating information must be kept on a written operating record at a hazardous waste facility, as described in 320 IAC § 4.1-19-4 [analogous to 40 CFR § 265.73]. The information required to be recorded includes a description, quantity and location of disposal of each hazardous waste received. Such information was not found during the ISBH inspection. Such lack of compliance warrants a penalty of $2,250, according to complainant.

Complainant considered this violation to have a minor "potential for harm." Complainant notes that there were no records of spills or of pumping leachate into the Grand Calumet River, and no record of where specific hazardous wastes were deposited. The "extent of deviation" was deemed by EPA as major, because of respondent's complete disregard for the requirement. CX 29.

There appears to be no reason in either the record or the Penalty Policy to assess a penalty different in amount from that proposed by EPA. The penalty for this violation will be set at $2,250.

8. Unmanifested waste report

If a facility accepts for treatment, storage or disposal any hazardous waste which is not accompanied by a manifest or equivalent shipping paper, then a report must be submitted within fifteen days of receiving the waste, as required by 320 IAC § 4.1-19-7 [analogous to 40 CFR § 265.76]. Complainant proposes a penalty of $2,250 for respondent's failure to file such a report. Complainant described the "potential for harm" as minor, and the "extent of deviation" as major.

Respondent accepted the waste shipments from ACS without hazrdous waste manifests. Taking Mr. Hagen's testimony as true regarding the manifests from J&L, respondent also accepted the J&L waste shipments without complete manifests. No unmanifested report was filed for any shipments of either the ACS waste or the J&L waste. Therefore, the assessment of the "extent of deviation" as being major is appropriate, and the penalty as proposed, $2,250,

will be imposed for this violation.

9. Groundwater monitoring

The owner or operator of a surface impoundment, landfill or land treatment facility for hazardous waste management is required to implement a groundwater monitoring system capable of determining the facility's impact upon the quality of groundwater in the uppermost aquifer underlying the facility. 320 IAC § 4.1-20-1. The system must include monitoring wells that meet the description of 320 IAC § 4.1-20-2, and groundwater elevations must be determined and evaluated as to whether wells are properly located. 320 IAC §§ 4.1-20-3(e), 4.1-20-4(f). Samples must be obtained for analysis, pursuant to a groundwater sampling and analysis plan, for certain parameters, and then evaluated statistically with regard to changes in parameters. 320 IAC §§ 4.1-20-3, 4.1-20-4. Records of such analyses and evaluation must be kept, and information therefrom reported. 320 IAC §§ 4.1-20-4(d), 4.1-20-5, 40 CFR § 265.94(a)(2). For respondent's failure to comply with these groundwater monitoring requirements [analogous to 40 CFR §§ 265.90. 265.91, 265.92, 265.93, and 265.94], a penalty of $46,750 is proposed.

This amount is based upon a "major" extent of deviation from the regulatory requirements, and a "major" potential for harm resulting from this violation. The maximum amount of penalty permissable under the statute, $25,000, was chosen by complainant as the gravity-based penalty. This amount was adjusted upward by $21,750 to account for the economic benefit that respondent would

gain from its failure to implement the groundwater monitoring system.

The penalty calculation worksheet notes that the major "potential for harm" included a consideration that groundwater contamination has been alleged by ISBH based upon samples collected by EPA. However, testimony of record shows that EPA had never sampled respondent's monitoring wells. Tr. 912. No evidence of groundwater contamination resulting from hazardous waste disposal appears in the record. The worksheet also notes that leachate was being pumped from the facility into the Grand Calumet River.

Complainant has not shown an actual adverse effect upon human health or the environment resulting from respondent's groundwater monitoring violations due to the fact that respondent's facility did not have wells that could be monitored for RCRA parameters. Tr. 220, 453-355, 892, 906, 911-912. The Penalty Policy provides that the "potential for harm" may be determined by the likelihood of exposure to hazardous waste posed by noncompliance, or the adverse effect noncompliance has on the statutory or regulatory purposes or procedures for implementing the RCRA program. The latter factor may be used where the violation is small, nonexistent, or difficult to quantify. Penalty Policy at 6. The proposed penalty in this case was based in part upon the latter factor, i.e. the potential threat to the RCRA program from respondent's noncompliance. Tr. 463-464.

Mr. Cooper testified on behalf of EPA with regard to the

penalty calculation. In assessing the potential for harm as "major," Mr. Cooper considered, among other factors, the potential threat of groundwater contamination from the insufficient thickness of the landfill's clay liner. Tr. 244-245, 448, 503.

A memorandum dated February 6, 1986, which refers to site visits by ISBH representatives was offered by complainant as a basis for calculating the amount of penalty proposed for this violation. CX 13. While it was admitted into evidence, the author of the memorandum, a State Board of Health employee, was not called to testify at the hearing, thus depriving respondent of an opportunity for cross-examination. Tr. 242. Therefore, in the interest of fairness, it will not be given significant weight except with regard to points which are otherwise verifiable in the record. The memo stated, *inter alia,* that the thickness of the west wall was in question, and that the west wall of the liner had several small leachate leaks, draining into a flooded ditch. CX 13. The memo referred to respondent's soil boring report, which indicated that the west wall of the clay liner was only 2.5 feet thick, and not as thick as respondent's claim of six to ten feet. CX 13; RX 6, 7; Tr. 243.

However, at the hearing, Mr. Cooper acknowledged that he did not know the permeability of the west wall, and that evidence was in conflict as to the thickness and permeability of the clay liner. Tr. 453-454, 462-463. The integrity of the clay liner depends upon both thickness and permeability. The report referenced in the memorandum, regarding four soil borings on the west wall, included

permeability measurements. RX 7. The geologist who prepared the report testified as to the sampling methods and permeabilities found, ranging from 6.0 x 10^{-7} to 2.4 x 10^{-8} centimeters per second (cm/sec.). Tr. 594-594. An Administrative Law Judge of the Indiana Department of Environmental Management found, as stated in an order dated September 29, 1986, that the west wall of the landfill complied with the standard for permeability established by the State. Tr. 654-655; RX 9. He concluded that the wall was nine to eighteen times less permeable than the standard, 5 x 10^{-6} cm/sec. Id.; Tr. 453. Dr. West, respondent's hydrogeology expert, cast doubt on the statement in the memo regarding observation of leachate seeping from the west wall. He testified that the clay liner is below the ground, that he did not know how one can determine that the clay liner is not working except by drilling, and that the report of analysis of the four borings indicated that the permeability is such that the liner operates as though it were 100 times thicker than the specific requirements. Tr. 849-850.

The evidence in the record, including a report of a groundwater monitoring inspection at respondent's facility dated October 12, 1984, shows that the clay layer underneath the landfill was approximately 80 feet. Tr. 394, 666; CX 4. There is no indication in the record that this clay liner underneath the landfill was leaking.

An Emergency Order of the Commissioner of the Indiana Department of Environmental Management, dated October 18, 1990, ordered respondent to immediately cease discharge of leachate into

waters of the State, and apply for an NPDES (National Pollutant Discharge Elimination System) permit. The Order stated that an inspection revealed that respondent was "discharging leachate water from their facility to receiving waters named the Grand Calumet River," that the State alleges that this leachate flowing from the landfill was untreated and a threat to human health and the aquatic environment. RX 16.

There is no question that respondent did not comply with any of the RCRA groundwater monitoring requirements, and that this is a major "extent of deviation." As to the "potential for harm," the category of "major" is also appropriate. According to the Penalty Policy (at 6), the likelihood of exposure posed by the noncompliance may be determined by considering the quantity of hazardous waste, and the potential threat to any environmental media and to human and animal life or health. There is no reliable and consistent evidence in the record to make the latter determination, although it is clear that the quantity of hazardous waste was substantial.

Respondent's facility was a sanitary landfill which was not designed for accepting hazardous waste -- it did not have a double liner or a leachate collection system, as is required for hazardous waste landfills under 40 CFR § 265.301(a). Tr. 845-846. Where respondent disposed of a large quantity of hazardous waste in such a landfill, the failure to implement any RCRA groundwater monitoring requirements has a major "potential for harm."

However, complainant did not present sufficient evidence to

support assessment of the maximum gravity based penalty. It is complainant's burden to show that the proposed penalty is appropriate. 40 CFR § 22.24. In the absence of more specific, reliable, and probative testimony or evidence regarding either the likelihood of exposure to hazardous waste posed by the noncompliance, or the adverse effect the noncompliance has with regard to the RCRA program, the maximum penalty amount allowed by statute is not supported. A gravity-based penalty at the midpoint of the range indicated in the Penalty Policy matrix, $20,000, will be assessed.

The figure complainant proposes for adjustment of the penalty upward by $21,750 apparently was obtained by the "BEN" computer model for assessing economic benefit of noncompliance. There is no testimony, no computer printout from the BEN model, or any other calculations or support for the $21,750 figure.

It is the role of the presiding administrative law judge to determine the amount of penalty for the violation in accordance with relevant criteria set forth in the Act. 40 CFR § 22.27(b). The statutory criteria do not include the economic benefit of noncompliance. RCRA § 3008(a)(3). The applicable procedural rules provide that the administrative law judge "must consider" the applicable penalty guidelines, and thus the factors -- such as economic benefit of noncompliance -- listed therein. 40 CFR § 22.27(b). There is, however, no requirement for the judge to adjust the penalty to account for the economic benefit of noncompliance in any particular case.

In this case, there is nothing in the record upon which to make a determination of the economic benefit of noncompliance. The record shows only the figure "$21,759" written on the penalty calculation worksheet, and a written note thereon that "BEN's figure is $22,271" and "slightly reduced." It goes without saying that the administrative law judge does not simply rubber-stamp complainant's penalty proposal, or any portion thereof, but must make an independent review. Katzon Bros., Inc. v. U.S. EPA, 839 F.2d 1396 (10th Cir. 1988). Because no such review is possible from the record, the penalty for this violation cannot take into account any economic benefit of noncompliance. The penalty for the groundwater monitoring violation will be $20,000.

10. Financial responsibility

Under 320 IAC § 4.1-22-4 [analogous to 40 CFR § 265.143], owners and operators of all hazardous waste facilities must establish financial assurance for closure of the facility, according to options specified in sections 4.1-22-5 through 4.1-22-9; and under section 4.1-22-14 for post-closure care of the facility, according to options specified in sections 4.1-22-15 through 4.1-22-23.

320 IAC § 4.1-22-24(a) and (b) [analogous to 40 CFR § 265.147(a) and (b)] require demonstrations as to financial responsibility for bodily injury and property damage to third parties caused by sudden and non-sudden accidental occurrences. For failure to meet these financial responsibility requirements, complainant proposes a penalty of $20,000.

By letter dated March 27, 1985, ISBH sent respondent a request to submit such financial assurance, with a requirement to respond within 30 days. CX 7. Respondent has not refuted complainant's assertion on the penalty calculation worksheet that respondent made no attempt to comply with the financial assurance requirements. CX 29. Therefore, the "extent of deviation" is properly assessed as "major."

The "potential for harm" is assessed by complainant as "major." Reasons given are that lack of financial assurance could result in improper or inadequate closure and post-closure and serious environmental problems, such as groundwater and surface water pollution. Complainant notes that there is no fence around the site and that leachate may be pumped into the Grand Calumet River. It is urged that these situations may contribute to the likelihood of injury which could be devastating where respondent has no liability coverage.

The record shows that respondent pumped untreated leachate into the Grand Calumet River without a permit to do so. RX 16. As to bodily injury from any unauthorized entry onto the unfenced site, barriers around the site minimize such entry, as noted above. Overall, however, the record reveals significant potential threats to human health and the environment resulting from respondent's disposal of hazardous waste.

The substantial penalty assessed herein for the financial assurance violations is supported by recent case law. In United States v. Ecko Housewares, Inc., 62 F.3d 806, 817 (6th Cir. 1995),

the Sixth Circuit Court of Appeals noted that the financial assurance regulations are "not mere paperwork requirements," and that a violation of these regulations "may significantly impair the ability to close and remediate the site when needed and to protect third parties from harm. This risk of future harm, found by the district court to present serious risks to human health and the environment, is no less important a consideration than the risk of present harm caused by activities causing contamination."

The proposed penalty of $20,000 will be assessed against respondent for violating the financial responsibility provisions.

11. Managing hazardous waste without RCRA permit or interim status

In general, Section 3005 of RCRA prohibits the treatment, storage or disposal of hazardous waste except in accordance with a permit or the requirements for interim status facilities. In order to achieve interim status, the owner or operator of a hazardous waste facility must apply for a permit and comply with Section 3010(a) of RCRA, which requires notification of hazardous waste activity within 90 days of promulgation of regulations identifiying the hazardous waste. RCRA §§ 3005(e)(1)(B) and (C), 3010.

Complainant proposes a penalty of $9500 for respondent's acceptance of hazardous waste without a permit or interim status. The potential for harm was assessed as "moderate," considering both potential damage to the environment and significant effect on the regulatory or statutory procedures for implementing the RCRA program. The extent of deviation was assessed as "major," because respondent never notified EPA of hazardous waste activity.

No reason to differ from the assessments made by EPA as to this violation appears in the record. It is concluded that a penalty of $9500 will be assessed for respondent's violation of Sections 3005 and 3010 of RCRA.

12. Failure to file Part B

40 CFR § 270.10(a) [320 IAC § 4.1-34-1(a)] mandates any person who is required to have a permit to submit a RCRA permit application, and persons currently authorized with interim status to apply for permits when required by EPA. Section 270.10(e)((5) [320 IAC § 4.1-34-1(e)(5)], which was not cited by EPA as a violation, provides that failure to furnish Part B on time, or to furnish in full the information required on Part B, is grounds for termination of interim status.

Respondent is alleged to have violated Section 270.10(a) for its failure to submit Part B of the application pursuant to EPA's request, dated March 18, 1985. CX 6. In that request, respondent was required to submit Part B by September 15, 1985. Id. Because no such document was received, EPA evaluated the extent of deviation from the requirement as "major." However, section 270.10(a) also requires Part A of the permit application. Respondent did not totally disregard the requirements of section 270.10(a), because it did submit Part A. The Penalty Policy provides that the extent of deviation is "major" if there is "substantial noncompliance, and "moderate" if the violator "significantly deviates from the requirements . . . but some of the requirements are implemented as intended." Penalty Policy at 8-9.

There appears to be no reason to assess the same penalty against respondent as against a person who never filed Part A. Therefore the extent of deviation should be "moderate."

Complainant assessed the potential for harm as "moderate," considering that the violation may have a significant adverse effect on the implementation of the RCRA program. Listed on the penalty worksheet in support of this assessment were notes that the facility has no real understanding of the hydrogeological situation or that it disregards the obvious consequences of a landfill in that location handling hazardous wastes. It notes further that operating the landfill in the most environmentally sound way is impossible without performing the research required for providing the information required in Part B. Consequently, complainant proposes a penalty of $9500.

Dr. West's research and knowledge as to the hydrogeology of the site and the history and characteristics of the respondent's landfill, including the composition and permeability of the clay liner, does not undermine complainant's reasoning as to its assessment of the potential for harm. He did not investigate respondent's facility until approximately two years after respondent was required to submit Part B. His first visit to the site did not take place until August 6, 1987, after the complaint was issued. Tr. 814.

Applying the penalty assessment matrix in the Penalty Policy (at 10), the penalty range for "moderate" extent of deviation and potential for harm is $5,000 to $7,999. The midpoint of the range,

$6,500, is an appropriate penalty for the violation of 40 CFR § 270.10(a).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent, an Indiana corporation, is a person as defined by section 1004(15) of the Act, 42 USC § 6903(15) and 320 IAC 4.1-1-7. It owns and operates a facility located at 479 North Cline Avenue in Gary, Indiana. The facility submitted Part A of a hazardous waste permit application, dated November 18, 1980, but did not submit Part B. In order to obtain interim status to operate a hazardous waste facility, a Notification of Hazardous Waste Activity is required under section 3010(a) of RCRA, 42 USC § 6930(a) to be submitted within 90 days after promulgation of regulations identifying a hazardous waste by persons who generate, transport, treat, store or dispose of the hazardous waste. The regulations identifying D001, D008, F005, and K087 hazardous wastes were promulgated on May 19, 1980. Respondent did not submit a Notification of Hazardous Waste Activity by August 18, 1980. Therefore, respondent did not have interim status or a permit to operate a hazardous waste treatment, storage or disposal facility.

2. Between December 5, 1980 and November 16, 1981, respondent received for disposal shipments of paint sludge waste from ACS, which was designated on the hazardous waste manifests as F005 hazardous waste. The waste contained a mixture of solvents rather than only one type of solvent. Under the regulations in effect at the time ACS the waste was received, it was not F005 hazardous waste, but was properly classified as D001, hazardous for the

characteristic of ignitability.

3. Before respondent disposed of the ACS waste, it treated the waste by mixing it with sand, which rendered it nonflammable. Therefore, at the time of the disposal, under the applicable regulations, the waste was not a hazardous waste under RCRA. However, the treatment of the waste subjects respondent's facility to regulation as a hazardous waste facility.

4. Between November 20, 1980 and January 1983, respondent accepted from USS Lead wastes consisting of calcium sulfate waste, battery chips (broken battery cases) and reverb slag. It was shown by a preponderance of the evidence that wastes from USS Lead were D008 hazardous wastes under RCRA.

5. A letter, which predated RCRA, from the ISBH approving the disposal in a sanitary landfill of calcium sulfate waste, did not constitute a waiver of the requirements for hazardous waste disposal under RCRA.

6. The fact that a shipping form is used by the transporter not only for hazardous waste but also for nonhazardous waste does not render invalid a notice therein that the waste is hazardous. The fact that some shipping forms for the same type of waste did not include such a notice does not negate a finding that waste was hazardous.

7. Between November 1980 and March 1982, Respondent accepted shipments of tar decanter sludge from J&L, in an amount of approximately 3,208,500 pounds, which is K087 hazardous waste.

8. Where it was not shown that respondent was provided with

hazardous waste manifests which included a description of the waste, respondent is liable nevertheless for accepting hazardous waste for disposal. Lack of intent to accept hazardous waste for disposal is not a defense to liability for noncompliance with hazardous waste disposal requirements. RCRA is a strict liability statute.

9. Because respondent treated and disposed of hazardous waste, it operated a hazardous waste facility and was subject to applicable statutory and regulatory requirements for hazardous waste treatment, storage and disposal facilities.

10. Respondent violated sections 3005 and 3010 of RCRA, 42 U.S.C. §§ 6925 and 6930, the following regulatory provisions:

320 IAC §§ 4.1-16-4(a) and (b); 4.1-16-5(c), 4.1-16-6(b) and (d), 4.1-17-3(a) through (d); 4.1-18-2; 4.1-19-2(a)(1) and (5); 4.1-19-4; 4.1-19-7; 4.1-20-1(a); 4.1-20-2; 4.1-20-3(a) through (e); 4.1-20-4(a) through (d) and (f); 4.1-20-5; 4.1-22-4; 4.1-22-14; 4.1-22-24(a) and (b), and 40 CFR § 270.10(a).[32]

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[32] There are some discrepancies among the statutory and regulatory provisions listed in the preamble to the complaint, those cited in the findings of the complaint, and those included in the penalty calculation worksheet (CX 9).

Section 3004 of RCRA, cited in the preamble to the complaint, authorizes EPA to promulgate regulations, and includes land disposal prohibitions effective after 1984, and other provisions not relevant here. Respondent is not in violation of this statutory provision.

Respondent is alleged in the preamble to the complaint to have violated 320 IAC § 4.1-21-3(a), the requirement to have a written closure plan. However, such allegation does not appear in the findings of the complaint, and is not included in the penalty calculation worksheet or the inspection report. CX 9, 29. Because respondent was not specifically alleged to have violated this

[Footnote continued on next page]

11. An appropriate penalty for these violations is $86,000.

Accordingly, the following ORDER is entered in this matter pursuant to Section 3008 of RCRA, 42 U.S.C. 6928.

[Footnote continued from previous page]
provision, with supporting facts, respondent is not found in violation of this provision. To the extent it has not already done so, respondent will be ordered to submit a closure plan as mentioned in the proposed compliance order.

The complaint alleges failure to establish proof of financial assurance for closure and post-closure, which are required by 320 IAC §§ 4.1-22-4 and 4.1-22-14. These provisions were omitted from the preamble to the complaint, and only the latter is cited in the findings of the complaint.

The complaint alleges that respondent failed to comply with EPA's request, pursuant to 40 CFR § 270.1(b), to submit Part B of the RCRA permit application. A violation of section 270.1(b) is included in the preamble to the complaint and in the penalty calculation for acceptance of hazardous waste without having interim status. However, this provision is part of the "purpose and scope" of 40 CFR Part 270, and merely provides an overview of the RCRA program. It is not a specific requirement which was violated by respondent.

40 CFR § 270.70 is also included in the penalty calculation for acceptance of hazardous waste without interim status, and its State counterpart, 320 IAC § 4.1-38-1, is cited in the complaint. These provisions set forth conditions to qualify for interim status, providing that any person who owns or operates a hazardous waste management facility shall have interim status to the extent the stated requirements are complied with. It is not necessary to cite these provisions as having been violated by respondent, because the alleged violations of sections 3005 and 3010 of RCRA specifically set forth the relevant requirements and prohibitions.

For failing to submit Part B of the RCRA permit application pursuant to EPA's request, respondent is alleged to have violated 40 CFR § 270.10(a). The State counterpart, 320 IAC § 4.1-34-1(a), is also cited in the preamble to the complaint. Citation of both provisions is redundant.

ORDER

It is ordered that respondent shall pay a civil penalty of $86,000 for the violations found herein.

Payment of the full amount of the penalty shall be made within sixty (60) days of service of this ORDER upon respondent, by cashier's check or certified check payable to the Treasurer, United States of America. The payment shall be mailed to: Environmental Protection Agency, Region V (Regional Hearing Clerk) P.O. Box 70753, Chicago, Illinois 60673.

And it is FURTHER ORDERED that respondent shall comply with paragraphs A through E and G as stated in the Compliance Order contained in the complaint, a copy of which is attached hereto and made a part hereof, except that respondent shall comply with paaragraphs A and B within sixty (60) days of the date upon which this Order becomes final. Respondent shall comply with paragraph F of the Compliance Order within the period stated in paragraph F, i. e. thirty (30) days.

And it is FURTHER ORDERED that respondent shall notify the U. S. Environmental Protection Agency upon achieving compliance with paragraphs A through G of the Compliance Order, by writing to U. S. EPA, Region V, RCRA Enforcement Section, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Notwithstanding any other provision of this Order, an enforcement action may be brought pursuant to section 7003 of the Act, 42 U.S.C. § 6973, or any other applicable statutory authority,

should it be determined that handling, storage, treatment, transportation, or disposal of solid hazardous waste at respondent's facility may present imminent and substantial endangerment to human health or to the environment.

J. F. Greene
Administrative Law Judge

April 8, 1996
Washington, D. C.

COMPLIANCE ORDER

A. Respondent shall, within thirty (30) days of this Order becoming final:

1. Prepare and submit a closure plan and post-closure plan to the Indiana Department of Environmental Management (IDEM), with a copy to Complainant, in accordance with 320 IAC 4.1-21 and 4.1-28 which will result in closure of the facility. These plans shall describe activities which will:

   a. Minimize the need for further maintenance (320 IAC 4.-21-2(a)); and

   b. Control, minimize, or eliminate post-closure escape of hazardous waste or hazardous waste constituents to the environment (320 IAC 4.1-21-2(b)).

   The plans must describe activities which will meet the requirements for landfill closure and post-closure care (320 IAC 4.1-28-4), indicate how they will be achieved, schedule the total time required to close the facility (320 IAC 4.1-21-3(a)(4)), and describe continued post-closure maintenance and monitoring for a minimum of thirty (30) years after the date of completing closure.

2. Submit to IDEM, with a copy to Complainant:

   a. A written cost estimate for closure of the facility in accordance with the closure plan, as required by 320 IAC 4.1-22-3(a);

   b. A written estimate of the annual cost of post-closure monitoring

and maintenance of the facility in accordance with the applicable post-closure regulations at 320 IAC 4.1-22-13(a);

c. Evidence of financial assurance for both closure and post-closure care of the facility as specified at 320 IAC 4.1-22-4, 4.1-22-14 and 4.1-22-23;

d. Evidence of financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operation of the facility, as required by 320 IAC 4.1-22-24(a); and

e. Evidence of financial responsibility for bodily injury and property damage to third parties caused by non-sudden accidental occurrences arising from operation of the facility, a requirement stated at 320 IAC 4.1-22-24(b).

B. Respondent shall, within thirty (30) days of this Order becoming final, submit to U.S. EPA and IDEM for approval, a plan and implementation schedule (not to exceed 120 days) for a ground-water quality assessment program to be put into effect at Respondent's landfill. This program must be capable of determining whether any plume of contamination has entered the ground water from the landfill, and if so, the rate and extent of migration and the concentrations of hazardous waste or hazardous waste constituents in the ground water as stated at 320 IAC 4.1-20-4(a). The plan must specify:

1. Methodology which will be used to investigate site-specific geology and subsurface hydrology at Respondent's landfill in order to yield:

a. A determination of the thickness and areal extent of the uppermost aquifer at the site and any interconnections which may exist between it and lower aquifers;

b. Aquifer hydraulic properties determined from lithologic samples, slug tests, or pumping tests;

c. A site water-table contour map from which ground water flow direction and gradient can be determined; and

d. Identification of regional and local areas of recharge and discharge of ground water.

2. Proposed location, depth, and construction specifications for each monitoring well. The proposed well system must consist of monitoring wells placed in the uppermost aquifer and in each underlying aquifer which is hydraulically interconnected such that:

a. At least one background monitoring well is installed hydraulically upgradient (i.e., in the direction of increasing static head) from the limit of the waste management area. The number of wells, their locations, and depths must be sufficient to yield ground-water samples that are:

(i) Representative of background ground-water quality in the uppermost aquifer and all aquifers hydraulically interconnected beneath the landfill; and

(ii) Not affected by the landfill itself.

b. At least three monitoring wells are installed hydraulically downgradient (i.e., in the direction of decreasing static head) at the limit of the waste management area. Their number, locations and depths must ensure that they immediately detect any statistically significant amounts of hazardous waste or hazardous waste constituents that migrate from the waste management area.

Monitoring wells must be cased in a manner that maintains the integrity of the monitoring well borehole. This casing must be screened or perforated and packed with gravel or sand where necessary to enable sample collection at depths where appropriate aquifer flow zones exist. The annular space (i.e., the space between the borehole and well casing) above the sampling depth must be sealed with a suitable material (e.g., cement grout or bentonite slurry) to prevent contamination of samples and the ground water.

3. The hazardous wastes (defined at 320 IAC 4.1.-3-3) and hazardous waste constituents (defined at 320 IAC 4.1-1-7 and listed at 320 IAC 4.1-5-5 and 4.1-6-8) which will be analyzed for in ground-water samples and the basis for selection of those specific constituents (e.g., information stated on manifests of hazardous wastes accepted for disposal at Respondent's landfill, information available from general waste analyses kept at the landfill, etc.);
4. A sample collection plan that contains the following:
   a. A detailed description of sample-collection procedures;
   b. Recording of ground-water elevations at each sampling:
   c. Written procedures for sample preservation and shipment of

ground-water samples that address each constituent for which ground water is being analyzed to ensure accurate laboratory results;

d. A written record and plan showing chain of custody control for samples from the time of collection until analyses are performed;

e. A written description of analytical procedures to be used by laboratories to analyze the ground-water samples; and

f. A written schedule for collection of samples.

5. Procedures for evaluating analytical results to establish the presence or absence of any plume of contamination that may be found and schedules for reporting such results to U.S. EPA and IDEM.

C. Respondent shall:

1. Implement the closure plan, after it has been approved by IDEM, as required by 320 IAC 4.1-21-4(a); and

2. Implement the post-closure plan, as approved by IDEM.

D. Respondent shall implement the ground-water quality assessment program, as approved by Complainant and IDEM, within 120 days of the approved date.

E. Respondent shall, within fifteen (15) days after carrying out the plan for a ground-water quality assessment program, submit to the Technical Secretary of the IDEM and to the U.S. EPA a written report containing the results of the ground-water quality assessment.

F. Respondent shall, within thirty (30) days of receipt of this order, post "Danger" signs in accordance with 320 IAC 4.1-16-5(c).

G. Respondent shall continue the current practice of not accepting hazardous waste for disposal.

The Respondent shall notify U.S. EPA in writing upon achieving compliance with this Order and any part thereof. This notification shall be submitted not later than forty-five (45) days after this Order becomes final to the U.S. EPA, Region V, RCRA Enforcement Section, 230 South Dearborn Street, Chicago, Illinois 60604.

Notwithstanding any other provision of this Order, an enforcement action may be brought pursuant to Section 7003 of RCRA, 42 USC §6973, or any other applicable statutory authority, should U.S. EPA find that the handling, storage, treatment, transportation, or disposal of solid hazardous waste at the facility may present an imminent and substantial endangerment to human health or the environment.