UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Buckeye Products Corp.,	)	Docket No. V-W-84-R-004
	)	
Respondent	)	

RCRA - Interim Status Standard - Penalties assessed as follows:

(a) For delay in installing a groundwater monitoring system and in complying with the sampling and reporting requirements (40 CFR 265.90 et seq.), - $23,000.

(b) For not preparing a closure plan (40 CFR 265.112), and a written cost-estimate of closure (40 CFR 265.73(b)(7)), until after the complaint was issued - an aggregate penalty of $2,500.

(c) For delay in establishing proof of financial assurance of closure (40 CFR 265.143), and in procuring liability coverage for sudden accidental occurrences (40 CFR 265.147(a)), and for failing to submit either proof of liability coverage for non-sudden accidental occurrences or a letter stating the date upon which such coverage would be established (40 CFR 265.147(b))- an aggregate penalty of $5,500.

(d) For delay in developing emergency procedures and a written contingency plan (40 CFR 265.51 - 265.53) - a penalty of $2,500.

(e) For failing to keep personnel records showing written job titles and job descriptions for each position at the facility relating to hazardous waste management (40 CFR 265.16) - a penalty of $500.

(f) For submitting an incomplete Part A permit application - a penalty of $500.

Appearances:

Babette J. Neuberger, Esquire, United States Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, IL 60604.

Arnold Kanter, Esquire, Freeman, Atkins & Coleman, 2300 Three First National Plaza, Chicago, IL 60602.

INITIAL DECISION

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (hereafter "RCRA"), section 3008, 42 U.S.C. 6928, for a compliance order and assessment of a civil penalty for alleged violations of the Act. 1/

A complaint was issued against Buckeye Products Corporation ("Buckeye") by the United States Environmental Protection Agency on November 16, 1983, alleging that Buckeye has used three lagoons to treat, store or dispose of hazardous waste without achieving interim status authority to do so as required under RCRA, and without complying with several provisions of the interim status standards for owners and operators of hazardous waste treatment, storage and disposal facilities (40 CFR Part 265). A compliance order setting the conditions for continued operation was included, and a penalty of $35,000 was assessed. Buckeye answered denying some of the violations, admitting other violations, but claiming that they have been corrected, and asserting that the $35,000 penalty was excessive. A hearing was requested.

1/ Pertinent provisions of section 3008 are:

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

Section 3008(g): "Any person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation."

Thereafter, a hearing was held in Chicago, Illinois, on June 26 and 27, 1984. Following the hearing the parties submitted briefs on the legal and factual issues. Complainant also moved to submit the affidavit of Thomas B. Golz, showing that Respondent has still not complied with certain financial and insurance requirements. That motion is unopposed and the affidavit is admitted into evidence. On consideration of the entire record and the briefs of the parties, a penalty of $34,500 is assessed for the reasons hereafter stated, and an appropriate compliance order is entered. Findings proposed by the parties which are inconsistent with this decision are rejected.

Findings of Fact

1. The respondent Buckeye Products Corporation is a Michigan Corporation which owns and operates a facility located at 410 East Beecher Street, Adrian, Michigan. Stipulation, Tr. 6. 2/

2. Operations at the facility are for the finishing of zinc die cast parts for the appliance and automotive industries. Respondent's Exh. 6, p. 4.

3. Located on the Buckeye facility are three lagoons used for the treatment, storage or disposal of hazardous waste. These lagoons are surface impoundments as defined by 40 CFR 260.10. Stipulation, Tr. 11-12.

4. On or about November 20, 1980, Buckeye submitted Part A of a hazardous waste permit application in order to achieve interim status authority under RCRA to treat, store or dispose of hazardous waste after that date. Stipulation, Tr. 7. Facilities achieving interim status are subject to the Interim Status Standards (40 CFR Part 265).

2/ "Tr." refers to the transcript of proceedings.

5. Attached to the Part A permit application was a drawing of Buckeye's facility showing the location of the three lagoons. The lagoons, however, were not described on the application as being used to treat, store or dispose of hazardous waste, and the application did not disclose what wastes were being treated, stored or disposed of in the lagoons. Plaintiff's Exh. 1. 3/

6. Between November 19, 1980 and the date of hearing, the following listed hazardous wastes were stored in lagoon No. 1: spent halogenated solvents, EPA hazardous waste number F001; spent non-halogenated solvents, EPA waste numbers F003 and F005; spent stripping and cleaning bath solutions from electroplating operations where cyanides are used in the process, EPA hazardous waste number F009; spent cyanide plating bath solutions from electroplating operations, EPA hazardous waste number F007; and paint sludges. Nitric acid stripping bath solutions are also stored in lagoon #1. The nitric acid stripping bath solutions may be hazardous waste due to corrosivity. Stipulation, Tr. 12.

7. According to a revised permit application submitted to the EPA March 12, 1983, and subsequently revised on June 6, 1983, waste water treatment sludges from Buckeye's electroplating operations were stored in the three lagoons. These wastes are listed hazardous wastes and have an EPA hazardous waste No. F006. Stipulation, Tr. 11-12.

8. The three lagoons contain approximately 19,800 cubic yards of hazardous waste. Stipulation, Tr. 13.

3/ The EPA's exhibits are designated as "Plaintiff's Exhibits." Buckeye's exhibits are designated as "Respondent's Exhibits."

9. On June 8, 1982, Buckeye's facility was inspected by an inspector from the Michigan Department of Natural Resources ("MDNR") to determine Buckeye's compliance with RCRA. Stipulation, Tr. 12; Plaintiff's Exhs. 3, 6.

10. Following the inspection, Buckeye on August 12, 1982, received written notice listing the following violations of RCRA:

1. There are significant differences between the November 20, 1980 Form 3 RCRA (EPA Form 3510-3) submitted to EPA and the actual hazardous waste activities now occurring at your facility relative to the treatment and disposal of hazardous waste. In accordance with 40 CFR 122.23(c), EPA should have been notified of these intended changes by submittal of a revised Part A permit application. You are in violation of 40 CFR 122.23(c).

2. A written waste analysis plan has not been completed, in violation of 40 CFR 265.13.

3. In violation of 40 CFR 265.14(c), your facility does not have appropriate warning signs posted at the entrance to your hazardous waste area.

4. Your facility does not have a written inspection schedule nor do you record the inspections that are done. This deviation from the requirements is a violation of 40 CFR 265.15.

5. Although you indicated that training in hazardous waste management is provided to your employees, none of the documentation required under 40 CFR 265.16 has been initiated. This is a violation.

6. 40 CFR 265.37 requires your facility to attempt to make a arrangements with local authorities, including fire departments, police departments and local hospitals, in case of an emergency at your facility. As you have not done this, you are in violation of this section.

7. Your facility is in violation of Subpart D of 40 CFR 265, being 40 CFR 265.51 through 40 CFR 265.56, in that you have neither a Contingency Plan nor Emergency Procedures developed.

8. Your facility does not maintain an operating record as required under 40 CFR 265.73 and hence is in violation of said section.

9. The records required under 40 CFR 265 were not available during my inspection and you are therefore in violation of 40 CFR 265.74.

10. You have neither developed a plan for, nor initiated, groundwater monitoring as required in Subpart F of 40 CFR 265. You are therefore in violation of 40 CFR 265.90 through 40 CFR 265.94.

11. The Closure Plan required by 40 CFR 265 Subpart G is neither developed nor available for inspection. This constitutes a violation of 40 CFR 265.112.

12. The uncovered tanks used to handle hazardous waste at your facility do not have the two foot freeboard required under 40 CFR 265.192.

13. You are in violation of 40 CFR 265.222 and 40 CFR 265.224 in that the surface impoundment used for storage of metallic hydroxide sludge does not have the necessary two feet of freeboard nor do the dikes have a protective covering to preclude erosion or deterioration.

14. A follow up program for tracking manifested waste shipments for which you have not received a signed disposal copy within 35 days of shipment has not been developed. Additionally, your facility is in violation of 40 CFR 262.42 in that the required manifest Exception Report had not been submitted to the EPA Regional Administrator at the time of my inspeciton.

15. You are in violation of 40 CFR 262.33 and 40 CFR 262.34 in that placards are not available at your facility in the event that your transporter does not have the necessary placards and your storage tanks are not clearly labeled with the words "Hazardous Waste".

16. The necessary records of test results and analyses needed for determination that your waste is hazardous are not on file as required by 40 CFR 262.40 and you are hence in violation of said section.

17. The present practice of disposing of the filter bags from the polishing filters in the pretreatment system and the paint sludge from the spray booth with the general plant refuse must cease immediately. These wastes must be disposed of in accordance with the requirements of Act 64, P.A. 1979 and the Resource Conservation and Recovery Act.

Plaintiff's Exh. 6.

11. Buckeye submitted a revised Part A application to the EPA on March 2, 1983, which was further revised on June 6, 1983, as a result of the EPA's comments. The lagoons were now shown as processes used to treat, store

or dispose of hazardous waste. The revised permit application dated June 6, 1983, contained the statement that the lagoons were no longer part of any treatment process. They are, however, still being used for the storage of hazardous waste and contain approximately 19,800 cubic yards of hazardous waste. Respondent's Exh. 16; Plaintiff's Exh. 2; Stipulation, Tr. 11-13; Tr. 68.

12. Pursuant to 40 CFR, Part 265, Subpart F, Buckeye by November 19, 1981, should have had a groundwater monitoring program capable of yielding groundwater samples for analysis to determine the impact of the lagoons on the quality of groundwater in the uppermost aquifer underlying the lagoons. Stipulation, Tr. 7.

13. MDNR's notice of violations of August 12, 1982, required Buckeye to submit a plan for a hydrogeological study to MDNR by September 13, 1982, which would include a schedule for establishing a groundwater monitoring program. Buckeye retained Johnson & Anderson on September 16, 1982, to assist it in preparing the plan. The plan was submitted to MDNR on November 2, 1982, and approved by MDNR subject to specified conditions by letter dated November 12, 1982. Stipulation, Tr. 8; Plaintiff's Exh. 6; Respondent's Exh. 9.

14. On February 7, 1983, Buckeye contracted with Johnson & Anderson to install observation wells and a groundwater monitoring system. Stipulation, Tr. 7-8.

15. On March 9, 1983, MDNR made another inspection of Buckeye's facilities. Buckeye was found to be still not in compliance in the following respects:

(a) The groundwater monitoring program had still not reached the stage where it was capable of yielding groundwater samples for analysis. As noted above (Finding No. 14), however, Buckeye, a month prior thereto, had contracted for the installation of observation wells and a groundwater monitoring system.

(b) Buckeye did not have a written closure plan as required by 40 CFR 265.112(a).

(c) Buckeye did not have a written estimate of closing costs as required by 40 CFR 265.73(b)(7).

(d) Buckeye had not established proof of financial assurance for the closing of its facility as required by 40 CFR 265.143.

(e) Buckeye did not have liability insurance coverage for its facility as required by 40 CFR 265.147.

(f) Buckeye did not have a contingency plan to minimize the hazards created by its facility as required by 40 CFR 265.51 through 265.53.

(g) Buckeye did not have on file written job titles and job description records for employee positions related to hazardous waste management as required by 40 CFR 265.16(d). Stipulation, Tr. 8-11; Tr. 127.

16. Buckeye completed its installation of monitoring wells in May 1983. Under the groundwater monitoring regulations, quarterly samples of the groundwater should have been taken during the first year after the monitoring wells were in place and analyzed for specified parameters indicating groundwater contamination. 40 CFR 265.92; Tr. 175. The results of the sampling should have been reported to the EPA within 15 days after completing each quarterly analysis. 40 CFR 265.94. The first sample, however, was not taken until December 1983, after the complaint in this matter was issued, with a second sample being taken in April 1984. These samples disclosed that some of the parameters had concentrations or values which exceeded the primary drinking water standards. Tr. 216-18. The results of these samples were not reported to the EPA until June 1984. Stipulation, Tr. 13.

17. By May 19, 1981, Buckeye should have prepared and had on file a written closure plan as well as a written estimate of the cost of closure. 40 CFR

265.112(a), 265.73(b)(7). The closure plan and cost estimate were not prepared until December 1983, after the complaint in this matter was issued, and they were submitted to the EPA in January 1984. Stipulation, Tr. 9-10.

18. By July 6, 1982, Buckeye should have established proof of financial assurance for closure of its facility. 40 CFR 265.143 (for effective date, see 47 Fed. Reg. 15033 (April 7, 1982)). This was not done until after the MDNR inspections and the necessary proof was not submitted to the EPA until January 1984, after the complaint was issued in this matter. Buckeye appears to have still not fully complies with this requirement in that it has not submitted a standby trust agreement for its closure letter of credit. Stipulation, Tr. 10-11; Affidavit of Thomas B. Golz.

19. By July 15, 1982, Buckeye should have had liability insurance coverage for sudden accidential occurrences at the facility. 40 CFR 265.147 (for effective date, see 47 Fed. Reg. 16545 (April 16, 1982)). This was not procured until after the MDNR inspections. By January 16, 1983, Buckeye was to have sumitted proof of liability coverage for non-sudden accidental occurences or a letter to the Administrator stating the date upon which such coverage would be established. 40 CFR 265.147(b)(5). In January 1984, after the complaint was issued, Buckeye submitted proof to the EPA of sudden liability coverage. Through an oversight, it omitted proof of coverage for non-sudden accidents, assuming that the policy submitted in January 1984 was sufficient. Buckeye at the hearing stipulated that it would submit said policy no later than July 10, 1984. Stipulation, Tr. 11, 168. As of October 12, 1984, however, the policy had not been submitted. Affidavit of Thomas B. Golz.

20. At the time of the inspections, Buckeye was unable to produce the contingency plan required by 40 CFR 265.51 through 265.53, to minimize

hazards created by its management of hazardous waste. A contingency plan was available, however, on April 11, 1983, and contained an Emergency Procedures Memo dated September 1982. Stipulation, Tr. 11.

21. The personnel training records maintained at Buckeye's facility at the time of the MDNR's inspection on March 9, 1983, did not include written job titles and job descriptions for each position at the facility related to hazardous waste management. Plaintiff's Exh. 4, p. 82.

Other findings of fact on contested issues are set forth in the discussion and conclusions which follow.

Discussion and Conclusions

Essentially the issues presented for resolution in this case all have to do with the appropriateness of the proposed $35,000 penalty, since the violations themselves are not disputed. The statute provides that in assessing a penalty consideration must be given to the seriousness of the violations and a respondent's good faith efforts to comply. 4/ Buckeye's defense is that the violations were not potentially harmful to man or the environment, and hence are not serious, and that in considering Buckeye's good-faith efforts to comply, account must be taken of its adverse financial condition in 1982 and 1983. Both sides are in agreement that in determining the appropriate penalty, guidance may be sought from the final RCRA Civil Penalty Policy dated May 8, 1984. 5/

4/ RCRA, section 3008(c), 42 U.S.C. 6928(c).

5/ The RCRA Civil Penalty Policy is in the record as Plaintiff's Exhibit No. 10.

Failure to Monitor Groundwater

Buckeye argues that no harm was created by its delays in monitoring its groundwater because the waste was pretreated to remove or render harmless the hazardous constitutents before it was put into the lagoons, the likelihood for migration from the lagoons was minimal, and there was no potential harm to drinking water. 6/

As to Buckeye's pretreatment of the waste, this apparently consisted of eliminating the cyanide through oxidation, reducing hexavalent chromium to trivalent chromium (not considered hazardous), and precipitating out the heavy metals. 7/

Dr. Homer, Complainant's admitted expert witness on the characteristics of hazardous waste and on the regulations and statutes which relate to its management, testified that even though the wastes were treated there was still the possibility of the treatment being incomplete and of heavy metals in the waste such as chromium, nickel or copper being deposited in mobile form in the sludge. 8/

6/ Buckeye's brief at 7-8.

7/ Tr. 259; Respondent's Exh. 6, p. 4.

8/ Tr. 33-34, 55-58. The danger of incomplete treatment was also noted by the EPA in its published statement explaining why it was retaining its listing of certain chromium-containing waste streams including electroplating wastestreams, No. F006, notwithstanding that these wastewaters, like Buckeye's waste, are treated by reduction of the hexavalent chromium to the trivalent state and the subsequent precipitation of chromium (III) hydroxide. See 45 Fed. Reg. 72939 (October 30, 1980). Official notice may be taken of this document. 44 U.S.C. 1507; see also Tr. 40.

Buckeye argues that Dr. Homer's testimony should not be given weight asserting that it was not based upon the process that Buckeye was using. 9/ Dr. Homer, however, was familiar with Buckeye's operation as shown in the EPA's files, including the Part A permit application, inspection reports, environmental assessment reports and the like. 10/ He was testifying from his knowledge of the Agency's regulations and background papers dealing with the wastes handled by Buckeye, which undoubtedly reflect the Agency's experience in such matters. His own training and his experience in enforcing the laws and regulations would also seem to qualify him to testify about the characteristics of hazardous waste and the effectiveness of waste treatment processes. 11/ Contrary to what Buckeye argues, nothing adduced by Buckeye about its treatment processes shows that Dr. Homer's concern about the waste containing hazardous substances capable of contaminating the groundwater was unreasonable. Buckeye's plant manager, Mr. Parker, who testified on this issue, admitted that the treatment used by Buckeye is the kind that is common to the electroplating industry, but went on to say that each electroplating company may have its individual problems because of the chemistry aspect of the treatment. 12/ Mr. Parker, however, was not enlightening on what was special about Buckeye's chemistry that would dispense with problems created

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9/ Buckeye's brief at 7.

10/ Tr. 22-23. Apparently, Dr. Homer did not know prior to the hearing of a revised permit application filed by Buckeye in March 1983. This did not affect the substance of his testimony. See Tr. 63, 88-91.

11/ Stipulation, Tr. 14, see also Tr. 21-22.

12/ Tr. 259.

by human error in the treatment, which Mr. Parker admitted could occur, or would ensure that the chemical treatment was as thorough in making the sludge harmless as Mr. Parker assumes it was. 13/ It is significant that the professional engineering firm employed by Buckeye to assist it in complying with the groundwater monitoring requirements, in its initial evaluation of Buckeye's facility noted that hazardous leachate was probably escaping from the lagoons into the soils and groundwater. 14/

Buckeye also argues that the potential for hazardous waste migrating from the lagoon was low because the lagoons were clay lined. 15/ The regulation allows for a partial or complete waiver of the monitoring requirements if a respondent can furnish a written demonstration certified by a qualified engineer that hydrogeological factors reduce the migration potential to a low probability. 16/ Presumably, if geological conditions at the site had supported such written demonstration, Buckeye would have obtained one in order to save itself the expense of a full monitoring program. Buckeye's engineers, however, have not produced any such demonstration, but on the basis of their evaluation have proceeded with a full monitoring program, including a quality assessment program to be carried out in the event that significant pollution of the groundwater is indicated by the initial

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13/ There is no evidence that Buckeye ever tested the sludge to determine whether, in fact, it contained harmful chemicals.

14/ See Respondent's Exh. 6, p. 11.

15/ Buckeye's brief at 8. The actual testimony of Mr. Water's, Respondent's expert on hydrogeology, was that the lagoons have a natural clay foundation. Tr. 325.

16/ See 40 CFR 265.90(c).

screening. 17/ The clay soil in which the lagoons were constructed may, in the words of Mr. Waters, have resulted in migration from the lagoons being "somewhat impeded." The record does not show, however, that the potential for migration was so low as to justify Buckeye's delay in implementing its monitoring program. 18/

A further argument made by Buckeye is that contaminants migrating into the groundwater from the lagoon would be diluted to nondetectable levels shortly after they enter the groundwater. 19/ Assuming for purposes of argument that the EPA would recognize dilution as an offsetting factor in determining what should be done about contaminants migrating from the lagoons, Buckeye at this time does not have the necessary data to support it's claim. The monitoring wells installed by Buckeye are but an initial screening step in evaluating how the lagoons may affect the quality of the underlying groundwater. If an increased concentration of pollutants over background levels is found at the monitoring wells, a more comprehensive monitoring program must then be undertaken to determine the possible effects upon the groundwater. 20/ Mr. Waters, admitted that more data was needed to determine at precisely what point the pollutants actually became non-detectable in the groundwater. He was willing to estimate that they would be nondetectable three-quarters of a mile down grade from the lagoons on

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17/ See Respondent's Exhibit 6, p. 12; Respondent's Exhibit 18.

18/ Tr. 325.

19/ Buckeye's brief at 13; see testimony of Mr. Waters. Tr. 326, 329.

20/ See Tr. 176-77; 40 CFR 265.92 - 265.93.

the basis of his past experience with other spills where metals were involved in similar aquifers. 21/ Mr. Water's estimate, however, is not an adequate substitute for the more thorough analysis required by the EPA's regulation.

Finally, Buckeye argues that there was no likelihood of harm to drinking water from the lagoon. While potential harm to drinking water is an important consideration in monitoring groundwater, it is by no means the only consideration. This is evident from the regulation itself which allows a variance from the monitoring requirements upon a demonstration that there is a low potential for migration of hazardous substances via the aquifer not only to domestic wells, but also to industrial and agricultural water supply wells. 22/ The EPA's intention is also made clear in the preamble to the regulation where the EPA stated:

> The Agency does not believe that aquifers underlying the facility that do not qualify as underground sources of drinking water should be exempted from consideration. Such aquifers may have other uses worthy of protection, or may be hydraulically connected to other water supply wells or surface waters needing protection. 23/

In this case, one surface water that could be polluted by the lagoons is the Raisin River. True, Mr. Waters estimated that metal pollutants migrating from the lagoons would be so diluted as to be nondetectable when

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21/ See Tr. 350-51.

22/ See 40 CFR 265.90(c).

23/ 45 Fed. Reg. 23192 (May 19, 1980).

they reached the Raisin River. 24/ As already noted, however, supra at 14, Mr. Waters' estimate is not supported by the monitoring and hydrogeological analysis which the EPA requires.

Groundwater monitoring, as is clear from the requirements themselves, is intended to prevent significant pollution of the groundwater from taking place, or at least to detect it in its incipiency when there is the greatest chance of being able to remedy it. As the EPA noted in its preamble to the regulation, "[I]f significant groundwater contamination occurs before detection, the difficulties of corrective action are made all the more severe." 25/ Buckeye's position seems to be that while it concedes its obligation to comply with the monitoring requirements, they were really a superflous precaution in its case. The record simply does not support such a position.

The EPA has classified the violation as a serious violation with a major potential for harm, under the RCRA Civil Penalty Policy. 26/ The risk created by Buckeye's violation is that of significant pollution of the groundwater. It has not been shown here that this is so unlikely to occur as to dispense with the monitoring required by the regulations. Pollution of the groundwater, if it does happen, can have very serious

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24/ Tr. 329. Mr. Waters testimony was based on the assumption that the river was more than a mile from the site. His firm's own hydrogeological evaluation, however, placed the river at 3/4 mile from the site. Respondent's Exh. 12, p. 2.

25/ 45 Fed. Reg. 33193 (May 19, 1980).

26/ See Complainant's brief at 12; Plaintiff's Exh. 10, pp. 4, 7-8.

consequences. This is sufficient justification for the EPA classifying this as a major violation with respect to potential harm. Similarly, a delay of about two years in having its groundwater monitoring program operative is properly classified as a major deviation from regulatory requirements. 27/ It should be noted that the two quarterly samples submitted by Buckeye each showed concentration values in drinking water parameters which exceeded values listed in Appendix III of the regulations. 28/ Such results must be reported to the EPA within 15 days after completion of the quarterly analysis, and hence, Buckeye is approximately two years overdue in reporting to the EPA evidence indicating that its lagoons may be a significant environmental hazard. 29/ I find, therefore, that EPA's proposed penalty of $23,000 is consistent with the guidelines.

The EPA contends that there has been a showing of actual harm here which would justify increasing the penalty. 30/ I do not agree. The argument seems to be based on data which does not provide enough information to support the EPA's position. 31/

27/ Under the regulation the first samples should have been drawn in the quarter starting on November 19, 1981. Tr. 175. Buckeye took its first samples in December 1983. Stipulation, Tr. 13.

28/ See Tr. 216-218; Plaintiff's Exh. 9.

29/ See 40 CFR 265.94(a).

30/ Complainant's brief at 12, 14.

31/ See. Tr. 219-20, 228-29.

The Remaining Violations

Complainant has proposed a penalty of $12,000, for the other violations broken down as follows. 32/

For failure to have a closure plan and provide a cost estimate of closure.	$ 2,500.00
For failure to comply with other financial requirements.	5,500.00
For failure to prepare a written contingency plan.	2,500.00
For failure to maintain documentation of training.	1,000.00
For failure to achieve interim status.	500.00
	$12,000.00

Buckeye delayed over 2 1/2 years in preparing a closure plan and a cost estimate of closure. It is not clear that Complainant arrived at it's proposed penalty of $2,500 for these violations by use of the penalty matrix, but the appropriateness of the penalty can still be judged by reference to the matrix. Certainly such a long delay constitutes a major deviation from the regulatory requirements. The $2,500 penalty falls within the upper range of the penalty for violations in this category having a minor potential for harm. Buckeye was advised by its consulting engineers as early as January 1982 to close the lagoons. 33/ Yet it did nothing about developing a closure plan so that it could promptly close the lagoons if facts had come to light showing that such action was necessary or desirable. The ability to properly close the lagoons could also have been adversely affected by Buckeye's failure to have set aside

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32/ Complainant's brief at 14-23.

33/ Respondent's Exh. 6, p. 12.

sufficient funds to cover the cost of closure owing to an inadequate or incomplete cost estimate. 34/ Under these circumstances, classifying the violations as having at least a minor potential for harm seems emminently reasonable, as does also the penalty of $2,500.

Buckeye delayed for over a year and one-half in establishing proof of financial assurance of closure and in procuring sudden liability insurance coverage. 35/ It appears to have still not procured liability insurance coverage for non-sudden occurences. 36/ Complainant's proposed penalty of $5,500 for its violation of all three requirements would fit within the range of penalty proposed in the civil penalty policy for a violation having a moderate potential for harm and being a moderate deviation from regulating requirements. 37/ Again it is not clear that Complainant arrived at this amount by attempting to use the penalty matrix, but the appropriateness of the penalty can be judged by reference to the matrix.

34/ A cost estimate based upon a proper closing plan was necessary in order to enable the owner or operator to develop sufficient funds to pay closing costs. See 46 Fed. Reg. 2818 (January 12, 1981).

35/ Buckeye appears to have still not fully complied with the financial assurance requirements. See Finding of Fact No. 18 supra.

36/ See Finding of Fact No. 19, supra. In light of Buckeye's stipulation that it would obtain coverage for non-sudden occurrences by July 10, 1984 (Tr. 168), it is unnecessary to decide whether Buckeye would have qualified as a firm with sales under $5 million, requiring it to have non-sudden liability insurance by January 16, 1985 or a firm with sales between $5 million and $10 million, requiring it to have the coverage by January 16, 1984. See 40 CFR 265.147(b)(4) (for effective dates see 47 Fed. Reg. 16545 (April 16, 1982), and Respondent's Exh. 10 (showing that in the four year period 1980-1983, Buckeye's sales were under $5 million for three of the years and over $5 million for one of the years.)

37/ Plaintiff's Exh. 10, p. 4.

Buckeye's delay in complying with two of the requirements and its still not having complied with a third requirement qualify as major deviations from regulation requirements. The financial assurance of closure, following upon the development of a closure plan and cost estimate of closure, is the third and final step in assuring that there will be sufficient funds to properly close a facility. In this case, the cost of closing the lagoons could be substantial, making it all the more important that adequate funds are actually available to accomplish the job. The liability insurance is important to the regulatory program not only because it guards against the risk of uncompensated injuries arising out of the operation of Respondent's facility, but also because it encourages owners and operators to design and operate their facilities so as to reduce the risk of harm and save insurance costs. 38/ Under this circumstances a combined penalty of $5,500 for the three violations is appropriate even if the potential for harm for each violation is considered to be only minor.

With respect to Buckeye's delay in preparing a written contingency plan to minimize hazards to human health and the environment, Complainant argues

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37/ Plaintiff Exh. 10, p. 4.

38/ See 47 Fed. Reg. 16545 (April 16, 1982). Assuming that Buckeye because of its level of sales, was not actually required to have liability insurance for non-sudden occurences until January 1965, see supra n. 36, the letter advising when such insurance would be procurred was still important to the regulatory program, because it was a means for monitoring compliance with the requirements and for determining whether adjustments were necessary in the schedules for obtaining such insurance. See 47 Fed. Reg. 16550 (April 16, 1983).

that this is a serious violation because Buckeye is and has been handling wastes which are ignitable or toxic. Moreover, as of January 1982, Buckeye could have been mixing incompatible wastes, i.e. cyanide bearing wastes and spent nitric acid, which could generate hydrogen cyanide gas, an extremely toxic substance. 39/ These arguments are supported by the record and support Complainant's proposed penalty of $2,500. 40/

In support of its penalty of $1,000 for failure to maintain documentation of training, Complainant asserts that Buckeye's records were deficient not only in not containing written job titles and job descriptions for positions related to hazardous waste management but also in not containing a description and documentation of training or job experience for employees filling those positions. 41/ It seems clear that these records were not available at the first inspection by MDNR in August 1982. 42/ The evidence however, is inconclusive on how deficient Buckeye's personnel records were at the time of the second inspection in March 1983, except for the fact that job titles and job descriptions were missing. 43/ Job titles and job descriptions are an integral part of the records required by the EPA to determine

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39/ Complainant's brief at 18-19.

40/ The proposed penalty of $2500 falls within the range of a violation having a minor potential for harm and being a major deviation from regulatory requirements. The delay of almost two years in preparing a contingency plan certainly constitutes a major deviation from regulatory requirements.

41/ Complainant's brief at 20.

42/ Plaintiff's Exh. 6.

43/ Mr. Nguyan, the MDNR inspector in March 1983, in his inspection report noted only the absence of job titles and job descriptions and the failure of the records to indicate that personnel have taken part in an annual review of their initial training. Plaintiff's Exh. 4, pp. B-2-B-3; see also Tr. 142.

whether a facility is complying with the training requirements. Their purpose is to show that each person in a position related to hazardous waste management is receiving the level of training commensurate with that person's duties and responsibilities. 44/ The information, then, cannot be dismissed as a mere technical requirement. 45/ I find, accordingly, that an appropriate penalty for this violation is $500. This would classify the violation as one in which there was a moderate deviation from regulatory requirements and a minor potential for harm. 46/

I finally find that Complainant's proposed penalty of $500 for submitting an incomplete Part A permit application is also appropriate, given the nature of the violation. 47/

Accordingly, a total penalty of $34,500 is assessed on the basis of the seriousness of the violation. It remains then to consider whether

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44/ See 45 Fed. Reg. 33182 (May 19, 1980).

45/ The importance of the information in this case is shown by the fact that Buckeye claims to have three people in positions directly related to hazardous waste management activities. Tr. 285. Yet the training records Buckeye produced (Respondent's Exh. 3) did not disclose whether each employee was receiving the training required for the position that employee occupied. See Tr. 124-25, 127.

46/ Plaintiff's Exh. 10, p. 10.

47/ See Complainant's brief at 21-23. Complainant treats the submission of an incomplete Part A permit as a failure to achieve interim status. It is not clear, however, that interim status is automatically terminated by the fact that an incomplete Part A permit has been filed or even that a penalty would accrue for filing an incomplete permit. See 49 Fed. Reg. 17716 (April 23, 1984) (Preamble to EPA's amendment of 40 CFR 270.70). A penalty, however, is justified here since Buckeye as early as January 1982, had sufficient information to put it on notice that its Part A permit application was incomplete and yet did not submit a revised permit until March 1983. See Respondent's Exhs. 6, 16.

the circumstances surrounding the violation justify a reduction in this initially determined amount. 48/

It is undisputed that Buckeye was put on notice of its violations by the engineering study it had done in January 1982. 49/ Apparently, however, it was not until the MDNR inspection in June 1982 that Buckeye took any steps to bring itself into compliance. A factor which apparently interfered with Buckeye's rate of progress, particularly with respect to installing its groundwater monitoring system, was that Buckeye had financial difficulties during this period. Indeed, by 1983, Buckeye's president testified that the situation had become critical. 50/ Nevertheless, Buckeye did proceed to bring itself into compliance by changing its waste management practices, and by having an environmental study made in October 1982, and then contracting for installation of a groundwater monitoring system in February 1983, with the monitoring wells being installed in May 1983. 51/ It can, of course, be argued that its rate of progress was too slow, and that Buckeye should have known this. If Buckeye believed, however, that it was proceeding in a satisfactory manner, nothing appears to have been said during the second MDNR inspection in March 1983, to indicate otherwise. Unlike the practice followed by MDNR after its first inspection, the first

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48/ The RCRA penalty policy would take account of the following factors in any final determination of the amount of the penalty: good faith efforts to comply or lack of good faith, degree of willfullness and negligence, history of non-compliance, ability to pay, and other "unique factors". Plaintiff's Exh. 10, p. 4.

49/ Respondent's Exh. 6.

50/ Tr. 389.

51/ See Respondent's Exhs. 7, 9, 10; Tr. 296, 310.

notification that Buckeye received that it was still considered to be in violation was the EPA's complaint in November 1983. 52/ Upon receipt of the complaint it did immediately attempt to comply with the compliance order.

Under the circumstances stated above, I do not agree with Complainant's statement that Buckeye has evidenced a "reckless disregard" of its obligation to comply with the regulations. 53/ It was faced with a serious financial problem and was endeavoring to comply with a measure of good faith under those conditions. Unfortunately, what detracts from the persuasiveness of its showing of good faith is its delay in submitting the groundwater monitoring sampling results. 54/ Also, Buckeye appears to have disregarded its representation that it would obtain insurance coverage for non-sudden occurrences by July 10, 1984, without providing any explanation therefore. 55/ Accordingly, I find that no reduction in penalty is warranted. It is recommended, however, that the EPA consider a delayed payment schedule for payment of the penalty or an installment payment, if Buckey's financial condition is still such that payment in one sum would adversely affect Buckeye's ability to continue in business. 56/

52/ Between the first MDNR inspection in June 1982 and the second inspection in March 1983, the EPA appears to have changed its policy about notifying a facility of violations found during an inspection, if the violation is a "Class I" violation. See Tr. 156-59.

53/ See Complainant's brief at 6.

54/ Finding of Fact No. 16, supra.

55/ Finding of Fact No. 19, supra.

56/ See RCRA penalty policy, Plaintiff's Exh. 10, p. 20.

The Compliance Order

The compliance order considered here is that proposed by Complainant in the final order submitted with its main brief.

The only part of the order found to be inappropriate is paragraph 2.b., requiring Buckeye to put into effect the more extensive grundwater monitoring required when the initial screening discloses a significant increase (or in the case of pH a decrease) of one or more of the specified parameters over background level. Complainant argues that this is necessary because Buckeye knows or assumes that the lagoons have contaminated the groundwater. 57/ The record does not support this claim. 58/ In determining the appropriate order to be entered, it is recognized that Buckeye has now installed and implemented a groundwater monitoring program. There has been considerable evidence pro and con on whether the program complies with the interim standards. 59/ Many of the EPA's concerns, as testified to by Mr. Boyle, appear to be based upon a lack of sufficient data from Buckeye to properly evaluate the monitoring. 60/ In some cases Buckeye has responded to those concerns by simply having its expert, Mr. Waters, state very generally his disagreement with Mr. Boyle's objections. 61/ It is also unclear whether the EPA's objection to the wells not being located

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57/ Complainant's brief at 32-33.

58/ See Tr. 324-26, 339, 346-48.

59/ See generally Boyle's testimony, Tr. 168-233, and Waters testimony, Tr. 310-24.

60/ See e.g. Tr. 188-196, 211-212.

61/ See e.g. Tr. 335, 339.

closer to the perimeter of the lagoons is one of substance. 62/ Rather than attempt to resolve such technical questions as have been raised about the adequacy of Buckeye's monitoring on what does seem to be insufficient data, the order will provide that Buckeye's monitoring system must be approved by the EPA Region V as meeting the requirements of 40 CFR 265.91. This will give Buckeye the opportunity to provide the EPA with sufficient data to satisfy the EPA's concerns about the adequacy of Buckeye's system to monitor the effect of the lagoons upon the groundwater, if, in fact, it is able to do so

ORDER 63/

Pursuant to the Solid Waste Disposal Act, as amended, section 3008, 42 U.S.C. 6928, the following order is entered against Respondent Buckeye Products Corporation:

1. a. A civil penalty of $34,500 is assessed against Respondent for violations of the Solid Waste Disposal Act found herein.

   b. Payment of the penalty assessed herein shall be made by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America, in the full amount within sixty (60) days after service of this order upon Respondent, unless upon application by Respondent prior thereto, the Regional Administrator approves a delayed payment schedule, or an installment payment plan with interest.

62/ See Tr. 317-18.

63/ Unless an appeal is taken pursuant to 40 CFR 22.30, or the Administrator elects to review this decision on his own motion, the decision shall become the final order of the Administrator. See 40 CFR 22.27(c).

2. Respondent shall within thirty (30) days of issuance of this order cease all treatment, storage, or disposal of hazardous waste at the facility except in complete compliance with the Standards Applicable to Generators of Hazardous Waste and owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities, 40 CFR Parts 262 and 265;

3. Respondent shall within thirty (30) days of issuance of this order, provide to the Regional Administrator of Region V of the United States Environmental Protection Agency, with the following:

   a. A Part A permit application identifying the process and design capacities of its surface impoundments and the hazardous wastes contained therein;

   b. A groundwater monitoring program in accordance with 40 CFR 265.90, which has been approved by the Regional Administrator as meeting the requirements of 40 CFR 265.91, and which complies with 40 CFR 265.92-265.94;

   c. Proof of liability coverage for non-sudden accidental occurrences, or notification of the date said coverage will be obtained in accordance with 40 CFR 265.147(b);

   d. A stand-by trust agreement satisfying the requirements of 40 CFR 265.147(b);

   e. Written job titles and job descriptions of the type of training for each employee working with hazardous waste in accordance with 40 CFR 265.16(d).

Gerald Harwood
Gerald Harwood
Administrative Law Judge

DATED: December 11, 1984