

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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In the Matter of)
Koppers Company, Inc.,) Docket No. RCRA-III-012
Respondent)

Resource Conservation and Recovery Act - Seriousness of Violation - Actual or Potential Harm - Conduct of Violator - In determining an appropriate penalty for Respondent's action in placing liquid hazardous waste (wastewater treatment sludges generated in the production of creosote, EPA Hazardous Waste No. K035) in a landfill not complying with the requirements of 40 CFR 265.314, Respondent's contention that the wastes involved were not, in fact, hazardous was rejected, because in the absence of an exclusion determination in accordance with 40 CFR 260.20-22, listed wastes must be regarded as hazardous as a matter of law. Because the Act provides that seriousness of violation and good faith efforts at compliance are principal factors in determining amount of penalty, degree of hazard or potential harm presented by particular waste and conduct of violator, including Respondent's history of compliance, were properly for consideration.

Appearance for Respondent:

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Appearance for Complainant:

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Office of Regional Counsel
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Region III
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Initial Decision

This is a proceeding under Section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976.^{1/} The proceeding was commenced by a Complaint and Compliance Order, issued June 11, 1982, charging Respondent with the disposition of wastewater sludges containing free liquids from the production of creosote (EPA Hazardous Waste No. K035) into a landfill lacking a liner, a leachate collection system or a waste treatment or stabilization system in violation of 40 CFR 265.314(a). A compliance order was issued directing Respondent to immediately cease the placement of liquid hazardous waste in its landfill unless and until it complied with 40 CFR 265.314. A penalty of \$25,000 for the violation alleged was proposed to be assessed against Respondent.

Respondent answered, admitting to a technical violation of 40 CFR 265.314(a), but contending that the violation was insignificant and that

^{1/} 42 U.S.C. 6928. The cited section, 42 U.S.C. 6928(a), entitled "Compliance orders," provides in pertinent part "* * (W)henever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subchapter [relating to the management of hazardous waste], the Administrator may issue an order requiring compliance immediately or within a specified time period * * *." Subsection (c) entitled "Requirements of compliance orders" provides "Any order issued under this section may include a suspension or revocation of a permit issued under this subchapter, and shall state with reasonable specificity the nature of the violation and specify a time for compliance and assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." The maximum penalty is \$25,000 for each such violation. For this purpose, each day constitutes a separate violation (42 U.S.C. 6928(g)).

the penalty proposed was grossly out of proportion to the seriousness of the offense. The parties have submitted this matter for decision upon a stipulation of facts, signed by Respondent on March 30 and by Complainant on March 31, 1983.

Findings of Fact

Based on the stipulation, proposed findings and conclusions, and the briefs of the parties I find that the following facts are established:

1. Respondent is a corporation doing business in the State of West Virginia and is a "person" under Section 1004(15) of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. 6903(15), (the Act) and regulation 40 CFR 260.10(a).
2. Respondent is the operator of a business located on R.D. 1 Crosscreek District, Brooke County, Colliers, West Virginia.
3. This business is located approximately 2 miles from the nearest human habitation.
4. Respondent submitted to EPA, in a timely manner, a "Notification of Hazardous Waste Activity" and a "Part A Permit Application" under the Act for this facility. This facility was assigned EPA I.D. No. WVT550010144.
5. In a letter to Respondent, dated September 23, 1981, EPA expressed the opinion that this facility is an existing hazardous waste management facility as defined in regulation 40 CFR 260.10(a) and appears to qualify for interim status as defined in Section 3005(e) of the Act, 42 U.S.C. 6925(e), and regulation 40 CFR 122.23.
6. Respondent's Part A indicates that a portion of this business is a landfill used for the disposal of material listed or identified as

hazardous waste by regulations promulgated by EPA pursuant to Section 3001 of the Act, 42 U.S.C. 6921 (the facility).

7. Representatives of Complainant inspected this facility on January 19, 1982. A copy of the report for this inspection was mailed to Respondent on May 26, 1982 and was received by Respondent on June 1, 1982.
8. Between November 19, 1981 and June 17, 1982, Respondent placed into this landfill facility approximately 5.7 million pounds of non-containerized wastewater treatment sludge generated in the production of creosote.
9. The wastewater treatment sludge described in paragraph 8, above, is listed as a hazardous waste in regulation 40 CFR 261.32 and is assigned EPA Hazardous Waste Number K035.
10. The wastewater treatment sludge described in paragraph 8, above, contains free liquids.
11. During the period November 19, 1981 through June 17, 1982, this landfill facility did not have a liner which was chemically and physically resistant to this liquid waste and did not have a functioning leachate collection and removal system with a capacity sufficient to remove all leachate produced.
12. During the period November 19, 1981 through June 17, 1982, Respondent did not treat or stabilize, chemically or physically, the wastewater treatment sludge described in paragraph 8, above, so that free liquids were no longer present before disposal.
13. Representatives of Complainant inspected this facility on June 7 and 8, 1982.

14. On June 11, 1982, Complainant issued a Complaint, Compliance Order and Notice of Opportunity for Hearing (the Complaint) against Respondent which, in part, required Respondent to immediately cease the placement of liquid hazardous waste into the landfill facility.
15. Respondent received the Complaint described in paragraph 14, above, on June 15, 1982.
16. Respondent ceased the placement of liquid waste into the landfill facility as of June 18, 1982.
17. On October 31, 1981, EPA issued a Notice of Violation (NOV) against Respondent concerning its plant in Follansbee, West Virginia and the landfill facility which is the subject of this proceeding. The NOV cited the Follansbee plant for being in violation of regulation 40 CFR 262.21 and the landfill facility for being in violation of regulations 40 CFR 265.13, .15(b), .32(a) and (c), .73, .112, .118 and .310. On March 1, 1982, Respondent replied in writing to EPA concerning the NOV.

Conclusions

1. Respondent's action during the period November 19, 1981 through June 17, 1982, in placing non-containerized sludge containing free liquids generated in the production of creosote (Hazardous Waste No. K035) in a landfill not having a liner which is chemically and physically resistant to the added liquid, and a functioning leachate collection system with a capacity sufficient to remove all leachate produced constitutes a violation of 40 CFR 265.314, and Section 3004 (42 U.S.C. 6924) of the Act.

2. In accordance with Section 3008 of the Act (42 U.S.C. 6928), Respondent is liable for a civil penalty.

Discussion

The violation having been established, the only question for resolution is the amount of the penalty. Complainant points out that the waste here concerned, wastewater treatment sludges generated in the production of creosote, has been designated hazardous waste No. K035 in 40 CFR 261.32, Hazardous wastes from specific sources (Brief at 4). It is further pointed out that the basis for this designation is the presence of up to nine hazardous constituents from the lists in 40 CFR Part 261, Appendices VII and VIII, which make it a toxic waste. Substances are listed in Appendix VIII only if they have been shown to have toxic, carcinogenic, mutagenic or teratogenic effects on human or other life forms (40 CFR 261.11(a)(3)(xi)).

Complainant says that Respondent was well aware of the regulations here involved by virtue of its submission of a notification of hazardous waste activity and a Part A permit application and that notwithstanding the fact that the effective date of 40 CFR 265.314(a) was delayed until November 19, 1981 (265.314(c)) in order to give those affected time to comply, Respondent made no effort to do so (Brief at 5). It is asserted that on 106 separate days between the dates of November 19, 1981 and June 17, 1982, Respondent placed a total of 290 truckloads of hazardous

waste (wastewater treatment sludge generated in the production of creosote) containing free liquids in the landfill.^{2/}

Complainant asserts that the potential harm to health or the environment is due to a combination of the waste involved, the quantity and the possibility of exposure (Brief at 6). Complainant further asserts that there was the possibility of direct human exposure due to the loading and unloading of liquid waste and the presence of a pond on the top of the landfill.^{3/} Although the landfill is located approximately two miles from the nearest human habitation (finding 3), Complainant says that the potential for indirect exposure is clearly present because of the large quantities of waste with free liquid, which were placed in the landfill. Migration or leaching of hazardous wastes out of the landfill is the major concern. It is pointed out that Respondent's own testing reveals a contamination problem at the site, the extent of which is unknown.^{4/}

^{2/} The stipulation (finding 8) indicates only that between the mentioned dates approximately 5.7 million pounds of wastewater sludge generated in the production of creosote were placed in the landfill. The fact that 290 truckloads of such sludge were placed in the landfill on 106 separate days was arrived at from hazardous waste manifests submitted to Complainant by Respondent (Proposed Findings of Fact No. 8a, Attachment 2).

^{3/} The existence of a pond on the site of the landfill is not mentioned in the stipulation. A pond is, however, shown on a site map sketch (Inspection Fact Sheet, inspection of January 19, 1982, Exh 1 to prehearing submittal, dated December 7, 1982). Both parties refer to this and other documents referenced in the stipulation, which were included in prehearing submittals, in their briefs. In view thereof and in view of the fact that neither party has objected thereto, documents included in prehearing submittals are accepted as part of the record.

^{4/} The basis for this statement appears to be a letter from Respondent to the Regional Administrator, dated July 16, 1982 (Exh 2 to Brief), which, was also included in the prehearing exchange (Exh 9).

Regarding Respondent's compliance with the Act, Complainant alleges that Respondent takes steps necessary to achieve compliance only after the initiation of enforcement action (Brief at 6-7). For this statement, Complainant relies on stipulation (finding) No. 17. Complainant says that the same pattern was followed in the instant case. It is pointed out that Respondent ceased placing sludge in the landfill within three days after receipt of the complaint (findings 15 and 16), having made no effort to achieve compliance in the 25 months since promulgation of the proposed regulation and over six months since its effective date. Complainant used the proposed RCRA penalty policy (Exh 1 to Brief, December 1980) as a guide in calculating the penalty herein, asserting that this policy focuses on both the violation and the violator and thus complies with the Act. This policy has been used as a guide in assessing penalties in other RCRA proceedings.^{5/}

Complainant argues that under all of the circumstances and inasmuch as the Act authorizes a penalty of up to \$25,000 for each violation, each day being considered a separate violation, there is no valid basis for reducing the proposed penalty of \$25,000, which is actually minimal.

Respondent describes the admitted violation herein as technical and de minimis (Brief at 5). It argues that despite its classification as

^{5/} Initial Decisions In the matters of Cellofilm Corporation, Docket No. II RCRA-81-0114 (August 5, 1982), and City Industries, Inc., RCRA 81-6-R-DSE-C (January 14, 1983).

hazardous in 40 CFR 261.32, Respondent's sludge is not, in fact, hazardous. This contention is based on the assertion that its wastewater treatment operations are very different from those shown in the background document supporting the listing of sludge generated in the production of creosote as hazardous (Exh A-1 to Brief). It is alleged that sludge in the background document is generated by the settling of heavy oils, while Respondent's sludge is the biological waste generated during the treatment of wastewaters and that Respondent's sludge contains only minute quantities of creosote and the constituents, (benz(a)anthracene, benzo(b)fluoranthene and benzo(a)pyrene), of concern. Because the background document refers to creosote wastewater being treated in holding ponds at larger plants, the basis for the former statement apparently is that creosote production represents a small proportion of biologically treated wastewater at the Follansbee plant (memo, dated May 18, 1982, Exh A-5). In support of the latter assertion, Respondent has attached a report of analysis of a sample of this sludge, apparently conducted in its own laboratory, showing concentration of benz(a)anthracene at 43 ug/l and concentrations of benzo(b)fluoranthene and benzo(a)pyrene at 97 ug/l (Exh A-3). Respondent also cites a separate test on a sample of its sludge, described as soil, by D'Applonia Consulting Engineers, Inc. showing less than 10 ug/l for water concentration and EP toxic extraction (leachability) of benz(a)anthracene, benzo(b)fluoranthene and benzo(a)pyrene (Exh A-4).

To further support its contention that the sludge here involved is not hazardous, Respondent has submitted a thesis by Charles P. Brush

"The Ability of Biotreaters To Remove Priority Toxic Pollutants Of The Polynuclear Aromatic Class" (Exh A-2). The thesis concludes that "(t)he biological wastewater treatment facilities installed to meet BPT [best practicable control technology currently available under the Clean Water Act] and operated in a range of SRT [sludge removal time] of 30 to 45 days and temperatures of 13.9 to 19.9 degrees C, remove PNA [polynuclear aromatic compounds] priority pollutants to non-detectable limits, with some minor exceptions" (Id. at 67). It is indicated that sufficient data are not available to explain the exceptions.^{6/}

As an attachment to its answer (Exh B) and its Brief (Exh A-5), Respondent has included a memorandum, dated May 18, 1982, which concludes that wastewater sludge from the production of creosote at the Follansbee, West Virginia plant should be exempted from the requirements of RCRA. This conclusion is based on the analyses referred to above and upon the fact that there appears to be little or no data concerning the quantities at which the constituents of creosote, benz(a)anthracene, benzo(b)fluoranthene and benzo(a)pyrene, present a hazard.^{7/} It is pointed out that the only

^{6/} Enclosed with the Brush thesis, but not labeled as an exhibit, is an American Wood Preservers' Association article "Migration of Creosote and its Components from Treated Piling Sections in a Marine Environment" (1982), which concludes, inter alia, that the amount of creosote that migrates from creosote-treated marine piling is extremely small (Id. at 7). This small annual loss, plus the fact that PAHs (polycyclic aromatic hydrocarbons) apparently are rapidly broken down in sea water, is taken as an indication that PAHs which migrate from creosote piling should have a negligible effect on the environment.

^{7/} Health and Environmental Effects documents prepared by EPA's Carcinogen Assessment Group (CAG), April 30, 1980 (Exh 4 to prehearing exchange of December 7, 1982), state, inter alia, that benz(a)anthracene is a weak carcinogen, that benzo(b)fluoranthene is a moderately active carcinogen and that benzo(a)pyrene is a potent carcinogen, but that no established human exposure standards exist for these compounds.

reference to a drinking water standard for these compounds is that set by the WHO to the effect that PAHs not exceed .2 ug/l and that because the criteria for hazardous waste (metals and pesticides) has been set at 100 times the drinking water standard, the low values for benz(a)anthracene, benzo(b)fluoranthene and benzo(a)pyrene shown herein, should allow exemption of the Follansbee sludge from hazardous waste requirements.

It is further pointed out that although the information as to the toxicity of creosote is more extensive, it is difficult to evaluate because creosote does not exist as a single identifiable molecule, but is instead made up of literally hundreds of compounds of varying concentrations. A 1971 study by Reichert, et al.^{8/} is cited, which concluded that the reduction of PAHs in wastewater was not due to biological degradation, but to irreversible adsorption of PAHs on the sludge.^{9/}

This phenomenon is asserted to explain the fact that although concentrations of benz(a)anthracene, benzo(b)fluoranthene and benzo(a)pyrene in the waste sludge were 43 ug/l, 97 ug/l and 97 ug/l, respectively, they were

^{8/} Reichert, J., H. Kunte, K. Engelhardt and J. Borneff (1971) "Carcinogenic Substances Occurring in Water and Soil - XXVII; Further studies on the elimination from wastewater of carcinogenic polycyclic aromatic hydrocarbons," Archives Hygiene and Bacteriology, Vol. 155, pg 18-40.

^{9/} This conclusion appears to be contrary to findings of the Brush thesis. It is noted that Health and Environmental Effects documents for benz(a)anthracene, benzo(b)fluoranthene and benzo(a)pyrene (note 7, supra) state that biodegradation and chemical treatment are effective in eliminating most PAH in the environment.

not released during the extraction procedure for EP toxicity which shows less than 10 ug/l for each compound. It is contended that the tendency of PAHs to adhere to solid particles would cause any PAHs which may leach from the waste sludge to be attenuated by the soil, thus preventing migration to groundwater.

Complainant has objected to Respondent's evidence and arguments concerning whether the sludge here concerned is hazardous, contending that what Respondent appears to be seeking is delisting without following the procedures in 40 CFR 260.20-22. It is pointed out that 40 CFR 261.3 (c) and (d) provide in effect that a listed hazardous waste will remain such until and unless it is excluded in accordance with 40 CFR 260.20-22. Because petitions to delist or exclude wastes produced at a particular facility from the regulations are beyond the scope of this proceeding,^{10/} Complainant's basic position that the wastes here concerned must be regarded as hazardous is sustained. Section 3008(c) of the Act, however, provides that seriousness of the violation is a principal factor considered in

^{10/} This conclusion is based on the fact that decisions on petitions to exclude or amend in accordance with 40 CFR 260.20-22 are made by the Administrator and upon the absence of any such authority in the Rules of Practice (40 CFR Part 22) governing this proceeding. It should also be noted that wastes containing any of the toxic constituents listed in 40 CFR 261, Appendix VIII, will be listed as hazardous unless the Administrator after considering, inter alia, the nature of the toxicity presented by the constituent, the potential of the constituent or any toxic degradation product of the constituent to migrate and the persistence of the constituent or any toxic degradation product thereof, determines that the waste is not capable of posing a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed (40 CFR 261.11(a)(3)).

determining a reasonable penalty and reconciling the statutory command with the requirement that the wastes here concerned cannot be regarded as non-hazardous is the principal difficulty presented by this proceeding.

In determining seriousness of the violation, the degree of hazard or potential harm presented by the particular waste would seem of paramount importance.^{11/} In this regard, Respondent alleges that the levels of PAHs in its sludge do not exceed those (1 to 30 mg/kg) found in domestic sewage sludge.^{12/} Respondent compares the concentrations of benz(a)-anthracene, benzo(b)fluoranthene and benzo(a)pyrene, 43 ug/l, 97 ug/l and 97 ug/l, respectively, in its sludge with the proposed 50 ug/l effluent limitation values for representative PAHs such as acenaphthene, fluorene and phenanthrene in the proposed guidelines for Organic Chemicals and Plastics and Synthetic Fibers Category Effluent Limitations Guidelines, Pretreatment Standards and New Source Performance Standards (48 FR No. 55, March 21, 1983, at 11864). It should be emphasized that the listed values are proposed maximum limitations for any one day and that effluent limitations under the Clean Water Act are performance or technology, rather than safety or health, based.

It is worthy of note that Table 10 "Ambient Water Quality Criteria and Observed Toxicity Levels For Contaminants Present Or Likely To Be

^{11/} The proposed penalty policy "A Framework For Development of a Penalty Policy For Resource Conservation and Recovery Act (RCRA)," December 31, 1980, groups intrinsic hazard of the waste and likelihood of exposure into a single category "damage."

^{12/} For this Grimmer, et al., 1978 and Nicholls, et al., 1979 are cited without further elaboration or identification.

Present In These Wastes,"^{13/} which, sets recommended levels of PAHs to protect human health of 2.8 ng/l (cancer risk of 10^{-6}) PAHs, and, inter alia, 0.2 mg/l (taste and odor only) for acenaphthene, 42 ug/l for fluoranthene and 2.8 ng/l (cancer risk of 10^{-6}) for benzo(a)pyrene. Respondent acknowledges, as it must, that the levels in its sludge are considerably higher than the listed recommended levels (Brief at 8). These recommended levels should be compared with the results of the analyses of samples from monitoring wells at the landfill site, which indicate concentrations of benz(a)anthracene ranging from 0.02 ug/l to 0.15 ug/l, concentrations of benzo(b)fluoranthene ranging from 0.03 ug/l to 0.19 ug/l and concentrations of benzo(a)pyrene ranging from 0.01 ug/l to 0.34 ug/l (letter, dated July 16, 1982, note 4, supra). While these quantities seem miniscule, they appear to cast some doubt on Respondent's contention that leaching of its wastes is not a problem inasmuch as PAHs become irreversibly adsorbed to sludge or soil particles.^{14/} Health and

^{13/} The cited table is contained in the Listing Background Document for Wood Preserving (Exh 4 to Complainant's Prehearing Exchange of December 7, 1982) which is applicable to wastewater from wood preserving processes that use creosote and/or pentachlorophenol and bottom sediment sludges from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol. Respondent has alleged (Brief at 7) and Complainant has conceded (Reply Brief at 2) that this was error and that the appropriate background document is that involving creosote production (Exh A-1 to Respondent's Brief).

^{14/} Although Respondent points out that its landfill is adjacent to a municipal landfill in the heart of an industrial district (Brief at 12), it does not specifically contend that this landfill is the source of PAHs from the monitoring wells.

Environmental Effects documents (note 7, supra) for benz(a)anthracene, benzo(b)fluoranthene and benzo(a)pyrene, however, indicate that these PAHs are ubiquitous to the environment, being found in ambient air, food, water, soils and sediment. Respondent cites these documents providing that PAHs are relatively stable in the environment and may be transported in air and water by adsorption to particulate matter to support its contention that low levels of PAHs in its sludge are bound to activated sludge floc or soils in the landfill and do not pose a threat to the environment (Brief at 8).

In view of the foregoing, Respondent's arguments concerning the non-hazardousness of the waste involved here cannot be dismissed as insubstantial. Nevertheless, for the reasons stated previously (note 10, supra, and accompanying text), the wastes here involved must be regarded as hazardous as a matter of law. Even if it was otherwise, the toxic nature of creosote and its constituents, benz(a)anthracene, benzo(b)fluoranthene and benzo(a)pyrene, is well established, and the fact that no safe human exposure levels have been set would seem to preclude a finding that the wastes here concerned are not hazardous. While there appears to be a substantial basis for Respondent's irreversible adsorption theory and the fact that the landfill is approximately two miles from the nearest human habitation tends to lessen the probability of exposure, contamination at the site by constituents of creosote appears to be established.^{15/}

The listing background document for creosote production states that creosote is highly mobile and persistent. Respondent does not appear to deny the likelihood of migration of these constituents, asserting that

^{15/} There is no data in the record as to background levels of PAHs in soils and sediments.

"(b)efore the tiny amounts of leachates from the Respondent's landfill could reach the nearest habitation they would be further diluted to a great extent by other waters including runoff and, quite probably, contaminated seepage from the adjacent municipal landfill" (Brief at 12). The other possibility of exposure, of course, arises from the large quantity of waste placed in the landfill on 106 days which increases the possibility of spillage, etc. Moreover, and although the background document for creosote production (Exh A-1), supports Respondent's position that the hazardous waste constituents of creosote are benz(a)anthracene, benzo(b)fluoranthene and benzo(a)pyrene, other chemicals such as chrysene, naphthalene and acenaphthalene are listed under pentachlorophenol in 40 CFR 261, Appendix VII, Basis For Listing Hazardous Waste. Accordingly, there may be other hazardous waste constituents of Respondent's sludges. It is concluded that notwithstanding Respondent's contention that the violation is merely technical, the potential for harm or damage caused by the wastes here involved is such that a reduction in the penalty proposed by Complainant is not warranted.^{16/}

Turning to the conduct element of the violation, Respondent contends that its actions in discontinuing placement of the sludge were rapid once the complaint and compliance order were received and Complainant's

^{16/} The proposed penalty policy (note 11, supra) placed all violations of 40 CFR 265.314 in Class I, which states that due to the waste involved the violation can lead to a high degree of harm to human health or the environment and that under the circumstances such harm was likely to occur (Id. at A-40, 38). Assertions in Respondent's brief to the effect that for several years monthly samples have been taken from points upstream and downstream from the landfill and that analyses of these samples, which have been supplied to the West Virginia Department of Natural Resources, do not show variations, except for statistical and analytical variations inherent in the test, have not been considered because they lack evidentiary support in the record.

true intentions became known (Brief at 13-14). It points out that representatives of EPA inspected the landfill in January of 1982, but raised no objections until a copy of the inspection report was mailed to Respondent on May 26, being received on June 1, 1982. A second inspection was conducted on June 7 and 8, 1982, the complaint was issued on June 11, and received by Respondent on June 15, 1982. Respondent asserts that this is hardly the conduct expected, if the Complainant considered the violation serious and argues that in a criminal case, such conduct would border on entrapment.^{17/}

To buttress the above argument, Respondent cites a RCRA Background Document, Section 264.15:Standards For Inspection and Interim Status Standards For Inspection, April 1980 (Exh B to Brief) providing at 3 that "(i)nspections are intended to serve as a preventive measure, to help avert the release of contaminants that could adversely affect public health and the environment" and at 16 "(t)hat it makes little sense to identify problems unless they are speedily corrected." These sentiments are unexceptionable and it may be assumed that if Complainant considered the matter as posing a serious threat to health or the environment, it would have acted with more alacrity. As Complainant points out, however (Reply Brief at 2-3), the cited Background Document is applicable to owners and operators of hazardous waste treatment, storage and disposal facilities. Accordingly, Respondent can derive little comfort from the Background Document on inspection.

^{17/} Brief at 10. This argument would be more persuasive if Complainant was seeking the maximum penalty for each day of violation.

Respondent says that it does not except to Complainant's position that history of compliance is an appropriate factor to be applied in determining the size of the penalty (Brief at 14). Respondent disputes, however, Complainant's position that its compliance record is poor. It points out that the regulation here involved (40 CFR 265.314) was issued as an Interim Status Standard on May 19, 1980 (40 FR 33232) becoming effective on November 19, 1980 (Brief at 10). It is further pointed out that 265.314(a) was adopted on July 26, 1982 (47 FR 32349) and became effective on January 26, 1983, but only as an Interim Final Rule.

Respondent says that this suggests some uncertainty as to whether this activity should be regulated and certainly suggests an absence of urgency regarding the need to control this activity.

Respondent says that its Follansbee plant and the Colliers landfill ~~here concerned~~ were inspected on May 28, 1981, giving rise to Complainant's letter, dated October 30, 1981, to the effect that the plant was in violation of one regulation and the landfill in violation of seven (finding 17). It is pointed out that by letter, dated March 1, 1982 (Exh 7 to prehearing submission), Respondent informed Complainant that all violations had been abated. In short, Respondent says that it corrected in four months matters it took Complainant five months to criticize.

Respondent minimizes the significance of the violations referred to in the letter of October 30, 1981. Regarding the plant violation, it apparently arose because of confusion as to the EPA identification numbers being used on hazardous waste manifests by Respondent and the owners of the landfill. Respondent asserts that this violation was

corrected before the inspectors left the plant. Concerning the violation of 40 CFR 265.13 (general waste analysis), Respondent says that both it and Complainant were well aware of the constituents of K035 waste and that the objectionable components were present in very small volumes. It is alleged that it was a simple case of required paperwork not having been accomplished and that the waste was analyzed and a written plan therefor established.

Respondent makes essentially the same comment regarding the violation of 265.15(b) (written schedule for inspecting all monitoring, safety and emergency equipment, security devices, etc.), asserting that inspections were being made, but that there was no written program. Respondent alleges it wrote one. Concerning 265.16 (personnel training), Respondent acknowledges that it had no formal training program or records thereof. Required records consist of job titles, job description, description of training and records documenting that training or job experience have been completed by facility personnel (265.16(d)). Respondent says that it proceeded to document the task of depositing waste into the landfill.

Concerning the violation of 265.32(a) and (c) (internal communications or alarm system and fire extinguishers and fire control equipment), Respondent alleges that there was a phone in the shanty on the access road approximately one-half mile from the landfill, that the material in the landfill had a high ignition point and that fire was unlikely and that fire control equipment in the form of a bulldozer was on the premises. It is contended that the regulation was not written for this type of facility.

Respondent argues that the lack of a written contingency plan and emergency procedures as required by 40 CFR 265, Subpart D involved a

very low order of risk inasmuch as no emergency was likely to develop from an accumulation of relatively incombustible material in a small landfill. Nevertheless, it is asserted that the necessary paperwork has been accomplished. Regarding the alleged violation of 265.73, lack of an operating record, Respondent says that it had a record of manifests of K035 material hauled to the landfill and that this paperwork has now been expanded. Respondent states that discussions are in progress as to whether the records should be kept at the plant where full security exists or in an unattended shanty approximately one-half mile from the landfill. Respondent acknowledges that in violation of 265.112, .118 and .310, it had no closure plan or post-closure plan. It asserts, however, that this defect has been corrected.

Respondent argues that with the exception of the lack of a closure and post-closure plan, the violations involved either insufficient generation of paperwork or a failure to formalize simple procedures for a small operation, which could easily be supplied by the application of common sense should the need arise (Brief at 17). Respondent says that its letter of July 16, 1982 (note 4, supra), was a request for assistance in locating monitoring wells in a hydrologically complex bit of hilly terrain and that Complainant's action four months later (November 9, 1982) in directing an unresponsive notice of violation for the failure to receive two RCRA quarterly reports should not be considered in determining the penalty in this proceeding.

It is contended that the fact that Complainant could have proposed a much greater penalty has nothing to do with the matter and that the

technical violation harmed no one. Rather than debate the issue, Respondent asserts that it discontinued all sludge dumping in the landfill.^{18/} It contends that imposing a penalty on a technicality accomplishes nothing and does not make the nation healthier or cleaner.

The purpose of a penalty, of course, is to deter future violations and to provide an incentive for compliance. Regarding Respondent's contention that as a factual matter the wastes here involved are not hazardous, the most that can be said is that there is some doubt as to the degree of hazard posed thereby. It is clear that a finding the wastes are not hazardous cannot be made. There is also reason to question Respondent's contention that the other violations forming its history of compliance chiefly involve paperwork and thus, are not serious.^{19/} The number of violations seem to suggest a casual attitude toward compliance and Respondent's record certainly cannot be regarded as exemplary. Under all the circumstances, considering the seriousness of the violation and Respondent's efforts at compliance, the \$25,000 penalty proposed by Complainant is determined to be reasonable and will be assessed against Respondent.

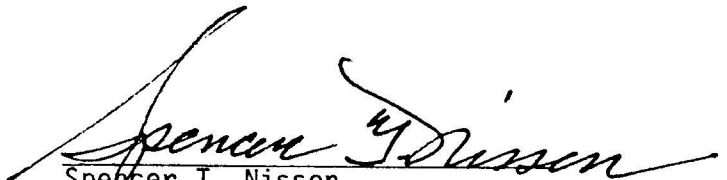
^{18/} Apparently, Respondent presently disposes of the sludge through discharges under an NPDES permit.

^{19/} The proposed penalty policy (note 11, supra) places violations of 265.13 (general waste analysis) in Class I, violations of 265.15 (general inspection requirements) in Class II, but appears to be talking more of failure to inspect than failure to record, violations of 265.16 (personnel training) in Class II, but indicates the appropriate criterion is the damage an untrained employee could cause, violations of 265.32 (communications and fire control equipment) in Class I, violations of 265.73 (operating record) in Class II, violations of 265.112 (closure plan) in Class II and violations of 265.118 (post-closure) and 265.310 (closure and post-closure cover) in Class I.

Order^{20/}

The compliance order directing that Respondent immediately cease the placement of liquid hazardous waste into its Colliers landfill unless and until it complies with the requirements of 40 CFR 265.314 is affirmed. In accordance with Section 3008(c) of the Resource Conservation and Recovery Act (42 U.S.C. 6928), a penalty of \$25,000 is assessed against Koppers Company, Inc. for the violations of the Act (42 U.S.C. 6924) and regulations (40 CFR 265.314) herein found. Payment of the mentioned penalty shall be accomplished by submitting a certified or cashier's check to the Regional Hearing Clerk in the amount of \$25,000 payable to the Treasurer of the United States within 60 days after receipt of this order.

Dated this 21st day of June 1983.


Spencer T. Nissen
Administrative Law Judge

^{20/} Unless appealed in accordance with 40 CFR 22.30(a) or unless the Administrator elects, sua sponte, to review the same in accordance with 22.30(b), this decision will become the final order of the Administrator in accordance with 40 CFR 22.27(c).