8/16/86

UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
LANDFILL, INCORPORATED,	)	Docket No. RCRA-IV-85-62-R
	)	
Respondent	)	
	)	

Resources Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. Respondent found in violation of South Carolina Hazardous Waste Management Regulations (HWMR) R.61-79.265, Subpart F (40 C.F.R. § 265, Subpart F) for failure to maintain an adequate downgradient ground water monitoring system. Nominal penalty assessed where respondent has installed monitoring wells at locations based upon its good faith reliance on State's advise and approval concerning location of wells. Respondent found not to be in violation of the regulations concerning the adequacy of upgradient ground water monitoring well.

Respondent found in violation of HWMR R.61-79. 265 Subpart H, 40 C.F.R. § 265. Subpart H) for failure to demonstrate liability insurance coverage for sudden and nonsudden accidental occurrences. No penalty assessed where respondent's good faith efforts to obtain insurance proved futile.

APPEARANCES:

For Complainant:	Kirk MacFarlane, Esquire Assistant Regional Counsel U.S. Environmental Protection Agency 345 Courtland Street Atlanta, Georgia 30365
For Respondent:	David A. White, Esquire Roddey, Carpenter & White, P.A. P.O. Drawer 560 Rock Hill, South Carolina 29731

INITIAL DECISON

Introduction:

This matter had it genesis in a complaint issued by the U.S. Environmental Protection Agency (EPA) on September 26, 1985 pursuant to Section 3008 of the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. § 6928.*

The complaint states South Carolina (State) enacted a Hazardous Waste Management Act and promulgated implementing regulations designated as Hazardous Waste Management Regulations. (HWMR). On February 25, 1981, the State was granted interim authorization to carry out Phase 1 of its hazardous

---

* Pertinent provisions of Section 3008 are:

Section 3008(a)(1): "Compliance orders. - . . . whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period or both . . . . "

Section 3008(g): "Civil penalty - Any person who violates any requirement of this subchapter shall be liable to the United States for 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."

waste program in lieu of the federal program. In pertinent part, the complaint alleged that following a review of respondent's facility file maintained by the State's Department of Health and Environmental Control (DHEC) respondent is charged with the following violations: (1) Failing to maintain an adequate ground water monitoring program as required of an owner or operator of a surface impoundment, landfill, or land treatment facility in violation of R. 61-79. 265 Subpart F of the HWMR, 40 C.F.R. § 265 Subpart F, and (2) Failing to maintain adequate financial assurance for closure and post-closure and by failing to demonstrate liability insurance coverage for sudden and nonsudden accident occurrences, in violation of R.61-79.265 Subpart H. of the HWMR and 40 C.F.R. § 265 Subpart H. The complaint proposes a total penalty against respondent of $29,500, in addition to a compliance order requiring respondent to take certain actions. An answer to the complaint was served on October 30, 1985, and an evidentiary hearing was held on April 1 and 2, 1986 in Columbia, South Carolina.

All arguments raised in Briefs have been reviewed and assessed. Those questions not discussed specifically herein

are found either not to be of sufficient relevancy or import for the resolution of the issues presented.

ANALYSIS AND FINDINGS OF FACT

Ground Water Monitoring:

Based upon a review of the evidence these are the findings of fact.* Respondent owns an inactive landfill site located at 21 Bypass, Chester, South Carolina. The respondent's property was originally purchased in 1972 to bury the sludges from the still bottoms of a distillation process. The waste disposed of was placed in 55 gallon metal drums, and placed within either of the two cells comprising the landfill. The cells had no man-made liners in the bottom of the units to inhibit or prevent the release of free liquids to the underlying soil and eventually to shallow groundwater. The landfill ceased to receive and bury waste after approximately June 1981.

---

* The findings necessarily embrace an evaluation of the credibility of witnesses testifying upon particular issues. This involves more than observing the demeanor of a witness. It also encompasses an evaluation of his testimony in light of its rationality or internal consistency and the manner in which it blends with other evidence. Wright & Miller, Federal Practice and Procedure § 2586 (1971).

Each of the two cells or units, having an irregular rectangular shape, is approximately 400 plus feet by 300 feet in area. The distance separating the cells varies from 250 to 300 feet. There was testimony that the distance from the westerly edge of the western cell to the easterly edge of the eastern cell is almost 2,000 feet. However, using the scale on the pertinent plat, or map, of the facility, the overall distance would be approximately 1,300 feet. (Answer at 1; Ex. C-1A; Tr. at 59-60, 63-65, 330-332).

There are two downgradient monitoring wells, designated as "A" and "B" servicing the westerly cell, and two downgradient wells for the easterly cell known as "C" and "D". These wells are located north of the respective cells. Situated generally between and south of the cells is upgradient well "E." It is located 120 feet southeast of the westerly cell and 539 feet southwest of the easterly cell.* Respondent engaged the engineering firm of Froehling & Robertson (F&R) in the fall of 1982 to install the monitoring wells (sometimes wells). A series of communications followed between F&R and DHEC. In the

---

* There are two unnamed wells near the westerly cell which were installed in 1977 by the State DHEC. (Tr. at 50). These wells are not in issue in this proceeding.

early part of 1983, DHEC placed its imprimatur on the proposed installation, approving completely the number of wells and their location about the site. The wells were installed in June 1983. (Ex. C-1A, R-10; Tr. 128-129, 332-340).

There is some question concerning how far the wells are from the cells. Respondent's Exhibit 11 is a plat of respondent's landfill surveyed on March 15, 1985 by Ashmark Land Surveyors. It does not reflect the distances from the wells to the respective cells. However, using the scale on the plat, the following are the approximate distances from wells to respective cells: Well A, 75 feet; well B, 50 feet; well C, 50 feet; well D, 100 feet; and well E, 75-100 feet. Complainant's Exhibit 1-A is a plat of respondent's landfill surveyed by Neyer, Tiseo and Hindo (NTH) on October 9, 1985. This Exhibit specifically shows the distances from the westerly and easterly cells to well E as stated above. This plat also reflects a scale, and using it the following are the approximate distances from the wells to the respective cells: Well A, 200 feet; well B, 125 feet; well C, 100 feet; and well D, 250 feet. It is found that complainant's Exhibit 1-A reflects more accurately the well/cell distances because, unlike respondent's Exhibit 11, it states with exactitude the location of at least one of the wells (E) indicating greater veracity in using

its scale to determine the distances from the cells to the other wells.

In a series of communications beginning on August 11, 1983, DHEC advised respondent of purported ground water monitoring deficiencies which, pertinent to this proceeding, primarily concerned upgradient well E. Respondent was informed that this well "apparently" had been affected by the facility and was not representative of natural ground water quality. The downgradient wells were not involved in these communications. (Ex. C-1, C-2, C-5, C-6, C-7). DHEC conducted a ground water Status Standards Inspection (SSI) of respondent's facility on September 5, 1985. In significant part, the SSI stated that well E "may" not be representative of the natural groundwater quality. By letter of September 30, 1985, which was subsequent to the issuance of the complaint, respondent was informed by DHEC of the alleged dificiencies revealed in the SSI, and that the matter was being referred to Region IV for posssible enforcement action. (Ex. C-9). Prior to this, Donald Stone (Stone) of EPA, and James Furr (Furr) of DHEC, had been in close communication for some months, almost on a daily basis, concerning the ostensible ground water problems. Furr informed Stone by telephone that well D was dry and

the purported questionability of well E's capability of producing data for a comparison analysis. (Tr. 44, 162, 176-178, 180).

The conductivity of flow through the soil, or flow rate, between the cells and the wells in layman's language ranges from approximately one-tenth of a foot to one foot per year. For example, any migration of waste from the cell to well A would take at least 200 years. Considering the large frontal area of the cells, there are only two wells (B and C) that are both functional and strategically located, but because of their distance from the cells detection of migrating waste would take 125 and 100 years, respectively. The proceeding was commenced without EPA having knowledge of the flow rate. Respondent asserts that it became aware of the problems concerning the distances to wells A, B,C, and D for the first time at the hearing. This is probably true. However, respondent was advised on December 18, 1985, after the complaint was issued, but before the hearing commenced, that EPA wanted respondent to install eight new downgradient wells. This was sufficient to alert respondent that there may be a problem with the present downgradient wells. EX. R-1; at 52-54, 59, 60-61, 110-116, 346-347).

Well E has higher levels of certain metals than the downgradient wells. This could mean that something is affecting the water quality on the upgradient side of the wells. Some

of the possible reasons for this could be mounding which, on a very local basis, could result in the reversal of ground water flow. Another likelihood could be that the area where well E is located was originally contaminated by waste being accidentally spilled there prior to being put into the cell. Another possibility for well E's condition could be runoff. Also, well E could be adversely affected by pollutants originating from higher upgradient sources. In EPA's opinion a more accurate picture of the upgradient situation may possibly be obtained by placing such a well farther away from the landfill cells than that of the present location of well E. This, however may require the placing of such a well on land not owned by respondent. (Tr. at 43-44, 72-75, 93-94, 100, 231).

The data produced by well E is not the result of migration from the cells or landfill for two reasons. First, well E is upgradient, and absent most unusual circumstances, not shown here, liquids do not flow to a ligher level. Second, even if this existed, considering the distance of well E from the cells, it would take a minimum of 120 years for the waste to migrate to the cell from the landfill. (Tr. at 146). This is corroborated, in part, by respondent's Exhibit 13, a report dated October 14, 1985, after the complaint was issued, from the consulting engineering firm of NTH. Though this Exhibit stated

that the "upgradient but unaffected question" was not resolved because of the limited data available and the theoretical nature of the computations, the report also concluded that "it is unlikely contaminants from the landfill cells could have migrated upgradient to well E." The NTH report was prepared at a cost of $5,000 to respondent and copies were furnished to both DHEC and EPA. (Tr. at 362).

Subsequent to the issuance of the complaint, by letter dated December 13, 1985, EPA advised respondent that it concurred in NTH's conclusion that the ground water flow direction at the facility was northeasterly. EPA continued to maintain in the communication that the fact that well E was upgradient did not ensure that it was not affected by the facility or that the downgradient wells were located in accordance with the appropriate regulations. EPA then explained what respondent would have to do to bring the facility into compliance. In short, respondent would have to install a minimum of four downgradient wells for each cell, with specified distances between them, at the downgradient limit of each of the landfill cells. Additionally, respondent would have to install a new upgradient well in an area where "the potential for effect by the facility is minimal." (Ex. R-2).

From the totality of the evidence it is more likely true than not true that the higher levels of certain metals found in well E did not originate from the landfill, and that this well is not affected by the facility.

Financial Assurance

On July 12, 1984, Allan Tinsley (Tinsley) of DHEC sent a letter to respondent advising the latter that its submission for "closure/post-closure care and/or liability coverage for sudden and/or non-sudden occurrences is deficient." The communication set forth the deficiencies respondent was expected to correct within 15 days in order to remain in compliance with the State's financial responsibility requirements. A similar communication was sent by Tinsley on December 4, 1984. On December 10, 1984, a telephone conversation took place between Tinsley and Mr. Neal, the sole stockholder of the respondent. The latter made notes of the conversation on the reverse side of the December 10 letter. (Ex. R-12). Stripped to the essentials, the notes state that Tinsley acknowledged that respondent could not get insurance on a facility like respondent's that is closed; that he would try to resolve the situation and get the facility out of the program; and that he would send another letter to respondent. (Exs. C-4, R-4; Tr. at 329, 352-353). Tinsley wrote this letter on December 11, 1984 referr-

ing to the December 10 telephone conversation. In pertinent part, this communication related that the State had two letters of credit, and that respondent would not have to submit documentation concerning items "2" and "3" mentioned in the December 4, 1984 communication. (These items addressed written verification of financial assurance for sudden and non-sudden accidental occurrences.) Notwithstanding the contents of the December 11, 1984 communication, at some point prior to the complaint and hearing, conversations took place between the State and EPA and it was determined that respondent was in violation of financial requirements. Curiously, EPA's witness conceded that the December 11, 1984 communication was either an expressed or temporary "waiver" of the insurance requirement. By letter of February 3, 1986, DHEC advised respondent that is closure plan was approved on the implementation of two conditions, neither of which concerned insurance. (Ex. R-5, R-7; Tr. at 200-201, 205, 354-355).

Respondent admitted that it did not have liability insurance, though it attempted to obtain same. Computrac, Inc. advised respondent on October 14, 1985, that as early as 1983 various companies were contacted and supplied with information concerning the securing of insurance coverage on respondent's landfill. Though not specifically stated in the communication, it can reasonably be interpreted to mean that

the companies mentioned in the letter declined to insure the landfill risk. This is buttressed by the concession of EPA's witness that he could not think of one single facility that is no longer active which has type of insurance required by the regulations. Respondent's evidence on this point, in the testimony of Mr. Neal, is credible and persuasive. It shows that respondent did communicate with numerous agents and vendors of insurance and that it could not obtain insurance, and that this is particularly true when a facility is no longer active. (Ex. R-6; Tr. at 349-351-356). The weight of evidence supports the finding that respondent, notwithstanding its efforts, could not obtain the type of insurance required by the regulations for landfill.

DISCUSSION AND CONCLUSIONS OF LAW

The Administrator is directed to promulgate regulations concerning owners and operators of disposal sites for specified wastes. Section § 3001(b)(B)(C), 42 U.S.C. § 6921(b)(B)(C). Additionally, Section 3010 of RCRA, 42 U.S.C. § 6930, requires that any person owning a facility for storage or disposal of hazardous waste shall file with the Administrator, or the states where authorized, a notification stating the location and general description of such activity and the hazardous wastes handled by such person. Further, Section 3004

of RCRA, 42 U.S.C. §6924, directs the Administrator to promulgate regulations establishing performance standards applicable to facilities for treatment, storage, or disposal of hazardous waste. RCRA also provides that the Administrator shall promulgate regulations requiring each person owning or operating a facility for treatment, storage or disposal of hazardous waste to have a permit. Section 3005(a), 42 U.S.C. § 6925(a). Insofar as the State of South Carolina is concerned in this proceeding, Section 3006 of RCRA, 42 U.S.C. § 6926, directs the Administrator to promulgate guidelines to assist states in the development of state hazardous waste programs. This section also provides that a state is authorized to carry out such a program in lieu of the federal program. Where a state has its own program, Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2), provides that in the case of violation occurring in a state which is authorized to carry out a hazardous waste program, as here, EPA has authority to commence a civil action after notice to the state.

Regarding ground water monitoring, the pertinent regulations provide:

> (a) A ground-water monitoring system must be capable of yielding ground-water samples for analysis and must consist of:
>
> (1) Monitoring wells (at least one) installed hydraulically upgradient (i.e., in the direction of increasing static head)

> from the limit of the waste management area. Their number, locations and depth must be sufficient to yield ground-water samples that are:
>
> (i) Representative of background ground-water quality in the uppermost aquifer near the facility; and
>
> (ii) Not affected by the facility; and
>
> (2) Monitoring wells (at least three) installed hydraulically downgradient (i.e., in the direction of decreasing static head) at the limit of the waste management area. Their number location and depths must insure that they immediately detect any statistically significant amounts of hazardous waste constituents that migrate from the waste management area to the uppermost aquifer. HWMR R.61-79, 265.91(a); 40 C.F.R. § 265.91(a).

It may be apposite to address a preliminary, but critical, question at this juncture. EPA asserts that it is ". . . the responsibility of the respondent to demonstrate the adequacy of the background well." (Tr. at 95; Op. Br. at 7). No authority is offered for this, and the undersigned believes this not to be an accurate statement of the law of evidence applicable to this proceeding. Stated broadly, "The burden of proof, . . . that is the ultimate burden of establishing the truth of a given proposition of fact essential to the cause of action . . . rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative

of the issue . . . and remains there until the termination of the action. * More specificaly, the Consolidated Rules of Practice of EPA, 40 C.F.R. § 22.24, provide:

> Burden of Presentation; Burden of Persuasion
>
> The complainant [EPA] 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, revocation, or suspension, as the case may be, is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint. Each matter in controversy shall be determined by the Presiding Officer upon a preponderance of evidence. **

There is nothing in the Supplemental Rules of Practice, 40 C.F.R. § 22.37, which alters this statement concerning "Burden of Proof." Nor can the undersigned discern anything in 265 C.F.R. Subparts F or H that is in conflict with § 22. 24. Thus, the burden of persuasion is not with respondent to show the adequacy of the wells; rather EPA has the burden to show their inadequacy.

---

* 29 Am Jr 2nd, Evidence § 127. See also Words and Phrases "Burden of Proof;" IX Wigmore, Evidence § 2486; McCormick on Evidence, § 337.

** "Preponderance of the Evidence" is that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

With regard to the upgradient well, EPA must establish that well E's ground water samples are not representative of background ground water quality in the uppermost aquifer near the facility, and such samples are affected by the facility or cells. The evidence shows that cell E is upgradient, is some distance from the cells, and that certain metals in well E could have resulted from a variety of reasons other than the landfill. EPA has not shown by the preponderance of the evidence that upgradient well E has been affected by the facility. It is concluded insofar as well E is concerned, that respondent has not violated HWMR R. 61-79.265, Subpart F.

Concerning the downgradient wells, it has been found that they are considerable distances from the cells, and that considering the ground water flow it would take a minimum of 100 years for migration to reach well C, and longer in the case of other wells. The significant languages of HWMR R.61-79, 265.91 (a)(2) provides that the wells should be installed "at the limit of the waste management area" and that they have the capacity to "immediately detect" any hazardous waste that may migrate from the landfill.* The wells do not meet this requirement in that their great distances from the limit of the waste area,

---

* Even if respondent's Exhibit 11 was found to reflect the approximate cell/well distances it would take a minimum of 50 years for hazardous waste to reach cell B, a situation hardly providing for immediate detection of such waste.

combined with the rate of flow, absolutely precludes immediate detection of any migrating hazardous waste. Insofar as the downgradient wells are concerned, it is concluded that EPA has shown by the preponderance of the evidence that these wells are not adequate and that respondent is in violation of HWMR R.61-79, 265, Subpart F.

There cannot be a guarantee that when wells are installed at given and approved locations they will forever remain adequate. The design or installation of a ground water monitoring system is not the same as the adequacy of such a system. Only after a period of time, as information is gathered from the system, can its adequacy be determined. If the wells are found subsequently to be inadequate the respondent must bring them into compliance with the regulations.

Respondent contends that EPA failed to provide reasonable notice prior to the hearing of its contention that the downgradient wells were too far from the limits of the waste management areas. (Op. Br. at 4-5). Any asserted deficiency of notice in the complaint was clearly cured during the progress of the hearings, and this is all that procedural due requires. Swift & Company v. United States 393 F. 2d 247, 252 (7th Cir. 1968); Golden Grain Macaroni Co. v. Federal Trade Commission, 472 F.2d 882 (9th Cir. 1972), cert. denied, 412 U.S. 918 (1973).

Financial Responsibility

Owners or operators of hazardous waste disposal facilities must demonstrate financial responsibility for bodily injury or property damage to third parties caused by sudden or accidental occurrences arising from the operation of the facility by, among others, obtaining and maintaining liability coverage. HWMR R.61-79, 265.147(a). The regulations do not contain a provision for "waiver" of the insurance requirements, but they do provide for a "variance." If an owner or operator can demonstrate to the satisfaction of DHEC that the levels of financial responsibility, in this case liability insurance coverage, are not consistant with the degree and duration of risk associated with the facility, he may obtain a variance. If it is determined that the levels of financial responsibility required are not consistant with the degree and duration of risk associated with the facility, the financial responsibility requirements may be adjusted to protect human health and the environment. HWMR R.61-79, 265.147(c)(d). A request for variance was not submitted by respondent. (Tr. at 247).

Even though respondent has applied for, or even received approval for closure, it would not effect the requirement that

liability coverage be maintained. Respondent is required to continuously provide liability coverage for the facility until certification of closure of the facility is received by DHEC. HWMR R.61-79, 265.147(e); R.61-79, 265.115. The closure plan could be approved by DHEC even though respondent was purportedly in violation of the requirements for the reason that the concept relating to closure is separate from the liability requirements. (Ex. R-7; Tr. at 210-213, 215). It is concluded that respondent is in violation of HWMR R.61-79, 265, Subpart H, for failure to demonstrate liability insurance coverage for sudden and non-sudden accidental occurrences.

Appropriateness of Civil Penalty

EPA seeks a penalty of $20,000 for ground water monitoring violations, and $9,500 for violations regarding financial requirements. Section 3008(a)(3) of RCRA 42 U.S.C. § 6928(a)(3) provides, in part, that in assessing a civil penalty the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. To assist compliance/enforcement personnel in assessing proposed penalties, EPA issued a final RCRA Civil Penalty Policy on May 8, 1984. (Penalty Policy or Guidelines, Ex. C-12). The Penalty Policy provides that the penalty

calculation system consists of (1) determining a gravity-based penalty for a particular violation, (2) considering economic benefit of noncompliance where appropriate and (3) adjusting the penalty for special circumstances. The two factors that are considered in determining the gravity-based penalty are (a) potential for harm, and (b) extent of deviation from the statutory or regulatory requirement. These two factors constitute the seriousness of a violation and are incorporated into a penalty matrix from which a gravity-based penalty is chosen. If a respondent has derived significant savings by its failure to comply with RCRA requirements, the the amount of economic benefit from noncompliance gained by the respondent may be calculated and added to the gravity-based penalty. After determining the appropriate penalty based on gravity, and where appropriate, economic benefit may be adjusted upwards or downwards to reflect the particular circumstances surrounding the violation. The factors to be considered are:

1. Good faith efforts to comply or lack of good faith;
2. Degree of willfulness and/or negligence.
3. History of noncompliance;
4. Ability to pay; or
5. And other unique factors. (Ex. C-12 at 3-4).

Compliance/enforcement personnel have discretion to make adjustments up or down, by specified percentages, of the gravity-based penalty. (Ex. C-12 at 17). The undersigned is enjoined to consider the civil penalty criteria in RCRA, and civil penalty Guidelines issued under RCRA. Should he assess a penalty different from that recommended to be assessed in the complaint, he shall set forth in the Initial Decision the specific reasons for any increase or decrease. 40 C.F.R. § 22. 27(b).

Regarding the gound water monitoring violations, and the Penalty Policy matrix, EPA determined that the potential harm was major. This was based upon the fact that one of the down-gradient wells (D) was dry and upon the assumption upgradient well E was not capable of being used for a comparison analysis. EPA considered an adequate background well important in arriving at whether or not contamination was taking place; and that an adequate number of downgradient wells were required in order to detect as soon as possible any release of contaminated matter from the cells in order to prevent any problem from becoming worse. In determining the seriousness of the violation in order to arrive at a gravity-based penalty, EPA was of a view that there was a major potential for harm because liquids were put into the landfill, and that the latter was unlined. It was also determined that the extent of deviation was major for the

reason of an inadequate number of downgradient wells, and because of a "suspicion" that the upgradient was improperly located and providing essentially unrepresentative data. Using the major/major cell of the matrix, EPA selected the midpoint figure to $22,500 for a penalty. EPA did not state what portion of the penalty was attributed to the alleged inadequacy of the upgradient well, and what amount was associated with the downgradient wells. Using the adjustment factors, EPA adjusted the penalty based upon the knowledge of the facility at the time. The ultimate figure arrived at was $20,000. At the time however, EPA could not state with certainty whether or not it was aware that the respondent had relied upon the advice and assistance of DHEC concerning the design and location of the wells. No adjustment in the penalty was made for good faith efforts to comply. Nor was an adjustment allowed concerning willfulness or negligence. No upward adjustment was made because of a history of noncompliance though DHEC had advised respondent that there was a question concerning the adequacy of the upgradient well. Respondent's ability to pay was considered. A 20 percent reduction was applied to the penalty for unique factors to arrive at an ultimate proposed penalty of $20,000. (Ex. C-11A at 1, C-11B at 1, 2; Tr. at 180-184, 280-285, 306).

Concerning the proposed penalty for failure to have and maintain liability coverage, it was determined by EPA that this resulted in a moderate potential harm primarily because landfill was inactive, but the extent of deviation was major because insurance documents did not exist at the time the penalty was calculated and from the information available the respondent never had insurance. Turning to the matrix, EPA applied the midpoint range and arrived at a penalty of $9,500. No adjustments were made by EPA because it did not feel it was "appropriate." (Ex. C-11B at 3; Tr. at 191-193).

On the facts of this case, the proposed penalty for the ground water monitoring well violation displays a special type of selective blindness, and what is perhaps more important, it is just unfair. This is so even if the penalty could somehow be proportionally reduced to account for no violation found concerning well E. The respondent installed the monitoring wells at their present location at great expense and with the advice and complete approval of the State. The undersigned is of the view that a nominal penalty of $250 should be assessed for the violation concerning the downgradient wells. It would be simply inequitable to saddle the respondent with a greater penalty for actions resulting from its good faith reliance upon the State's representations. The public interest will be served adequately by respondent coming into compliance with the regulations.

Regarding respondent's violation for not having liability coverage, no penalty should be assessed. Respondent labored under the belief that it had some sort of a waiver from DHEC concerning the insurance requirements. Though this reliance on DHEC representations was misplaced, under the totality of circumstances respondent acted in good faith. More important, however, is that respondent's genuine efforts to obtain insurance proved fruitless. Simple justice requires that respondent should not be held responsible for its failure to accomplish an impossible task.

Having considered the pertinent Section of RCRA,the Guidelines and the facts of this case, a condign penalty in this matter is $250.

Order *

Pursuant to Section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928, the following order is entered against respondent Landfill, Incorporated.

I. A civil penalty in the amount of $250 is assessed against respondent Landfill Incorporated.

---

* Unless an appeal is taken pursuant to 40 C.F.R. § 22.30, or the Administrator elects to review this decision sua sponte the Initial Decision shall become the Final Order of the Administrator. 40 C.F.R. § 22.27(c).

II. Payment of the full amount of the civil penalty shall be made within sixty (60) days after a receipt of the final order by submitting a certified or cashier's check payable to the Treasurer, United States of America, and mailed to:

EPA - Region IV
(Regional Hearing Clerk)
P.O. Box 100142
Atlanta, Georgia 30384

III. The following compliance order is also entered against respondent. Within thirty (30) days of this order:

A. Install an adequate downgradient ground water monitoring program in accordance with HWMR R.61-79, 265 Subpart F of the HWMR.

B. Submit an adequate outline of ground water quality assessment program in accordance with HWMR R.61-79, 265.93.

C. Submit documents, or demonstrate the requirements of paragraph A and B above to:

Robert E. Malpass, Chief
Bureau of Solid and Hazardous
Waste Management
South carolina Department of
Health and Environmental
Control
2600 Bull Street
Columbia, South Carolina 29201

D. Submit copies of the documents mentioned in paragraph C, above to:

Allan E. Antley, Chief
Waste Compliance Section
U.S. Environmental Protection
Agency
345 Courtland Street, N.E.
Atlanta, Georgia 30365

Frank W. Vanderheyden
Administrative Law Judge

Dated: September 16, 1986
Washington, D.C.