UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

BABCOCK & WILCOX COMPANY	**(**	**Docket No. RCRA-III-162**
Naval Nuclear Fuel Division	**(**	**Judge Greene**
	(	
Respondent		

DECISION AND ORDER

The summary judgment order attached hereto as Appendix A is dispositive of all liability issues raised in this matter. It is hereby adopted in full, incorporated herein, and made a part of this Decision and Order. [1]

Also attached and adopted in full as to text is a proposed stipulation between the parties (Appendix B) regarding, *inter alia*, the appropriate civil penalty to be assessed in this matter for the violations found. The stipulation as to civil penalty is accepted. It conforms to statutory and regulatory requirements, as well as to policy pronouncements issued by the U. S. Environmental Protection Agency (EPA) . Accordingly, it will be ordered that Respondent shall pay a civil monetary penalty of $65,940.00 to resolve the outstanding issue in this proceeding, i. e. the amount of the penalty to be imposed.

One additional matter must be addressed here. Respondent's corporate name has been changed to BWX Technologies, Inc. EPA, through Complainant's counsel, has determined that three months, or ninety (90) days, of operation under the new corporate name must precede the signing of the stipulation by EPA, in order that EPA has the opportunity to avail itself of the "new" corporation's financial assurances in connection with the obligations contemplated. It is understood that the ninety day period ends September 30, 1997.

Under the special circumstances of this matter, which include Respondent's preference that the new corporate name be reflected in the final documents, service of this Decision and Order will be made on October 21,1997, by the Regional Hearing Clerk. During the twenty-one day period thus provided, Respondent will submit the remaining documents pertaining to financial assurance to EPA.

The above procedural matter does not affect the date of this Decision and Order. Upon execution of the stipulation by the parties, the stipulation or a copy therof of will be lodged with the Regional Hearing Clerk, who will be directed to substitute the executed version for the proposed stipulation as Appendix B to this Decision and Order.

In view of the above, and in consequence of findings and conclusions in Appendix A to the effect that Respondent violated the Act and certain applicable regulations, the following Order is entered.

ORDER

1. Respondent shall pay a civil penalty of $65,940.00 for violations of the Act found herein. This amount

is consistent with applicable statutory and regulatory requirements, and with EPA published policy pronouncements.

2. Payment shall be made within sixty (60) days of the date of the final order herein.

3. **This Decision and Order shall be served by the Regional Hearing Clerk on October 21, 1997, unless further ordered before that date. Following service, Respondent shall have the period provided by the rules of practice for appeal.**

4. And it is FURTHER ORDERED that, following execution of the stipulation by both parties, the parties shall file the stipulation, or a copy thereof, with the Regional Hearing Clerk. The Clerk shall append the signed stipulation to this Decision and Order as Appendix B in place of the unsigned document.

5. This Decision and Order shall become the final order of the Environmental Appeals Board within forty- f ive (45) days after service upon the parties without further proceedings unless it is appealed by a party or the Board elects sua sponte to review.

J.F. Greene

Administrative Law Judge

September 29, 1997

Washington, D. C.

[1] ***Amended Order Denying Motion to Dismiss and Granting Motion for "Accelerated" Decision***, June 11, 1997.

APPENDIX A

UNITED STATES ENYIRONMENTAL PROTECTION AGENCY

In the Matter of

Babcock & Wilcox, Naval Dkt. No. RCRA-III-162

Nuclear Fuel Division Judge Greene

Respondent

Amended
ORDER DENYING MOTION TO DISMISS
and
GRANTING MOTION FOR "ACCELERATED DECISION"

The complaint in this matter charges Respondent with seventeen violations of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§690 et. seq., and the Virginia Hazardous Waste Management Regulations (VHWMR) including treatment, storage or disposal of hazardous waste without obtaining either a permit or interim status, generating hazardous waste and owning or operating a hazardous waste storage facility without having filed a notification of hazardous waste activity, failure to identify a surface impoundment in the permit application, failure to develop and follow a waste analysis plan, and failure to implement a ground water monitoring program. After months of negotiations between the parties and with State of Virginia

officials, following which it appeared that settlement would be effected, Respondent raised a new defense -- lack of jurisdiction in the U. S. Environmental Protection Agency (EPA) and the State of Virginia to prosecute this matter on the ground

that sole jurisdiction lies in the Nuclear Regulatory Commission (NRC). Respondent was permitted to amend its answer to the complaint in order to assert this defense. Subsequently Respondent moved to dismiss. Complainant then cross-moved for "accelerated decision" as to liability.

The sole legal issue presented by the motion to dismiss is whether Respondent, which admits that it stored an acidic, corrosive hazardous waste in a surface impoundment ("cold pond")from 1980 until September, 1983, is nevertheless not subject to federal or state hazardous waste management regulations because the facility was allegedly "contaminated" by uranium enriched in the U-235 isotope ("enriched uranium") . The presence of enriched uranium would bring the facility within the exclusive jurisdiction of the NRC or the U. S. Department of Energy pursuant to 42 USC §§2011-2013 and regulations issued pursuant to authority thereunder. In order to prevail, Respondent must show (1) that the cold pond contained a "radioactive mixed waste" as defined by the regulations,[1] and (2) that the impoundment area did in fact contain such radioactive mixed waste for the entire period from November 19,1980 when the RCRA regulations became effective, until September, 1983.

In 1990, Respondent discovered that roof run-off from a building contained minute quantities of enriched uranium, that this water was recycled and mixed with water from a cleaning process performed at the facility, and that the runoff water contaminated the hazardous waste pond with a small amount of radioactive material. As discussed below, Respondent cannot prevail on the facts in showing contamination with enriched uranium prior to the actual discovery in 1990, and, even if it could, cannot prevail at law inasmuch as the belatedly discovered enriched uranium in the sludge from Respondent's landfill and wastewater treatment system hardly rises to the level of contamination contemplated by the regulations.

The facts here are clear: (1) Respondent operated a hazardous waste impoundment from 1972 until at least September, 1983; (2) this pond came under RCRA regulation at the end of 1980; (3) the pond was noted by State of Virginia authorities in 1986; (4) a complaint was filed by EPA in 1987; and (5) Respondent discovered that sludge from its landfill and wastewater treatment system contained some

enriched uranium in 1990, which enriched uranium is ascribed to run-off from the roof of a building at the facility. The level of radioactive waste and its nature, even assuming it was there

for the entire period, is so small as to be no greater than that cortained in the water drawn by the plant from the James River.

Respondent admits that it has "limited data" from the period 1980-1983 (motion to dismiss, at 5). In fact, it has no "data," but seeks to create facts by inference. No tests of the sludge in the landfill or wastewater treatment system were conducted during the nearly three-year period in question. The tests that were performed on the recycle water system at the time do not show radioactivity in excess of river water intake levels. Respondent does not contest this fact, and argues only that the nature of the radioactivity in the sludge and the recycle water system shows that it was derived from the plant, rather than from the James River (Respondent's motion to dismiss, at 5) Thus, there is no valid basis from which to infer that merely because sludge from Respondent's landfill or wastewater treatment system may show contamination with enriched uranium in 1989,

that the pond was similarly contaminated in 1980, in 1983, or at any time in between. [2] In an affidavit supporting Complainant's response to the motion to dismiss, not only are Repondent's inferences refuted, but strong inferences to the contrary are drawn by Complainant that the pond had no radioactive roof run--off from 1980 - 1983, or, that, if it did, the pond was not contaminated for this period (see Complainant's response to Respondent's motion to dismiss, and Ellison affidavit, at 3-16). Moreover, since the inference proposed by Respondent would lead to a result contrary to the intent of a remedial statute, such inference ought not to be drawn. Consequently, it is found that Respondent has failed to meet its burden of showing that the pond was contaminated with enriched uranium throughout the entire period.

Second, the "contamination" here is such that, even if it did exist, it was not intended to be governed by the regulation, and so finding would not reach a rational result. The "contamination" here is basically non-existent [see Zeff affidavit (Exhibit 4) in support of motion to dismiss] , since the radioactivity in the recycle water system is on the whole less than the radioactivity of the intake water from the James River and most surface water. The isotopic data on the sample of recycle water which Respondent submitted may not be

conclusive (see Ross affidavit in support of Complainant's response; and see May 21, 1991, letter from NRC to EPA). [3] It is questionable also whether the enriched uranium in the analysis

of sludge from the filter press relied upon by Respondent for its 1990 istopic examination is from roof contamination at all (Ellison affidavit, attached to Complainant's response to Respondent's motion to dismiss, at 17 ff). It must also be noted that in 1981 there was a spil1 which may have contaminated the recycle water independent from roof runoff or the pond (Ross affidavit at 3). It cannot seriously be contended that a hazardous corrosive waste pond has been "contaminated" by recycle water that is no more hazardous most if not all the time than typical river water. Remedial statutes such as RCRA, together with its implementing regulations, are designed to protect public health and the environment. They cannot be set aside lightly or found inapplicable on the basis of speculative inference alone. A preponderance of evidence does not exist when the only evidence consists of opposing inferences. The beginning and the end of the inquiry is that there is no specific evidence in Respondent's rebuttal of Complainant's *prima facie* case.

For the reasons set out above, Respondent has failed to show that it is not subject to federal or state

hazardous waste management regulations, and, consequently, the motion to dismiss must be denied.

Turning to Complainant's cross motion for "accelerated decision", no material facts relating to whether the pond was a hazardous waste facility subject to federal and state hazardous waste regulation are at issue. In the motion to dismiss, Respondent admits that between 1973 and 1980 a surface impoundment ". . . . used for the storage prior to treatment and discharge, of pickle acid waste . . . ." was operated. It is further admitted

that "...while it was in use, B & W assumed that the wastewater stored in the pond was non-radioactive...."

The dispute between Complainant and Respondent through their witnesses is the level of reliability which can be placed upon Respondent's inference of contamination during the period in question. But as noted above, since there is no showing that the holding pond was "contaminated," Respondent'*s* defense could not prevail and the issue in controversy is not material; even if resolved in Respondent's favor, these inferences would not overcome Complainant'*s prima facie* case. Consequenty, there are no material facts at issue and, even if they were found in Respondent's favor as inferences, would not defeat a motion for accelerated decision. Complainant is entitled to judgment as a

matar of law as a consequence of there being no material facts at issue. Respondent has not only failed to show, but has demonstrated that it cannot show, that EPA lacks jurisdiction over this matter.

Accordingly, Complainant's cross motion for "accelerated decision" as to liability must be granted. It is held that there are no material facts at issue, that Respondent has not overcome Complainant's *prima facie* case, and that Complainant is entitled to judgment as a matter of law.

Last, Respondent has made several assertions which might well form the basis for a reduction of the penalty proposed in the complaint. It is noted that NRC relegated the violation of burying sludge containing U-235 in a landfill to one of its lowest penalty levels; any settlement discussions should take various circumstances into account.

The following findings are adopted in part from Complainant's Response to Motion to Dismiss and Motion for Accelerated Decision on Liability:

FINDING OF FACTS AND CONCLUSIONS OF LAW

Respondent is subject to RCRA and regulations issued pursuant to authority, and to VHWMR. Respondent is a "person" as defined in VHWM §2.134 (1984).

Respondent "pickles" (i.e., cleans) zirconium parts with a solution of nitric and hydrofluoric acids at its Lynchburg, Virginia, facility. From November 19, 1980, when the RCRA regulations became effective, until September 1983, Respondent stored the spent acid solution ("pickle acid waste'') in a surface impoundment. The pickle acid waste was a corrosive hazardous waste (DO02) , as defined in VHWMR §3.00 (1984) , 40 C.F.R. Part 261, (1984) , VHWMR Part III (1986) .

Respondent did not obtain a RCRA permit or interim status for the impoundment. The impoundment was discovered by the Virginia Department of Waste Management ("VDWM") during an inspection in 1986. By agreement with VDWM, EPA filed the complaint in this action and seeks, *inter alia*, closure of the impoundment in accordance with RCRA regulations.

It is found and concluded that Respondent cannot show that enriched uranium was present in the surface impoundment during the period 1980 to September, 1983; and that such material, even

if present, was *de minimus* and did not rise to the level contemplated by RCRA and regulations promulgated pursuant thereto. Accordingly, it is found that the surface impoundment contained hazardous waste as charged, and is subject to regulation under RCRA.

It is concluded that, as charged in the complaint, Respondent violated §§ 3005(a)and 3010 (a) of

RCRA, 42 U.S.C. §§6925 (a) and 6930 (a); and §§11.01 (1984) , 11.1 (1986) , 4-02 (1984) , 4.1.B (198 6) 11.02.05 (1984) [11.2.0 (1986)] , 10.02.04 (b) (2) (1984) [10.1.D (2) (b) (1986)], 10.06.01 (a) (1984)[10.5.A (1986), 10.11.02(c) (1984) [10.10.B.3 (1986)], 10.05.02 (1984) [10.4.B (1986)], 10.02.06(b) (1984) [10.1.F.2 (1986)]; 10.02.06(d) (1984) [10.1.F.4 (1986)], 10.02.07(d) (1984) [10.1.G.4 (1986)], 10.04.01 (1984) [10.3.A (1986)], 10.05.04 (1984) [10.4.D (1986)], 10.07.03 (1984) [10.6.C (1986)], 10.07.09 (1984) [10.6.I (1986)], 10.08.02 and 10.0.03 (1984) [10.7.B and 10.7.C (1986)], 10.08.04 and 10.08.05 (1984), [10.07.D and E (1986)], 9.08.07 (1984) [9.7.G (1986)] of VHWMR.

ORDER

It is ORDERED that Respondent's motion to dismiss be, and it is hereby, denied; and that

Complainant's motion for "accelerated" decision as to liability be, and it is hereby, granted.

And it is FURTHER ORDERED that the parties shall confer for the purpose of attempting to conclude the settlement which once seemed at hand. They shall meet, confer, and report upon the status of this matter no later than January 30, 1992. Failure to observe the terms of this order will, in the absence of extraordinary circumstances -- which do not include the possibly busy schedules of counsel -- result in the matter being set for trial.

J. F. Greene

Administrative Law Judge

Dated: June 11. 1997

Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the a original of this order, was filed with the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on June 12, 1997.

Shirley Smith

Legal Staff Assistant

For Judge J. F. Greene

NAME OF RESPONDENT: Babcock & Wilcox Company

DOCKET NUMBER: RCRA-III-162

Lydia Guy

Regional Hearing Clerk

Region III - EPA

841 Chestnut Building

Philadelphia, PA 19107

Patricia D. Hilsinger, Esq.

Office of Regional Counsel

Region III - EPA

841 Chestnut Building

Philadelphia, PA 19107

J. J. Jewett, III, Esq.

McGuire, Woods, Battle & Boothe

One James Center

Richmond, VA 23219

Appendix A/

[1] "Radioactive mixed waste" is defined as any "matrix containing a RCRA waste . . . and a radioactive waste subject to the Atomic Energy Act is a radioactive mixed waste." 53 Fed. Reg

[2] If the impoundment were not contaminated with enriched uranium at any time between November, 1980, until September, 1983, federal or State hazardous waste regulations would apply.

[3] Complainant's argument that the Federal Register notice is prospective and did not apply to pre-1988 hazardous waste ponds need not be reached for purposes of deciding these motions.

APPENDIX B

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In Re:

BWX Technologies, Inc.

Naval Nuclear Fuel Division

P.O. Box 785

Lynchburg, Virginia 24505,

Respondent

Docket No. RCRA-III-162

Judge Greene

STIPULATION

On April 10, 1987, Complainant, EPA, issued a Complaint, Compliance Order and Notice of Opportunity for Hearing ("Complaint") against Babcock and Wilcox Company, Naval Nuclear Fuel Division, (now BWX Technologies, Inc., Naval Nuclear Fuel Divison ("Respondent"), pursuant to Section 3008(a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(a). On December 20, 1991, the Presiding Officer issued an Order denying Respondent's Motion to Dismiss and granting Complainant's Motion for Accelerated Decision as to Liability.

The sole legal issue presented by Respondent's Motion to Dismiss is whether Respondent's surface impoundment is subject to regulation under RCRA. Respondent wishes to appeal this issue, which was decided by the Presiding Officer in her Order of December 20, 1991, to the Environmental Appeals Board pursuant to 40 C.F.R. § 22.30.

The parties wish to achieve an Initial Decision for this purpose without the necessity of a trial on the matter of the civil penalty for the violations cited in the Complaint. Therefore, the parties join in this Stipulation for the purposes of: (1) providing the basis for the penalty portion of an Initial Decision of the Presiding Officer so that the Initial Decision can then be appealed to the Environmental Appeals Board; and (2) recording an agreement reached between the parties.

Subject to the concurrence of the Presiding Officer, Complainant and Respondent stipulate and agree that, in lieu of a trial on the matter of penalty, the Presiding Officer may enter an order directing Respondent to pay the civil penalty amount in the attached unexecuted Consent Agreement and Consent Order, $65,940.00, to the United States of America, in the time and manner provided in the Consent Order.

Complainant and Respondent further stipulate and agree that if Respondent does not prevail in its appeal to the Environmental Appeals Board of the Initial Decision of the Presiding Officer, Respondent will sign the attached Consent Agreement. Complainant will then submit the Consent Agreement to the Regional Administrator of EPA Region III, or his designee, for his signature.

For Respondent:

BWX TECHNOLOGIES, INC.

NAVAL NUCLEAR FUEL DIVISION

Date:Oct. 15,1997

For Complainant:

ENVIRONMENTAL PROTECTION AGENCY

REGION III

Date: Oct. 16, 1997

APPENDIX B 1

BEFORE THE UNITED STATES ENVIRONNENTAL PROTECTION AGENCY

REGION III

In Re:

BWX Technologies, Inc. Docket No. RCRA-III-162

Naval Nuclear Fuel Division CONSENT AGREEMENT

P.O. Box 785

Lynchburg, VA 24505,

Respondent

PRELIMINARY STATEMENT

1. This Consent Agreement is entered into by tile Associate Division Director for RCRA Programs of the Hazardous Waste Management Division of the United State Environmental Protection Agency ("EPA"), Region III ("Complainant") and BWX Technologies, Inc., Naval Nuclear Fuel Division ("Respondent" or "Facility"), pursuant to Section 3008(a) of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to hereinafter as "RCRA"), 42 U.S.C. § 6928(a), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22, to address the violations alleged in the Complaint, Compliance Order and Notice of Opportunity for Hearing ("Complaint") issued to the Babcock and Wilcox Company, Naval Nuclear Fuel Division, now, BWX Technologies, Inc., Naval Nuclear Fuel Division, on April 10, 1987.

2. The United States Environmental Protection Agency ("EPA") has given the Commonwealth of Virginia prior notice of the issuance of this Consent Agreement and Consent Order in accordance with Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2).

3. For the purposes of this proceeding only, Respondent admits the jurisdictional allegations

set forth in the Complaint.

4. Respondent does not admit the factual allegations and conclusions of law set forth in paragraphs 1 through 79 on pages 2 through 9 of the Complaint, or the Findings of Fact and Conclusions of Law herein, and reserves all rights and defenses which Respondent may have regarding liability or responsibility in any subsequent proceeding, except that Respondent agrees not to contest such findings of fact or conclusions of law in any subsequent proceeding initiated by EPA to enforce this Consent Agreement and Consent Order.

5. Respondent hereby expressly waives any rights it may have to any further hearing or trial on any issue of fact or law set forth in the Complaint or herein, in this proceeding or in any subsequent proceeding initiated by EPA to enforce this Consent Agreement and Consent Order.

6. Respondent does not admit any wrongdoing. However, to avoid further litigation and delay in the settlement of this proceeding, Respondent consents to the issuance of this Consent Agreement and Consent Order and agrees to comply with the terms herein.

7. Each party shall bear its own costs and attorneys' fees.

8. "Days" as used herein shall mean calendar days unless specified otherwise.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

9. EPA incorporates by reference the allegations of fact and conclusions of law contained in paragraphs 1through 79 on pages 2 through 9 of the Complaint and adopts them as the Findings of Fact and Conclusions of Law herein.

COMPLIANCE TASKS

10. Respondent hereby certifies that it has ceased all treatment, storage or disposal of hazardous waste at the surface impoundment which is the subject of the Complaint (the "Cold Pond').

11. Respondent further certifies that:

(a) In order to meet the requirement of a contingency plan, Respondent has amended the NNFD Emergency Plan to include hazardous waste and has submitted said plan to the Virginia Department of Environmental Quality ("DEQ") for approval;

(b) Respondent has submitted to EPA for approval the names of the facility personnel

who have been trained, the type of training they received, and the dates of their training; and

(c) Respondent has submitted to EPA and DEQ for approval, or amendment and approval, a Site Characterization Plan and a Groundwater Assessment Plan for the Cold Pond. Within six (6) months of the effective date of this Consent Agreement, Respondent shall submit to EPA and DEQ a revised version of the Site Characterization Plan and the Groundwater Assessment Plan.

12. EPA and DEQ will coordinate their responses to any submissions made by Respondent to EPA and DEQ pursuant to this Agreement.

13. No later than ninety (90) days after the effective date of this Consent Agreement and Consent Order, Respondent shall submit to the Nuclear Regulatory Commission (NRC) for approval, and to EPA and DEQ for informational purposes, a radiological survey plan for the below-grade areas of both the Cold Pond and the adjacent impoundment (the "Hot Pond"), and a decontamination schedule. Said decontamination schedule shall provide for the submittal of survey results and an independent NRC confirmatory survey prior to the backfilling of either the Cold Pond or the Hot Pond.

14. Within ninety (90) days of receipt of DEQ's written approval of the Site Characterization Plan and

Groundwater Assessment Plan for the Cold Pond, or 120 days of the effective date of this Consent Agreement and Consent Order, whichever is later, Respondent shall submit to EPA and DEQ a Closure Plan for the Cold Pond. This Plan shall meet the requirements of 40 C.F.R. Part 264, Subparts G and K, and Sections 10.07 and 10.11.09 of the Virginia Hazardous Waste Management Regulations ("VHWMR") (9 Virginia Administrative Code ("VAC") 20-60-800 and 9 VAC 20-60-840 I of the Virginia Hazardous Waste Regulations ("VHWR")) [1]. At the same time, Respondent shall submit to EPA and DEQ Contingent Closure and Contingent Post-Closure Plans for the Cold Pond, as required

under Section 10. 11.09(c) of the VHWMR (9 VAC 20-60-800 C.1.a and 9 VAC 20-60-840 I.3.a of the VHWR). DEQ shall approve, or modify and approve, these plans in accordance with the VHWMR (VHWR).

15. If Respondent proposes to close the Cold Pond in accordance with the requirements of 40 C.F.R. § 264.228(a)(1) and VHWMR Section 10.11.09(a)(1) (9 VAC 20-60-840 I. 1.a) ("clean" closure), and wishes to avail itself of the site-specific removal option described in 52 Fed. Reg. 8704 (March 19, 1987), which would require Respondent to demonstrate that any hazardous waste, hazardous constituents, leachate, contaminated run-off, or hazardous waste decomposition products attributable to the waste stream formerly managed in the Cold Pond which are left in the subsoils, will not cause unacceptable risks to human health or the environment, Respondent shall submit to EPA and DEQ, prior to submittal of the Closure Plan, specific details on how it expects to make the demonstration, including, but not limited to, sampling protocols, schedules and the exposure levels that are intended to be used as standards for assessing whether removal or decontamination is achieved ("risk-based cleanup levels"). EPA and DEQ shall review such submission to determine whether it satisfies the requirements of EPA regulations, policy statements and guidance on the clean closure of surface impoundments, including the requirements described at 52 Fed. Reg. 8704 (March 19, 1987). In making such determination, EPA agrees that data obtained from work done by Respondent under the September 27, 1991 Final Administrative Order on Consent pursuant to Section 3008(h) of RCRA between Complainant and Respondent in Docket No. RCRA-III-050-CA may be used in the submission. If EPA determines that Respondent's submission does not satisfy the requirements of EPA regulations, policy statements and guidance on the clean closure of surface impoundments, EPA will notify Respondent of any necessary modifications. If EPA determines that Respondent's submission satisfies said requirements, Respondent shall submit EPA's determination to DEQ prior to DEQ's approval of the Closure Plan, for possible inclusion of the EPA-approved levels in the Closure Plan.

If DEQ incorporates such EPA-approved levels into the Closure Plan, Respondent shall submit to EPA, DEQ, and any other agency that has jurisdiction, before completion of closure, a demonstration that all residues and subsoils contaminated with hazardous waste, hazardous constituents, leachate, contaminated run-off, or hazardous waste decomposition products, have in fact been removed in accordance with EPA requirements. This

demonstration shall be subject to EPA and DEQ approval. If DEQ does not incorporate such EPA-approved levels into the Closure Plan which it approves, or EPA does not approve Respondent's submission, the requirements of VHWMR Sections 10.11.09(a)(2) and 10.11.09(b) (9 VAC 20-60-840 I.1.b and 9 VAC 20-60-840 I.2) shall apply.

16. Within 180 days of receipt of DEQ's written notice of approval of the Closure, Contingent Closure and Contingent Post-Closure plans described in paragraph 14, Respondent shall complete closure of the Cold Pond in accordance with the schedule set forth in the approved Closure Plan, unless, pursuant to the Virginia Administrative Process Act, Respondent has appealed the action of the DEQ in approving the Closure Plan and obtained intermediate relief under the Code of Virginia (Va. Code § 9-6.14:18), in which case such 180-day closure period shall be tolled pending final resolution of the appeal. If the requirements of the NRC described in paragraph 13 cannot be completed by the deadline for closure, Respondent may petition DEQ for such extension of time as may be reasonably necessary to achieve compliance with said requirements. It is the desire of the parties that DEQ grant such extension as may be reasonably necessary.

If "clean" closure of the Cold Pond has been achieved, Respondent shall provide to EPA and DEQ owner/operator and professional engineer certifications, as required under VHWMR Section 10.07.06 (9 VAC 20-60-800 F). If "clean" closure cannot be achieved, Respondent shall notify EPA and DEQ of this fact and immediately begin the approved contingent closure. Within 180 days of such notification, Respondent shall submit to EPA and DEQ a permit application for groundwater monitoring and any necessary post-closure care, in accordance with VHWMR Section 11.00 (9 VAC 20-69-970) and consistent with VHWMR Sections 10.07.08, 10.07.09, and 10.11.09(b) (9 VAC 20-60-800 H, 9 VAC 20-60-800 I and 9 VAC 20-60-840 I.2). Following the completion of contingent closure and until such time as a permit is issued, Respondent shall follow the approved Contingent Post-Closure Plan referenced above.

17. Respondent shall maintain the height of the berm on the surface impoundment at the current level until such time as the construction for closure begins, unless the NRC deems it necessary to breach the berm or reduce its height in the NRC decontamination process.

18. Respondent shall inspect the impoundment daily, and maintain a record of all inspections, until closure has been completed.

19. EPA agrees that any work performed by Respondent in accordance with the terms and conditions of this Consent Agreement and Consent Order may be used, if appropriate, as determined by EPA, to satisfy Respondent's obligations required by EPA pursuant to Section 3008(h) of RCRA.

20. At the same time that Respondent submits the Closure Plan, Contingent Closure Plan and Contingent Post-Closure Plan to EPA and DEQ, it shall submit to both agencies financial cost estimates and financial assurance for contingent closure and contingent post-closure, in accordance with 40 C.F.R. Part 264, Subpart H and Section 10.08 of the VHWMR (9 VAC 20-60-810).

21. At the same time that Respondent submits the Closure Plan, it shall submit an annual report for the current year to EPA and DEQ for approval, or amendment and approval. Thereafter, Respondent shall submit an annual report to EPA and DEQ by March 1 of each subsequent year that said report is required under the applicable regulations.

22. Any notice, report, certification, data presentation, or other document submitted by Respondent pursuant to this Consent Agreement and Consent Order, which discusses, describes, demonstrates, or supports any finding, or makes any representation concerning Respondent's compliance or noncompliance with any requirement of this Consent Agreement and Consent Order, shall be certified by a responsible corporate officer of Respondent or his/her "duly authorized representative."

A. A "responsible corporate officer" means: (1) a president, secretary, treasurer, or vice- president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation and has been assigned or delegated the authority, in accordance with corporate procedures, to sign documents on behalf of the corporation, or (2) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $35 million (in 1987 dollars when the Consumer Price Index was 345.3), if authority to sign such documents has been assigned or delegated to the manager in accordance with corporate procedures.

B. A person is a "duly authorized representative" of a responsible corporate officer only if: (1) the authorization is made in writing by a person described in Paragraph A above; (2) the authorization specifies either an individual or a position having responsibility for overall operation of the regulated facility or activity (a duly authorized representative may thus be either a named individual or any individual occupying a named position); and (3) the written authorization is submitted to EPA in accordance with Paragraph 23.a, below.

The certification of the responsible corporate officer required above shall be in the following form:

I certify that the information contained in or accompanying this [type of submission] is

true, accurate, and complete.

As to [any identified portion(s)] of this [type of submission] for which I cannot personally verify [its/their] accuracy, I certify under penalty of law that this [type of submission] and all attachments were prepared in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person(s) directly responsible for gathering the information, or the immediate supervisor of such person(s), the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

Signature:

Printed Name:

Title:

23. All documents and reports to be submitted pursuant to this Consent Agreement shall be sent to the following persons:

a. Documents to be submitted to EPA shall be sent by certified mail, return receipt requested, to:

Michael A. Jacobi (3HW90)

U.S. EPA, Region III

841 Chestnut Building

Philadelphia, PA 19107

and

Patricia D. Hilsinger, Esquire (3RC33)

U.S. EPA, Region III

841 Chestnut Building

Philadelphia, PA 19107

b. One copy of all documents submitted to EPA shall be sent by first class mail to:

Ms. Leslie Romanchik

Virginia Department of Environmental Quality

Office of Waste Permits

629 East Main Street

Richmond, VA 23219

CIVIL PENALTY

24. Respondent agrees to pay the amount of sixty-five thousand, nine hundred and forty dollars ($65,940.00) to the United States of America, which EPA hereby agrees and acknowledges shall be in full and final satisfaction of the claims for civil penalties based upon the violations alleged in the Complaint. Respondent further agrees to certify that no part of such arnount will be claimed as an allowable cost under any govemment contract, or claimed as a deduction or expense in any federal, state or local tax return. Such payment and certification shall be made by Respondent within sixty (60) calendar days of the effective date of this Consent Agreement.

25. Respondent agrees that any publicity disseminated by Respondent or any person under the control of Respondent regarding this payment shall state the full amount of the payment and indicate that the payment is in settlement of an administrative complaint brought against Respondent by EPA.

26. Payment of the penalty required under the terms of Paragraph 24, above, shall be made by sending a cashier's or certified check, payable to "Treasurer, United States of America," to:

Regional Hearing Clerk

U.S. EPA, Region III

P.O. Box 360515

Pittsburgh, Pennsylvania 15251-6515

Copies of such check shall be sent simultaneously to:

Regional Hearing Clerk (3RC00)

U.S. EPA, Region III

841 Chestnut Building

Philadelphia, PA 19107

and

Patricia D. Hilsinger, Esquire (3RC33)

U.S. EPA, Region III

841 Chestnut Building

Philadelphia, PA 19107

OTHER APPLICABLE LAWS

27. Nothing in this Consent Agreement and Consent Order shall relieve Respondent of any duties otherwise imposed on it by applicable federal, state or local law and/or regulations.

28. Any violation of this Consent Agreement and Consent Order, or further violation of Subtitle C of RCRA, may subject Respondent to further administrative, civil and/or criminal enforcement action, including the imposition of civil penalties of up to $25,000 for each day of continued noncompliance and criminal fines and/or imprisonment, as provided in Section 3008 of RCRA, 42 U.S.C. § 6928.

RESERVATION OF RIGHTS

29. This Consent Agreement and Consent Order only resolves those civil claims which are alleged in the Complaint. Nothing herein shall be construed to limit the authority of the Complainant to undertake action against any person, including the Respondent, in response to any condition which Complainant determines may present an imminent and substantial endangerment to the public health, public welfare or the environment.

30. Nothing herein shall be construed to limit EPA's right to enforce the terms of this Consent Agreement and Consent Order, or to limit EPA's or Virginia's right to pursue further enforcement actions for violations of RCRA or any federal or State law other than the violations alleged in the Complaint.

31. In the event that EPA or Virginia pursue enforcement actions for violations other than the violations alleged in the Complaint, Respondent reserves its rights to assert any and all defenses it may have to such actions.

PARTIES BOUND

32. This Consent Agreement and Consent Order shall apply to and be binding upon Respondent and EPA, their officers, directors, employees, agents, successors and assigns, and upon all persons, independent contractors, contractors, and consultants acting under or for Respondent or EPA.

33. No change in ownership or corporate or partnership status relating to BWX Technologies, Inc., Naval Nuclear Fuel Division, will in any way alter Respondent's responsibility under this Consent Agreement and Consent Order.

EFFECTIVE DATE

34. This Consent Agreement and the attached Consent Order shall become effective upon the signing of the Consent Order by the Region III Regional Administrator or his delegate.

For Respondent: BWX Technologies, Inc.

Naval Nuclear Fuel Division

Date: _____ By: _____

James A. Conner

Vice President and General Manager

For Complainant: EPA Region III

Date: _____ By: _____

Patricia D. Hilsinger

Senior Assistant Regional Counsel

After reviewing the Findings of Fact, Conclusions of Law and other pertinent matters, I recommend that a civil penalty in the amount of sixty-five thousand, nine hundred and forty dollars ($65,940.00) be assessed against the Respondent for violations alleged in the Complaint. I further recommend that the Regional Administrator or his delegate issue the Consent Order attached hereto.

Date: _____ By: _____

Maria Parisi Vickers

Associate Division Director for RCRA Programs

Hazardous Waste Management Division

U.S. EPA, Region III

THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III

In Re:

BWX Technologies, Inc. Docket No. RCRA-III-162

Naval Nuclear Fuel Division

P.O. Box 785 CONSENT ORDER

Lynchburg, VA 24505,

Respondent

The undersigned accepts and incorporates herein by reference the terms and conditions of the foregoing Consent Agreement, including but not limited to the Compliance Tasks and Civil Penalty, as if set forth at length herein.

NOW, THEREFORE, pursuant to Section 3008 of RCRA, 42 U.S.C. § 6928, and 40 C.F.R. § 22.18(c), BWX Technologies, Inc., Naval Nuclear Fuel Division ("Respondent") is hereby ordered to comply with the terms and conditions of the Consent Agreement, including but not limited to the Compliance Tasks, and to make a civil penalty payment of sixty-five thousand, nine hundred and forty dollars ($65,940) in settlement of the allegations made in the Complaint. Payment of the penalty shall be made within sixty (60) days of the effective date of this Consent Order, as required in accordance with the Consent Agreement. Payment shall be made by cashier's or certified check payable to the "Treasurer, United States of America," and shall be forwarded to the Regional Hearing Clerk, U.S. EPA Region III, P.O. Box 360515, Pittsburgh, Pennsylvania 15251-6515. Simultaneously with the forwarding of this payment, copies of the check shall be sent to the Regional Hearing Clerk (3RC00), U.S. EPA Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107 and to the EPA Region III attorney assigned to this matter.

Respondent's failure to make timely payment or to comply with the conditions in this Consent Order may result in referral of this matter to the United States Attorney for enforcement of the Consent Agreement and Consent Order in the appropriate United States District Court, including the assessment of penalties of up to $25,000 per day of noncompliance pursuant to Section 3008(c) of RCRA, 42 U.S.C.§ 6928(c).

Additionally, Respondent's failure to make timely payment or to comply with the conditions in the Consent Agreement and this Consent Order shall result in the assessment of interest, penalties, and/or late payment penalty charges.

Pursuant to 31 U.S.C. § 3717, an executive agency is entitled to assess interest and penalties on debts owed to the United States, and a charge to cover the cost of processing and handling a delinquent claim. Interest will begin to accrue if any or all of the sixty-five thousand, nine hundred and forty dollar ($65,940.00) civil penalty, set forth above, is not paid within sixty (60) days of the effective date of this Consent Order. 4 C.F.R. §102.13(b). Interest shall be assessed and accrue at the rate of the United States Treasury tax and loan rate. 4 C.F.R. § 102.13(c). In addition, a penalty charge of six (6) percent per year will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. However, should assessment of a penalty charge on the debt be required, it will be assessed as of the first day payment is due. 4 C.F.R. § 102.13(e).

Pursuant to 40 C.F.R. § 13.11 (b), the costs of EPA's administrative handling of overdue debts will be assessed monthly throughout the period the debt is overdue. As provided by EPA Resources Management Directives System, Chapter 9, EPA will assess a fifteen dollar ($15.00) administrative handling charge for administrative costs for the first thirty (30)-day period after the payment is due and an additional fifteen dollars ($15.00) for each subsequent thirty (30) days that the penalty remains unpaid.

To avoid the assessment of interest, Respondent must pay the civil penalty of sixty-five thousand, nine hundred and forty dollars ($65,940) within sixty (60) calendar days of the signing of this Consent Order. To avoid the assessment of penalty charges, Respondent must pay the full amount of the penalty within ninety (90) calendar days of the signing of this Consent Order.

This Order is effective on the date that it is signed by the Region III Regional Administrator or his delegate.

Date: _____ _____

W. Michael McCabe

Regional Administrator

Appendix B/1

[1] The Virginia Hazardous Waste Management Regulations ("VHWMR") cited herein are regulations which the Commonwealth of Virginia has been authorized by EPA to administer in lieu of the federal hazardous waste management regulations, pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b). Through this authorization, the VHWMR have become requirements of RCRA Subtitle C and are, accordingly, enforceable by EPA pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). After the VHWMR were authorized by EPA, the Commonwealth of Virginia amended its regulations, titled them Virginia Hazardous Waste Regulations ("VHWR") and codified them in the Virginia Administrative Code. For convenience, the VHWR which are analogous to the federally-authorized VHWMR are cited in parentheses immediately following the VHWMR.