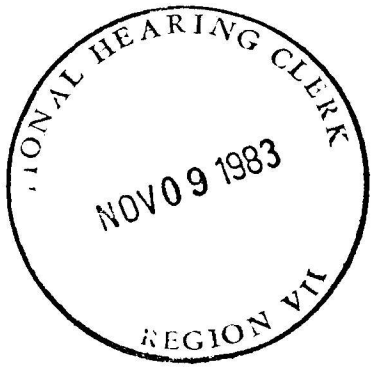

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	RCRA-83-H-004
KUHLMAN DIECASTING COMPANY	)	
	)	INITIAL DECISION
Respondent	)	

1. Resource Conservation and Recovery Act - Penalty Assessment - Where a count(s) in a complaint alleges violations concerning the improper or unpermitted storage of hazardous wastes or failure to install a groundwater monitoring system relative to such waste, the Agency must produce testimony concerning the relative toxicity or hazardousness of such wastes or risk that the fact finder will consider the actual or threatened damage which they pose to the environment or human health to be of a low order.

2. Resource Conservation and Recovery Act - Penalty Assessment - Isolated violations regarding such matters as failure to post "No Smoking" signs and leaving a lid off of a drum of solvents, absent aggravating circumstances, should be dealt with by a warning letter or included in the complaint as a violation for which no penalty is assessed.

3. Resource Conservation and Recovery Act - Penalty Assessment - For violations involving the failure to install and utilize a ground monitoring system, the burden is upon the Agency to produce evidence concerning the likelihood of the stored wastes contaminating ground waters, wells and springs. Actual contamination, of course, need not be proved.

4. Resource Conservation and Recovery Act - Penalty Assessmen - In assessing multiple penalties for a single act which may violate separate sections of the regulations, the Agency should examine both the legality and propriety of seeking such penalties. (See also, sylabus #3, in re, American Ecological Recycle Research Corp., et al, RCRA-VIII-82-4, July 1, 1983).

5. Resource Conservation and Recovery Act - Penalty Assessment If a person fails to test a solid waste, based on his knowledge of the hazardous characteristics of the waste in light of the materials or process used and a later analysis determines that the waste is not hazardous, no violation of RCRA is present.

Appearances:

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U. S. Environmental Protection Agency
Kansas City, Missouri
For the Complainant

J. Daniel Stewart, Esquire
Brown, Koralchik & Fingersh
Kansas City, Missouri
For the Respondent

INITIAL DECISION

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, (hereafter "RCRA"), Section 3008, 42 U.S.C. 6928 (Supp. IV 1980), for assessment of a civil penalty for alleged violations of the requirements of the Act, and for an order directing compliance with those requirements.[1/] This proceeding was instituted by a complaint and compliance order against Kuhlman Diecasting Company, Inc., issued by the United States Environmental Protection Agency (hereafter "EPA") on January 1, 1983. The complaint alleged that Kuhlman at its facility in Stanley, Kansas conducts hazardous waste activities and had violated the standards for hazardous waste treatment, storage and disposal facilities. The specific

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1/ Pertinent provisions of Section 3008 are:
Section 3008(a)(1): "[W]henever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subtitle[C] the Administrator may issue an order requiring compliance immediately or within a specified time. . . ."
Section 3008(g): "Any person who violates any requirement of this subtitle [C] shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation."
Subtitle C of RCRA is codified in Subchapter III, 42 U.S.C. 6821-6931.

violations charged were that since November 19, 1980 the Company had generated hazardous wastes not identified on its notification form specifically those listed wastes "F001" and "F005" as defined in 40 C.F.R. 261.31 and had conducted hazardous waste activities not identified on its notification form specifically--treatment, storage or disposal of hazardous wastes. The complaint further alleged that the Company had violated Section 3010(a) of RCRA by filing a notification of hazardous waste activity which failed to state all of the hazardous wastes handled, and failed to state the treatment, storage and disposal of those wastes as engaged by the Company at their Stanley, Kansas plant. The complaint identified eight (8) specific individual counts growing out of the general deficiencies described above and sought a total civil penalty in the amount of $25,500.00. The order as part of the complaint also listed a number of activities that the Company must accomplish within specified time limits.

The Company filed an answer which, in essence, admitted the violations but pled extenuating circumstances which they felt would either substantially mitigate any penalty assessment or eliminate any penalty. Since no essential facts as set forth in the complaint were denied by the Respondent, the undersigned sought to have this matter submitted to him on briefs merely arguing the question of the amount of the appropriate penalty to be assessed. The Respondent resisted this suggestion, stating it felt that it could not properly and fully set forth its position in this matter through briefs, and requested that a full hearing on the matter be held. Accordingly, a hearing was held in Kansas City, Missouri on August 16, 1983. Following the hearing, each party submitted proposed findings of fact and conclusions of law. On consideration of the entire record and submissions of the parties, a penalty of $8500.00 is assessed, and a Compliance Order is issued. All proposed findings of fact inconsistent with this decision are rejected.

Factual Background

Kuhlman, which has been in business for approximately 36 years, manufactures zinc diecastings primarily for the automotive, small appliance and telecommunications industries, and it also electroplates and paints the parts it manufactures. At the facility in question, Kuhlman has approximately 39 acres of land on which is located its 70,000 square foot manufacturing facility. The Company became aware of the requirements of RCRA sometime in late July 1980 and on or about August 1980 it filed a notification of hazardous waste activitiy with the Agency. The Company indicated on that notification that it generated a hazardous waste identified as "F006" which is a wastewater treatment sludge from its electroplating operation. At the time of the Company's filing of the notification with EPA, it was of the opinion that its only hazardous waste activity was the generation of the above-mentioned sludge and that it was not engaged in any other activity regulated by RCRA, such as treatment, storage or disposal of a hazardous waste. The Company, believing that its wastes, although designated as hazardous by EPA, did not really contain hazardous substances in the quantities identified by the regulations, attempted to determine from EPA just what constituents of its waste rendered it hazardous. It was determined that several components of its waste, such as nickel and cyanide, were the components of concern, and subsequent to that discovery, the Company tried to find out from EPA and the State of Kansas what the allowable concentrations of these components were. Apparently, they were able to find out the allowable limits on cyanide, but were unable to determine what the allowable limits were for nickel.

The record reflects that in 1980 the Company had its wastes analyzed and was of the opinion that it should not be considered hazardous under the Act, and inquired of the State of Kansas and EPA as to the procedures for having the

sludge "delisted". Delisting is a procedure identified in the regulations as a method whereby a listed "substance", which is identified in the regulations as being hazardous by its nature, may be delisted if the generator thereof can satisfy EPA that its particular material does not, in fact, contain the substances of concern in the quantities that the regulations contemplate. Once this delisting petition has been received and approved by EPA, the facility no longer need to concern itself with its handling thereof and need not proceed to comply with the regulations normally associated with the handling of a hazardous waste. On April 8, 1981, the Company petitioned to have the waste delisted and also filed a Part A application.

Under the procedure envisioned by Congress and as administered by EPA, any hazardous waste handling facility in existence on November 19, 1980 was required to have done two things in order to obtain what the Agency refers to as "interim status". The facility must file a notification with the Agency of the fact that it handles hazardous waste along with the description of precisely what it handles and how it deals with it. If it treats, stores and disposes of any hazardous waste, it must also file a Part A application, and upon the performance of these two acts the facility is given what the Agency refers to as interim status. This is, as one can imagine from the title, a temporary status which ultimately will lead either to the issuance of a final permit under the Act or the closure of the facility by the owners thereof. Since at the time they filed this notification in August 1980, the Company did not feel that it was doing anything other than generating a hazardous waste, it did not file a Part A application and, therefore, did not enjoy interim status at all times pertinent to this proceeding. When the Company was later advised that they were, in fact, not only generating hazardous wastes but also storing it, since it put the

sludge from its treatment pond into its storage lagoon, they filed a Part A application. On February 10, 1982, the Agency denied their Part A application primarily for the reason that they had failed to file on or before November 19, 1980, the date specified in the statutes and the regulations for such filing. During this time, the Company was still attempting to have its wastes delisted and engaged in some correspondence with both the Regional office of EPA and the Headquarters office of EPA which handles these petitions. Apparently some of the test results which the Company had performed on its wastes indicated that its concentrations of nickel were higher than those allowed and they were advised that they should withdraw their petition, which they did on December 3, 1981.

On May 6, 1982 and August 19 and 20, 1982, representatives of EPA inspected the Company's facilities and discovered information and activities which gave rise to the complaint issued as above described.

The Complaint

Count I of the complaint alleges that when the Company sent in its notification back in August 1980, it failed to list the fact that it was using and storing on its facilities two specifically listed wastes, those being "F001" and "F005" which are, essentially, solvents. The Agency sought a penalty in the sum of $2500.00 for this violation.

Count II of the complaint alleges that inasmuch as the Company was storing hazardous wastes on its facility, it was required by the law to file a Part A application and achieve interim status, and since it did not do so in a timely fashion, a penalty of $2500.00 was requested to be assessed for this violation.

Count III of the complaint alleges that the Company's Part A application stated that the only hazardous waste treated, stored or disposed of was the

wastewater treatment sludge and it neglected to list the solvents hereinabove identified. The specific violation was for storing hazardous wastes not specified in Part A of the permit application, and a civil penalty in the amount of $2500.00 was requested to be assessed for this violation.

Count IV of the complaint alleges that the facility employed processes not specified in Part A of the permit application, and in this case the processes involved storing of the solvents in tanks or drums and storing the hazardous waste sludge in surface impoundments, neither of which processes were specified in Respondent's Part A permit application. A penalty in the amount of $5000.00 was requested to be assessed for this violation.

Count V of the complaint alleges that the Respondent Company was generating a solid waste, to wit, paint filters which may be hazardous, and also a solid waste which is identified as a reddish-brown liquid which was reported by the Respondent to be a mixture of synthetic oil and water from a dye-casting machine which also may be hazardous. The EPA alleged that the Respondent had a duty to determine whether these wastes were hazardous and that the failure to do so violated the Kansas statutes and EPA regulations, and a civil penalty in the amount of $1000.00 was requested to be assessed for this violation.

Count VI of the complaint also makes mention of a Kansas regulation which is identical to the EPA requirement having to do with the necessity to have "No Smoking" signs conspicuously placed wherever there is a hazard from ignitable wastes. The inspection reveals that in the vicinity of approximately 12 full or partially-full 55-gallon drums of solvents there were no "No Smoking" signs posted. The complaint requests a fine in the amount of $1000.00 for this violation.

Count VII of the complaint is based on the fact that the regulations require that containers holding hazardous wastes must always be closed except

when necessary to add or remove hazardous wastes and that on August 19 and 20, 1982 during the inspection one of the drums containing a solvent was open. A civil penalty in the amount of $1000.00 was requested to be assessed for this violation.

Count VIII of the complaint alleges that the surface impoundments used to manage hazardous wastes located on the premises, of which three (3) were identified, constitute treatment, storage and/or disposal of hazardous wastes, and that a groundwater monitoring program must be installed no later than November 19, 1981, and that as of the date of the inspection in August 1982, no such groundwater monitoring program capable of determining the impact on the quality of groundwater in the upper-most aquifier underlying the facility was in place and, therefore, a penalty in the amount of $10,000.00 was proposed to be assessed for this violation.

Discussion

Essentially what happened in this case was that the Company made several omissions in 1980 which provided the foundation upon which most of the eight (8) counts in the complaint are premised. They neglected to file a Part A application on or before November 19, 1980 based upon their judgement that they were only generators of waste. They mistakenly believed that the storage of this waste in their lagoons and treatment ponds did not constitute "storage" of a hazardous waste and, therefore, they did not need to file a Part A application. They also failed to investigate the other materials being handled on the facility, to wit, the solvents which they use for cleaning of painting equipment and degreasing other equipment. Solvents are very clearly identified in the information which the Company received from EPA back in 1980 and also prominently mentioned in the identification and listing of hazardous waste regula-

tions promulgated by the Agency in May 1980 appearing in the Code of Federal Regulations at 40 C.F.R. 261. The fact that these solvents were considered to be hazardous waste by the Agency was apparently not known to the Company until the time of the inspection in 1982. Since the Company is not a "mom-and-pop operation" and employs a hazardous waste coordinator, the Court was at a loss to understand how the Company could have missed the solvents in inventorying its materials and processes prior to filing its notification with EPA. When Mr. Meeker, the hazardous waste coordinator, was on the stand this question was posed to him by the Court and Mr. Meeker responded that the procedure employed was to take the list of hazardous materials to a senior company official who had been involved with the Kansas operation for some time and ask him to look through it and see what there was on the list that they were involved with. Somehow or other the solvents slipped by unnoticed in this exercise and even though everyone on the premises knew that they used solvents, nobody took the trouble to see if the solvents used were of the type described by EPA in its listings. This omission was not determined until after the Company had belatedly filed its Part A application in 1981 where it listed the wastewater treatment sludge as the only hazardous material that the facility dealt with.

The failure to recognize that the placing of its sludge in a storage lagoon constituted the storage of a hazardous waste also gave rise to the most expensive violation identified in the complaint, that being the failure to install and operate an adequate groundwater monitoring system to determine whether or not the waste contained in the lagoon would find its way into the groundwater on or adjacent to the facility and, thus, contaminate surface water, wells or springs, as required by the regulations.

Under the regulations promulgated by EPA, if a facility is storing a material which the regulations describe and list as being hazardous it must

continue to treat the material as hazardous until such time as, based on a delisting petition, the Agency determines that the material is not, in fact, hazardous. Prior to such delisting, the development and operation of a groundwater monitoring system is required. In this instance, the Company took a gamble that the Agency would agree with its determination that the sludge was not, in fact, hazardous and, therefore, took the chance that if they were wrong in their decision they must suffer the consequences for their failure to follow the dictates of the regulations concerning the storage of such a waste. In this case the Company gambled and lost. Their delisting petition although not formally rejected by the Agency was subsequently withdrawn by the Company and, therefore, for all regulatory purposes, the sludge must be treated and considered as a hazardous waste despite the Company's honestly held belief that it was not, in fact, hazardous.

As an aside at this point, it should be pointed out that the Company at the time of the hearing had complied with all requirements of the Compliance Order incorporated within the complaint with the exception of installing and operating a groundwater monitoring system. It should also be noted that shortly after the Company was advised that the placing of the waste in the lagoon constituted storage of hazardous waste, it discontinued the practice and instead placed the material in barrels which were then stored in a steel tank for subsequent removal to a hazardous waste disposal site in another state.

As part of the prehearing exchange of information ordered by the Court, EPA was required to specify in detail how it arrived at the amount of the penalties requested for each count in the complaint. In its submission in response to this request, EPA advised the Court and the Respondent that its witness, Mr. Wayne Kaiser, would testify on this subject from Exhibits 1 through 3.

The three exhibits referred to are in-house Agency memoranda developed by the Office of Solid Waste and Emergency Response in EPA Headquarters in Washington, D.C. and are titled, respectively: "Penalty Policy for RCRA Subtitle C Violations, Guidance on Developing Compliance Orders under Section 3008 of RCRA; Enforcement of Groundwater Monitoring Requirements at Interim Status Facilities", and "Guidance on Application of Interim Status Standards to Facilities Which Have Failed to Qualify for Interim Status". These memoranda all eminate from the office of Mr. Douglas McMillan, Acting Director of Office of Waste Programs Enforcement. The purpose of these documents was to provide guidance to the regional offices in determining how to proceed against persons or facilities which had violated certain requirements of the statute and the regulations promulgated pursuant thereto. These documents also were intended to expand upon and modify a previous document entitled: "Framework for the Development of a Penalty Policy for Resource Conservation and Recovery Act", prepared for the Office of Enforcement, EPA, by Policy Planning and Evaluation, Inc., a contractor located in McLean, Virginia. Throughout this opinion, this document will be referred to as the Draft Penalty Policy. It should be noted that although this Policy has never been officially adopted by the Agency nor published in the Federal Register, its use by the Agency for the purpose described has been approved by this Court as well as other Judges within the Agency in previous decisions.

The Draft Penalty Policy provides a basis whereby a uniform penalty assessment process can be utilized by all the Regions within EPA so that there is not a disparity among the Regions in assessing penalties for the same or similar violations. One of the foundations of this process is the establishment of classifications of violations and then the creation of the penalty matrix for

each class of violations. This matrix is a grid, upon one axis there is Conduct and on the other axis there is Damage. Each of these axes are divided into three categories--those being: major, moderate or minor in descending order of seriousness, to wit:

FIGURE III-2

THE PENALTY MATRIX FOR CLASS I VIOLATIONS

Damage / Conduct	Major	Moderate	Minor
Major	$25,000 to 20,000	$11,000 to 8,800	$4,800 to 3,800
Moderate	19,000 to 15,000	8,500 to 6,500	3,600 to 2,700
Minor	14,500 to 11,500	6,500 to 5,000	2,500 to 500

Apparently, the Agency has established a policy whereby the failure to propose, develop and utilize a groundwater monitoring system in those instances where such a system is required is considered to be a Class I violation.

The attachments to these Exhibits indicate that the Agency has altered the configuration of the original matrix so that the axes now are identified as Actual or Threatened Damage with the degrees of seriousness as being identified as Major, Substantial and Moderate, and the other axis identified as Classification of Respondent's Noncompliance with Regulatory Standards, likewise being divided into the same three categories of seriousness, to wit:

THE PENALTY MATRIX FOR CLASS I VIOLATIONS
AND FOR CONTINUED OR FLAGRANT CLASS III VIOLATIONS

Actual or Threatened Damage

Classification of Respondent's Non-compliance with Regulatory Standards

	Major	Substantial	Moderate
Major	$25,000 to 20,000	$10,000 to 8,000	$2,500 to 1,500
Substantial	19,000 to 15,000	7,000 to 5,000	1,000 to 500
Moderate	14,000 to 11,000	4,000 to 3,000	400 to 100

In utilizing these matrices EPA witness Mr. Kaiser testified that the failure to install and employ the groundwater monitoring system was determined to be a substantial noncompliance with regulatory standards and that on an actual or threatened damage axis he placed their violations somewhere between major and substantial which according to his testimony caused him to arrive at the figure

of $10,000.00. In selecting the appropriate damage category, Attachment C to Complainant's Exhibit 1 states that the actual harm or potential for harm to human health or the environment should be based upon facts of a particular situation and that this threat should then be classified as major, substantial or moderate.

Complainant's Exhibit 2, which the witness identified as providing some guidance on the question of how to come up with an appropriate penalty for failure to install or operate a groundwater monitoring system does not, in fact, provide any help in determining where, in the prevously described matrix, a Respondent should be placed. It only indicates that, in most instances, failure to utilize such a groundwater monitoring system should be considered as a Class I violation. Complainant's Exhibit 1, which is entitled: "Penalty Policy for RCRA, Subtitle C Violations", once again provides little or no help in directing the appropriate Agency official as to where in these matrices a particular Respondent's conduct would place him both in context of the damage portion or the classification of the Respondent's noncompliance with requirements. Therefore, one must go back to the previously mentioned Draft Penalty Policy which does address these questions in some detail.

My review of the Draft Penalty Policy suggests that the Agency's choice on the conduct side of the matrix of substantial is justified in this instance since the installation and operation of a groundwater monitoring system is considered by the Agency to be a very important part of the overall enforcement scheme designed by the Congress and enforced by EPA under RCRA. As to the actual or threatened damage aspect of EPA's assessment, the picture is not that clear. As indicated above, the determination of the damage category is based on the actual harm or the potential for harm to human health and the environment.

The Draft Penalty Policy, on Page 27, states that:

> "The damage factor consists of two elements: (1) the extent of actual or potential harm that has occurred or could occur as a consequence of the violation; and (2) the likelihood that the subject violation will lead to the potential harm. The two elements making up the damage factor are closely related. However, enforcement personnel should be aware that the first element accounts for the degree of potential harm and is therefore concerned with the hazardousness of the waste, amount involved, and other characteristics of the waste. The second element is concerned with the circumstances leading to and making up the violation."

The Draft Penalty Policy then goes on to state that in evaluating the different levels of actual or potential damage, the categories defined in the document, which are "major", "moderate" and "minor", are closely akin to the subdivisions in Complainant's Exhibit 1, which are "major", "substantial" and "moderate". The EPA witness stated that in determining the damage aspects of the failure to install the monitoring system, he placed the amount somewhere between major and moderate and came up with his figure of $10,000.00. On Page 38 of the Draft Penalty Policy, major is defined as, "due to the waste involved, and the violation can lead to a high degree of harm to human health or the environment". Moderate is defined as, "a violation which involves a highly hazardous waste but the likelihood of damage resulting from noncompliance is low, or that the waste involved does not exhibit characteristics that represent a major threat to human health or the environment." The minor category which I assume corresponds to the moderate designation in the later memo states that this category encompasses violations where "the likelihood of harm and the degree of potential harm is considered low".

The record in this case reveals that the hazardous component of concern of the Company's sludge is nickel. EPA presented no witness nor offered any exhibits which would indicate the relative toxicity of or, in the terms of the document, the "hazardousness" of the material involved. Not being a toxicologist

nor a scientist but merely possessing a well-informed layman's notion of the relative toxicity of substances, I am not persuaded that nickel would be considered as a highly toxic or highly hazardous material. In addition, EPA introduced no creditable evidence relating to the potential for this material reaching either the surface waters, wells or springs in and around the area of the Company's property. In this regard, EPA presented a report prepared by its witness Mr. Littell entitled: "Report of Toxic Residues in the Upper Blue River Biota", which appears as Complainant's Exhibit 4. In designing the report, samples of cray fish, sun fish, minnows and other macro and micro benthic organisms were tested above, at and below the Kuhlman facility on the Blue River and its tributaries. This report concluded that the aquatic species tested showed higher levels of cadmium, chromium, copper, nickel and zinc adjacent to and downstream from Kuhlman's facility than was seen upstream. The report concluded that:

> "It is reasonable to assume that, as a result of Kuhlman discharging chromium, copper, nickel and zinc, the Company is at least partially responsible for the higher than background residues in a downstream biota. The impact Kuhlman is having on the overall biological integrity of the river still remains largely unanswered, however."

The results of the study are not questioned. However, there was nothing in the report to suggest that the presence of the metals detected have their genesis in any of the storage lagoons operated on Kuhlman's facilities as opposed to some other source on their property. The picture is further clouded by the fact that Kuhlman has a NPDES permit which permits it to discharge directly into the river in question and the constituents of that discharge are precisely the same metals that were detected in the study. Given the fact that data and evidence submitted by the Respondent as to the low permeability of the soil in and around its facilities and the distance of the storage lagoons from the river itself would argue that the NPDES water discharge directly to the river is the more

likely source of the heavy metals seen by Mr. Littell in his study and that a conclusion or assumption that the presence of these materials in the river has their genesis in the Company's storage lagoon is not warranted by the evidence.

Since the Agency presented no testimony as to the relative toxicity of nickel nor any evidence addressing the potential for the Respondent's waste entering the groundwater in and around the Company's facility, I am of the opinion that the potential danger category relevant to this facility must be rated as "moderate". Utilizing the matrix submitted by EPA using a substantial category for the lack of compliance element and a moderate category for the actual or threatened damage, it is my opinion that a fine of $1,000.00 would be appropriate for this violation. In making this determination, I also considered the fact that despite the Company's initial failure to develop such a monitoring system, the testimony shows that at the time of the hearing substantial agreement had been made between EPA and the Respondent as to the design of the system, and it is my understanding that the Company is in the process of installing a system at some expense. Therefore, one can not penalize them for being recalcitrant, but rather some credit must be given to them for cooperativeness and an expressed intent to remedy their failure in a prompt and efficient manner.

Count V of the complaint, as indicated above, has to do with the failure of the Respondent to test certain wastes which it generates on its premises consisting of paint filters and casting machine wastes. The testimony at the hearing revealed that the Respondent, based on its experience and knowledge of the processes involved, did not feel that these two materials were, in fact, hazardous and at EPA's prompting they had the paint filters and the liquid wastes tested and it was determined that these two materials were not, in fact, hazardous. EPA takes the position in assessing the penalty requested, that it

is the responsibility of an owner of a facility which generates any hazardous wastes as defined in the regulations to subject that material to tests to determine whether or not it is, in fact, hazardous. A reading of 40 C.F.R. §262.11 states that: "A person who generates a solid waste, as defined in 40 C.F.R. 261.2 must determine if that waste is a hazardous waste using the following methods." The section then goes on to describe the steps involved in making this determination. Subsection C of that section states that: "If a waste is not listed as a hazardous waste in Subpart D of 40 C.F.R. 261, he must determine whether the waste is identified in Subpart C of 40 C.F.R. 261 by either: (1) testing the waste according to the method set forth in relevant parts of the regulations, or (2) applying knowledge of the hazard characteristic of the waste in light of the materials or the process used." In this case, the Respondent utilized part (2) in its initial determination that the solid waste was not, in fact, a hazardous waste as described by the regulations. This determination was substantiated by subsequent tests performed by the Respondent on the waste which, as indicated above, showed that is was not, in fact, hazardous. In light of the above, I am of the opinion that no violation of the Act or the regulations was committed by the Respondent in this regard by virtue of their failure to subject the solid waste to testing. Obviously, if a owner of a facility feels that his waste is not hazardous and treats it as such, and it is later determined, after testing, that the material was, in fact, hazardous then obviously a violation of the statute and regulations has occurred. Unlike the Respondent's acts as previously discussed, in this case the Respondent gambled and won and, therefore, no penalty for this activity is appropriate under the Act.

Counts VI and VIII have to do with the failure to have "No Smoking" signs posted in the vicinity of the solvents and the fact that upon the date of the

inspection one of the lids was observed to be off of one of the drums of solvent. The Agency has suggested that a penalty of $1000.00 for each of these violations would be appropriate. In its answer and as substantiated by the testimony of the Respondent's witnesses at the hearing, the facility did have "No Smoking" signs in areas immediately adjacent to the storage area for the solvents through which one must pass in order to get to the area where they are stored and, in addition, immediately after the inspection, "No Smoking" signs were placed in the area immediately adjacent to the drums.

As to the failure to have a lid on one of the drums of solvent at the time of inspection, the Respondent's witnesses testified that at the time of the inspection the employees were in the process of adding solvents to the drums and that in all other instances the lids are kept firmly in place on the drums. At the hearing, the Court examined Mr. Kaiser, the Agency's witness on penalty assessment, and he was asked whether or not he would have suggested a penalty for this violation if he had been advised that the lid was merely off for the purpose of adding some additional solvent and that following that exercise the lid was promptly replaced. His answer was that he would not. As to the "No Smoking" sign violation, the policy of the Agency as enunciated in the memoranda heretofore described, which appear as Complainant's Exhibits 1 through 3, the Agency's policy appears to be that in cases of violations of this nature which are not shown to be continuous or flagrant violations, a warning letter rather than the imposition of a fine is the recommended procedure for the Agency to take.

Based on the entire record as to these two violations and considering the testimony and the Agency's penalty policy as expressed in its own memoranda, I am of the opinion that no penalty should appropriately be assessed for these violations which under the Agency's own guidance are considered to be de minimus in nature.

Counts I, II, III and IV essentially stem from the same act or acts of omission on the part of the Respondent. That being: (1) the failure to list the solvents on the notification form sent to EPA in 1980, and (2) the failure to have acquired interim status at the time of the inspection, which makes the treatment and storage of hazardous wastes illegal. As discussed briefly above, Count I for which a $2500.00 penalty is requested stems from the failure of the Respondent to list the solvents as a hazardous waste on its premises that it deals with. Count III, for which another $2500.00 penalty is requested, has to do with storing the solvents on the premises without having achieved interim status. Count IV, for which a $5000.00 penalty is assessed, has to do with storing these solvents without having listed such activity in their Part A application which they belated filed in April 1981. Therefore, if one looks at these three Counts it appears that the Agency is attempting to assess a $7500.00 penalty because it stored its solvents on its premises. This single activity according to the Agency resulted in three separate violations: (1) the failure to list the solvents on their notification form; (2) storing the solvents without having interim status, and (3) the very act of storing the solvents constituted the utilization of a process, that being storing, which the Respondent neglected to mention in its Part A application. Somehow this procedure seems to me a little heavy handed and may constitute "over-kill" in the area of assessing penalties against this Respondent.

The Respondent seems to have been caught in a "Catch 22" situation in this case, because when they belated filed their Part A application, the Agency says you are not entitled interim status because you filed your application late and yet when it comes time to assess penalties against them they are judged by the standards applicable to facilities which do enjoy interim status, thus the regulations applicable to those who have filed their Part A application on time

are being applied to this Respondent who does not have interim status. This apparent paradox is discussed in the Agency's memorandum dated December 21, 1981, which appears as Complainant's Exhibit 3, where they discuss this very question and come to the conclusion that the Agency should enforce the interim status standards against existing facilities operating without interim status and that they should proceed to assess penalties where appropriate for violations under the standards. The Agency realizing that this is not a conclusion, which leaps from a reading of the current regulations, goes on to say that they plan to amend 40 C.F.R. §265.1(b) as soon as possible to provide clearer notice to owners or operators of facilities operating without interim status that they must comply with the Part 265 regulations which have to do with people with interim status. The other option open to the Agency which is more clearly indicated from reading the statute and the regulations is that they would prosecute persons such as the Respondent for operating without a permit, rather than coming in and telling them if you had a permit here is what you should have been doing, and since you do not have a permit and you are doing it, we are going to treat you as though you really did have a permit.

The other problem I have with the Agency's theory in this case has to do with a line of cases dealing with multiple violations growing out of the same act. A detailed discussion of this concept was made by the late Honorable Bernard D. Levinson, Administrative Law Judge, in his decision in the matter of Hawk Industries, Inc., FIFRA Docket No. II-120C. In that case, the Respondent was charged with misbranding in that he placed his own label over the label of the manufacturer and shipped the drum of pesticide in interstate commerce. The complaint in that case contained three separate paragraphs in which a different mode of misbranding is alleged by reason of the failure of the label to bear

certain required information, that is, failure to bear the required warning or caution statements, failure to bear adequate directions for use, and failure to bear ingredients statement, all of which are required by separate sections of the Act. In that case, a penalty of $1540.00 was proposed to be assessed for violations of the defacing and destroying of the label and a separate penalty, each in the amount of $1540.00 was proposed to be assessed for each mode of misbranding. Thus, the penalties in that case aggregated $6160.00. In his decision, Judge Levinson, after discussing a variety of cases, concluded that it was not proper for the Agency to attempt to assess three separate penalties for each of the various modes of misbranding since the actual violation was that of misbranding for which one penalty should be properly assessed and that the three spearate counts described were merely descriptive of various ways in which misbranding could be accomplished. Judge Levinson also discussed the principle expressed in Blockburger v. United States, 284 U.S. 299, 304 (1932), wherein the Supreme Court said that: "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of additional fact which the other does not." He distinguished his decision from that case by saying, in essence, that where different modes of misbranding are charged, different proof may be required to establish each mode of misbranding, but there is only one offense and separate statutory provisions have not been violated.

Although the circumstances in the Hawk decision are not precisely the same as they are in this case, the basic philosophy enunciated therein seems to have some application to this case. The primary activity for which the Respondent is being charged in regard to the solvents is that they stored them in drums on their facility. That constitutes the act that triggers the imposition of the

three separate counts that EPA suggests be separately penalized in this case. The Agency's position is that they failed to list the solvents on their notification form, they failed to get interim status, and, therefore, the storage was done without obtaining interim status, and that the failure to tell EPA that it was, in fact, storing them constitutes yet a third violation. There is nothing in the testimony or exhibits admitted in this case which would indicate that the presence of these drums of solvent on the Respondent's property, in and of itself, constituted a hazard to the environment or human health. Additionally, the testimony reveals that as soon as the Respondent was advised that the solvents on their premises were, in fact, hazardous materials, they immediately arranged to have them transported off of their property for disposition by another facility.

Mr. Kaiser, the Agency's expert witness on the establishment of penalties, stated he considered all of the violations in the complaint to be: (1) Class I violations; and (2) that on the Respondent's noncompliance with regulatory standards axis, they were all considered by him to be substantial. In determining the proper cell to use on the actual or threatened damage axis of the matrix, the witness felt that the proper place was somewhere between substantial and moderate, and he picked a mid-way point, which was $2500.00. Once again, I have no particular quarrel with the Agency picking the substantial category for purposes of the Respondent's noncompliance with regulatory standards in that they certainly should have known the solvents were hazardous wastes under the Act and should have identified them in both the notification report, which they timely filed, and the Part A application, which they filed late. I am not persuaded, however, that the Agency's choice of $2500.00 as representing the penalty to be associated with the actual or threatened damage which the presence of these drums of solvents on the Respondent's property presented to human

health or the environment was appropriate. There was no evidence presented that the drums in question were defective in any way, that they were leaking or rusting or in a general state of poor maintenance. Given all of the circumstances concerning the presence of these solvents on the property as identified in Count III and Count IV of the complaint, I am of the opinion that the presence of these drums on the Respondent's property constituted at most a moderate threat to the environment and that, therefore, using the top figure of that cell, I feel that a penalty of $1000.00 for Count III and the portion of Count IV having to do with storing the solvents should be $1000.00.

The second part of Count IV involves the storage of the treatment sludge in surface impoundments, which is a process not identified in the Respondent's Part A permit application. The Part A application filed by the Respondent stated that they stored the sludge in tanks. The fact that they were also storing the sludge in surface impoundments constituted a storage process not identified by the Respondent in its application and, therefore, was a violation of 40 C.F.R. §122.23(b)(2), that is, using a process not specified in a Part A permit application. In regard to this penalty assessment, EPA's witness stated that he once again referred to the penalty matrix which appears as Attachment C to Complainant's Exhibit 1. He determined that the noncompliance with regulatory standards category should be substantial and that the actual or threatened damage category should also be substantial, and in this case he elected to pick the lower of the two numbers and came up with $5000.00. As discussed above, the presence of the sludges in the storage lagoon has not been demonstrated to create a substantial hazard to the environment or to human health since the Agency presented no information on the toxicity of the components of the sludge, nor did they present any competent testimony concerning the likelihood of the components of the sludge reaching ground waters, surface waters, springs or

wells. I am, therefore, of the opinion that the potential damage aspect of this violation is somewhere between moderate and substantial, and I am of the opinion that a penalty in the amount of $1500.00 is appropriate given the totality of the circumstances surrounding that violation. Taking into account, therefore, the two aspects which comprise Count IV, I am of the opinion that a total penalty of $2500.00 would be appropriate.

Counts I and II of the complaint which are the failure to list the solvents on the notification form and the failure to file for a Part A permit application and thus obtain interim status, were described by EPA's witness as being Class II violations. Class II violations according to EPA's witness are statutory violations in this case being failure to comply with the notification requirements of §3010 of the Act and §3005 of the Act having to do with the necessity of obtaining a permit to engage in the handling of hazardous wastes. Unlike the matrix approach, which the Agency has utilized in determining a proper penalty for Class I violations, the method set forth for Class II violations consist of a spectrum ranging from $100.00 to $25,000.00 with three categories of violation being: "moderate", "substantial" and "major". The spectrum of penalties suggested for a moderate violation are from $100.00 to $5000.00. In this case, EPA testified that it selected a penalty of $2500.00 which is the mid-line of the lowest category, in other words, mid-way between $100.00 and $5000.00. As to Count I, the failure to list the solvents on the notification form, I consider this to be a more serious violation than Count II, since this notification form is the primary information source available to the Agency to know what kinds and types of hazardous material which exist on the premises on a given facility and how the operator of that facility deals with these hazardous wastes. I am, therefore, of the opinion that a more appropriate penalty for the failure to list these solvents should be $3000.00, rather than

$2500.00. As to Count II, which is the failure to timely file a Part A permit application, I am of the opinion that that violation is not a serious one inasmuch as the Respondent has already been substantially penalized for failing to have interim status and that had they filed their Part A application in a timely fashion they would have been granted interim status, based solely upon the filing of the required information with EPA. As indicated above, the Respondent did file for interim status in April 1981 and was refused such status primarily on the basis that its application was late. It is my understanding that there exists a procedure within EPA for dealing with late Part A filers and that although they are not granted interim status, as such, the Agency in many cases issues a consent agreement whereby the late filer agrees to operate his facility in conformity with all the regulations applicable to the person enjoying interim status and the Agency will treat him as having interim status for all purposes. Although I recognize that the Agency has the flexibility of exercising its prosecutorial discretion in these cases, it occurs to me that an imposition of a fine of $2500.00 for failing to have interim status in this case is not appropriate. Given the circumstances of this case, I am of the opinion that a penalty of $1500.00 is appropriate for the violation set forth in Count II of the complaint.

Conclusion

It is concluded on the basis of record that the Respondent has violated §3008 of RCRA, by failing to list the hazardous wastes designated as "F001" and "F005" as defined by 40 C.F.R. §261.31; §3005 for failing to have achieved interim status; 40 C.F.R. §122.23(b)(1) for storing an unspecified hazardous waste on its facilities; 40 C.F.R. §122.23(b)(2) for employing a process of

storage not specified in Part A of the permit application; 40 C.F.R. §265.17 and §265.173; and 40 C.F.R. §265.90 for failing to implement a groundwater monitoring program. It is further concluded, for the reasons stated, that $8500.00 is an appropriate penalty for said violations and that a compliance order in the form hereafter set forth should be issued.

ORDER[1/]

Pursuant to the Solid Waste Disposal Act, §3008, as amended, 42 U.S.C. 6928, the following order is entered against Respondent, Kuhlman Diecasting Company:

1. (a) A civil penalty of $8500.00 is assessed against Respondent for violations against the Solid Waste Disposal Act found herein.

(b) Payment of the full amount of the civil penalty assessed shall be made within 60 days of the service of the Final Order upon Respondent by forwarding to the Regional Hearing Clerk, EPA Region VII, a cashier's check or certified check payable to the United States of America.

2. Upon receipt of this Order:

(a) Respondent shall not accumulate hazardous waste solvents at the facility for longer than 90 days and shall comply with the regulations at 40 C.F.R. §262.34 regarding those wastes.

(b) Within 10 days of approval by EPA of a closure plant for the three surface impoundments, Respondent shall begin closure activities and shall complete all closure activities within 90 days of approval of the plan.

(c) Within 10 days of receipt of this Order, Respondent shall implement the groundwater monitoring plant in accordance with 40 C.F.R. §265.90 which was approved by the EPA and shall subsequently comply with the requirements of 40 C.F.R. Part 265, Subpart F regarding groundwater

monitoring. The first quarterly report of analysis shall be due thirty days from installation of the wells.

(d) Subsequent to the closure of the surface impoundments, Respondent shall oeprate as a generator only of hazardous waste and shall not operate as a treatment, storage or disposal facility for hazardous wastes.

Notice of compliance with terms of this Order and a description of steps taken to achieve compliance shall be provided to the Regional Hearing Clerk, EPA, Region VII, and counsel of record for Complainant within 5 days of completion. In the event any of these actions have already been completed, notice shall be provided within 5 days of the effective date of this Order.

Thomas B. Yost
Administrative Law Judge

DATED: November 7, 1983

1/ Unless appealed in accordance with 40 C.F.R. 22.30 or unless the Administrator elects, sua sponte, to review the same as therein provided, this Decision shall become the Final Order of the Administrator in accordance with 40 C.F.R. 22.27(c).