UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Gulf and Western Manufacturing Company	)	Docket No. 82-1026
	)	
	)	
Respondent	)	

Appearances:

George Ciampa, United States Environmental Protection Agency; Region I; Boston, Massachusetts; for Complainant.

Michael J. Bauer; Associate Counsel, Gulf & Western Manufacturing Company; Southfield, Michigan; for 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/] A complaint and compliance order was issued against Respondent, Gulf and

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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 period . . . ."

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 42 U.S.C. 6921-6931.

Western, by the United States Environmental Protection Agency ("EPA") on December 2, 1981, which complaint was subsequently amended by order of the Administrative Law Judge dated March 29, 1982. The amended complaint alleged that Respondent at its facility at 699 Middle Street, Middletown, Connecticut, stores hazardous waste and had violated the interim status standards for hazardous waste treatment, storage and disposal facilities. The specific violations charged were of 40 CFR 265.14, requiring that the part of the facility where the hazardous waste is stored be secured to prevent the unknowing entry and to minimize the possibility of unauthorized entry thereon, and 40 CFR 265.31, requiring that facilities be maintained and operated to minimize the possibility of any unplanned release of the waste into the environment. A penalty of $3,150 was proposed for violation of the security requirements, and of $1,500 for violating the requirements for operating and maintaining the waste, making a total penalty of $4,650, in all. The compliance order directed Gulf and Western to correct the alleged violations.

Respondent answered and denied committing the alleged violations. A hearing was then held in Hartford, Connecticut, on June 15, 1982. Following the hearing, each party submitted proposed findings of fact and conclusions of law, and a supporting brief. On consideration of the entire record, and the submissions of the parties, a penalty of $2,000 is assessed, and an order directing compliance is issued. All proposed findings inconsistent with this decision are rejected.

Findings of Fact

1. Respondent, Gulf & Western Manufacturing Company is a corporation which owns and operates a facility at 699 Middle Street, Middletown, Connecticut (the "facility"), for the production of general hardware

and boat hardware (Tr. 53).[2/]

2. The facility was in existence on November 19, 1980 (admitted in Respondent's answer).

3. At the facility, Respondent stores hazardous wastes generated from its manufacturing operations (admitted in Respondent's answer; see also, Tr. 53-54).

4. Respondent timely filed with the Administrator of the EPA, the preliminary notification of its hazardous waste activity as required by RCRA, Section 3010, 42 U.S.C. 6930. Respondent subsequently submitted to the EPA Part A of an application dated October 30, 1980, for a hazardous waste permit, and complied with the requirements for interim status under RCRA Section 3005, 42 U.S.C. 6925. Respondent thus became subject to the interim status standards, 40 CFR Part 265. See Respondent's answer; Complainant's Ex. 1 and 2.

5. In its fiscal year next prior to July 2, 1981, the date on which the alleged violations occurred, Respondent's operating income was in excess of $100 million, and the operating income of its North & Judd division, of which the facility was a part, was over $1.6 million (Tr. 4-5; see also Respondent's answer).

6. On July 2, 1981, an EPA employee inspected the facility (Tr. 7).

7. On July 2, 1981, Respondent was storing sludge generated from an operation in which it removes burrs and polishes small metal parts. This sludge was stored in a waste pile of five acre-feet containing approximately two-thousand (2,000) tons of material. The waste contained cadmium in a concentration of 2.12 to 8.8 mg/l (milligrams per litre).

2/ Tr. refers to the transcript of testimony.

See Respondent's answer; Tr. 61; Respondent's Ex.8, pg. 3.

8. Near the waste pile were two open tanks, or lagoons, constructed with cement blocks. Each tank was approximately 25 feet square and 6 feet deep. In these tanks, Respondent was storing hazardous waste consisting of partially treated electroplating waste. This hazardous waste was in the form of sludge lying on the bottom of the tanks (admitted in Respondent's answer; see also Tr. 8-9, 17).

9. The area containing the waste pile and storage tanks ("active portion") was situated behind the building on the facility. Facing from the front to the rear of the building, the active portion was off the left side of the building and about 150 yards from a security guard's station located on the left side of the building. The top of the storage tanks and the front of the waste pile, but not the rear of the waste pile, were visible from the guard's window (Tr. 16, 64, 77; Respondent's Ex. 7).

10. Behind the waste pile was an open marshy area through which high tension wires ran. The nearest buildings to the facility, possibly a residential area, were located about a half-mile away from the front, or Middle Street side, of the building (Tr. 27, 67-68).

11. Portions of the waste pile were observed by the EPA inspector to have eroded into an adjacent parking lot. The waste had also eroded into a grassy area near the waste pile and the marshy area in the rear of the waste pile. (Tr. 20-21, 70).

12. The EPA inspector also saw empty beverage containers along the side of the waste pile, and footprints and tire tracks in the eroded waste (Tr. 21, 27, 46-47).

Discussions and Conclusions

Respondent is charged with the failure to comply with the requirements of the interim status standards in the management of certain hazardous wastes stored at its facility. These wastes consisted of a waste pile containing cadmium and two tanks containing partially treated electroplating wastes.[3/] Specifically, Respondent is charged with violating 40 CFR 265.14, and 40 CFR 265.31, of the interim standards. The first standard, 40 CFR 265.14, provides in pertinent part as follows:

> Section 265.14 Security.
> (a) The owner or operator must prevent the unknowing entry, and minimize the possibility for the unauthorized entry, of persons or livestock onto the active portion of his facility, unless:
> (1) Physical contact with the waste, structures, or equipment with the active portion of the facility will not injure unknowing or unauthorized persons or livestock which may enter the active portion of a facility; and
> (2) Disturbance of the waste or equipment, by the unknowing or unauthorized entry of persons or livestock onto the active portion of a facility, will not cause a violation of the requirements of this part.
> (b) Unless exempt under paragraphs (a)(2) of this section, a facility must have:
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> (1) A 24-hour surveillance system (e.g., television monitoring or surveillance by guards of facility personnel) which continuously monitors and controls entry onto the active portion of the facility or
> (2)(i) An artificial or natural barrier (e.g., a

3/ Wastes containing concentrations of cadmium in excess of 1.0 mg/l are listed as having the characteristics of "EP Toxicity", 40 CFR 261.24. EP Toxicity identifies those toxic wastes which are likely to leach and contaminate the groundwater, see 45 Fed. Reg. 33110 (May 19, 1980). The contents of the tanks are not identified other than as partially treated electroplating waste, but Respondent concedes that the tanks contained hazardous waste (answer, Par. 9).

fence in good repair or a fence combined with a cliff), which completely surrounds the active portion of the facility; and
(ii) A means to control entry, at all times, through the gates or other entrances to the active portion of the facility (e.g., an attendant, television monitors, locked entrance, or controlled roadway access to the facility.)

Comment: The requirements of paragraph (b) of this section are satisfied if the facility or plant within which the active portion is located itself has a surveillance system, or a barrier and a means to control entry, which complies with the requirements of paragraph (b)(1) or (b)(2) of this section 1 * * * 4/

The second standard, 40 CFR 265.31, provides as follows:

Section 265.31 Maintenance and operation of facility.

Facilities must be maintained and operated to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water which could threaten human health or the environment.

The Alleged Security Violation

The RCRA regulations require that the "active portion" of the facility, i.e., the part where the hazardous waste is stored, must be protected against unknowing or unauthorized entry by persons or livestock either by 24-hour continuous surveillance system or by a fence or natural barrier.[5/] Respondent contends that the surveillance requirements in this

4/ Omitted is paragraph (c) of the standard. This requires in addition to the measures spelled out in paragraph (b), the posting of signs warning unauthorized persons to keep out of the area in which the hazardous waste is stored. Respondent appears to have complied with this requirement. See Complainant's Ex. 4 at 5.

5/ See 40 CFR 260.10, for definition of "active portion."

instance were satisfied by having the front of the waste pile visible from the guard station in the building 150 yards away. The effectiveness of a guard post that is 150 yards distant from the storage area and allows only a partial view of it, as a means for keeping people away from the area would seem to be questionable in and of itself.[6/] Respondent, however, seeks to justify this surveillance as sufficient on the grounds that the waste pile is situated where persons or livestock would be unlikely to go, and the waste itself was not injurious to man. This rationale is based on a misunderstanding of the regulations.

Respondent describes the storage area as being in an isolated setting. The EPA inspector during his inspection, however, saw empty beverage containers along the side of the waste pile, and tire tracks and footprints in the eroded waste, all indicating that people had been in the area.[7/] Respondent was unable to reconcile this evidence with its claim that the storage area was too remote for people to go there. Since Respondent is seeking to do less than have the continuous surveillance, which the regulation

6/ Surveillance seems to have been done entirely from the guard post inside the building. It was not until after the EPA's inspection on July 2, 1981, that an employee routinely visited the area to determine whether people were entering the area. Tr. 44, 68.

7/ The physical features are not such as to preclude the possibility that people will enter into the waste storage area. The rear of the waste pile appears to face on a relatively remote area, but the property itself is located about a half-mile from other buildings. While the building is fenced in, this does not appear to be the case where the waste pile was located (Tr. 12). Aside from the claimed isolation of the location, there is also the possibility of employees entering the open storage area. Respondent contends that the part of the parking lot which is adjacent to the area is inconvenient to use because there is ample parking space closer to the plant. The evidence of the empty bottles, tire tracks and footprints indicate that it might not be as inconvenient as Respondent contends.

specifically requires, the burden of showing that a lesser amount of surveillance would suffice is on Respondent, as the one naturally possessed of the relevant evidence.[8/] Respondent has not met this burden, and, therefore, it must be assumed that the danger of people entering the area, is more than a remote possibility. This is enough to require the full security measures prescribed by the regulation, even though the protection may actually benefit only a few persons. This is not to say that the surveillance cannot be done in a way which has some reasonable relationship to the number of people who would have to be watched. In some cases, for example, two guards may be required while in other cases one guard would be enough. But, here, Respondent is claiming the right to have only a very cursory kind of surveillance, which simply increases the risk that the few who may be in danger of exposing themselves to the waste will, in fact, do so. I do not construe the regulations as sanctioning such a result.

Respondent as justification for its minimal security efforts argues that the waste pile was not injurious to persons even though it contained cadmium. In support of its argument, Respondent introduced testimony of Dr. Joseph A. Cimino, Professor and Chairman, Department of Community and Preventative Medicine, New York Medical College. Dr. Cimino testified that neither the waste pile's alkalinity nor its cadmium content would have any harmful effects as a result of coming into contact with human skin. He further said that it was improbable that anyone would ingest a sufficient amount of the sand and solid waste to cause a toxic effect. A child weighing 20 kilograms (about 44 lbs.), for example, would

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8/ See The Commonwealth of Puerto Rico v. Federal Maritime Commission, 468 F. 2d. 872, 881 (D.C. Cir. 1972.)

have to ingest the equivalent of one to two liters (about one to two quarts) of sand and solid waste before a sufficient amount of a cadmium would be digested to cause acute symptons.[9/]

The EPA dismisses Respondent's argument as irrelevant, saying that the Administrator's determination that cadmium is a hazardous waste cannot be questioned in an enforcement proceeding, and that Respondent's appropriate remedy is to have the Administrator exclude Respondent's waste from the lists of hazardous waste by a petition to amend, as provided in 40 CFR 260.22. The EPA, however, misses the point, for Respondent is not seeking to question the Administrator's listing of cadmium as a hazardous waste, but only the applicability of the specific management requirements which Respondent is charged with violating to the wastes in this proceeding. As the EPA itself has stated, the identification of the waste as a hazard does not in itself dictate how that waste should be managed.[10/]

One thing which the EPA appears to have overlooked is that the security requirements themselves contain an exception for wastes that are not injurious to persons or livestock who enter storage site, and if persons or livestock do enter the storage site, are not likely to be disturbed in a manner that would cause a violation of one of the other management practices. Respondent's evidence as to the waste pile not being hazardous is certainly relevant to determining whether Respondent comes within the exception.

Respondent's evidence, however, falls far short of the necessary showing to excuse it from the security requirements, for the following

9/ Respondent's Ex. 8.

10/ See 45 Fed. Reg. 33090 (May 17, 1980).

reasons:

First, Respondent's evidence is directed solely to the asserted lack of toxicity of the waste pile. Respondent ignores the hazards associated with the waste in the tanks, presumably believing it can do so because the EPA has not identified the specific wastes stored in the tanks. The EPA's burden, however, has been satisfied by Respondent's admission that the tanks are used for the storage and treatment of hazardous waste consisting of partially treated electroplating waste. Respondent as the one relying on an exception to the general regulatory requirement of maintaining adequate security has the burden of showing that the hazardous waste being stored in the tanks came within that exception. See United States v. First City National Bank, 386 U.S. 361, 366 (1967). Respondent not having met this burden, it must be assumed that the waste in the tanks could injure anyone who, for example, accidentally fell into the tanks.

Second, Dr. Cimino's testimony was directed solely to the possibility of exposure causing immediate, observable injury. He was unable to testify to whether there could be other, more subtle adverse effects which could result, for example, if someone accidentally ingested only a minute amount of the contaminated waste.[11/] It may well be that a child, to take Dr. Cimino's example, is not likely to ingest even small amounts of the waste, but Dr. Cimino's testimony is silent on the point.

Finally, Respondent seems to have ignored altogether the other condition which must be met in order to come within the exception, namely, that disturbance of the waste by unknowing or unauthorized entry will not cause a violation of the requirements of the interim standards.

11/ See Tr. 95. Cadmium has the potential for concentrating in the human body and also has been observed as capable of causing chromosomal injury (mutagenic) and also of causing birth defects (teratogenic). See Complainant's Ex. 6.

It would seem self-evident that if the sludge can be dispersed by rain water, it can also be dispersed by someone who accidentally entered upon the pile. Respondent contends that dispersal of the waste is not a violation, but for the reasons noted below, this argument is without merit.

Consequently, it is found that Respondent has not maintained the security over its waste as required by 40 CFR 265.14, and is not excused from complying with the security requirements by the exception allowed for wastes which are not injurious and which will not be disturbed so as to cause a violation of the interim standards.

The Alleged Violation of the
Maintenance and Operation Requirements

Section 265.31 requires that the waste pile be maintained and operated so as to minimize among other things, the unplanned release of the waste to air, soil or surface water, in this case the hazard created is not only that people may come into contact with the waste, but also that the waste may get into the groundwater. The waste pile admittedly contained cadmium in sufficient concentration to exhibit the characteristic of EP toxicity. This is a characteristic assigned to wastes which are likely to leach hazardous concentrations of a particular toxic constituent, here cadmium, into the groundwater.[12/] Respondent contends that erosion onto the asphalt surface of the parking lot does not constitute a release to air, soil or water, but the argument overlooks that the waste had also eroded onto soil

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12/ See 45 Fed. Reg. 33110 (May 19, 1980).

in the area, including the marshy land behind the pile.[13/]

The only justification which Respondent seems to offer to excuse the violation is the asserted noninjurious nature of the waste. But Dr. Ciminos' testimony is silent on the hazards associated with cadmium leaching into groundwater. In any event, the standard itself, unlike the security standard, allows for no exception for noninjurious wastes, and there is merit to the EPA's position that whether concentrations of cadmium in excess of the EP toxicity limit are hazardous is not a proper issue in this enforcement proceeding. In setting the maximum concentration for cadmium and the other contaminants which give waste the characteristic of EP toxicity, the EPA carefully considered the level of concentration which would give that characteristic.[14/] To go into the question of whether at the level of concentration fixed by the EPA cadmium presents any hazard as a groundwater contaminant would, in effect, be reviewing in this enforcement proceeding the Administrator's determination that it is hazardous at that level. This would be inconsistent with the statutory provision precluding judicial review of the standards in an enforcement proceeding.[15/] If Respondent believes that variances should be allowed in determining EP toxicity for wastes containing cadmium, its remedy would appear to be to petition the Administrator to modify the EP toxicity

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13/ The testimony of Mr. Marchitto that he saw no indications of the waste eroding in the back of the pile (Tr. 70) is unpersuasive. In first place, the EPA's inspector testified that he did see the erosion of waste into the grassy area near the pile and into the wetter area behind the pile (Tr. 20-21). Secondly, the erosion itself, apparently being caused by rainwater running off the pile, would seem to be the kind that could occur in any direction; although it would probably be most noticeable on the asphalt parking lot.

14 / See 45 Fed. Reg. 33110 (May 19, 1980).

15/ RCRA, Section 7006(a)(1), 42 U.S.C. 6976(a)(1).

listing for cadmium.[16/]

It is accordingly found that Respondent has not managed its waste as required by 40 CFR 265.31

The Appropriate Penalty and Order Requiring Compliance

The EPA requests in this case a penalty of $3,150 for Respondent's failure to keep its waste pile secure, and of $1,500 for Respondent's failure to properly maintain and operate the waste pile.

RCRA, Section 3008(c), 42 U.S.C. 6928(c), provides that the penalty assessed shall be one which is "reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements."

The criteria for determining the penalty was discussed in my initial decision in the case of Cellofilm Corporation, Docket No. II RCRA-81-0114 (EPA, Region II, August 5, 1982). In that case the EPA relied upon a draft penalty policy which has not been officially adopted by the EPA. Here the EPA merely asserts that its penalty is justified by the claimed severity of the violation and Respondent's asserted lack of good faith efforts to comply with the requirements. Nevertheless, the draft policy set down more precise guidelines for determining the seriousness of the violation and a respondent's good faith efforts, and in the absence of any better guidance will be followed here. The policy set down in the draft penalty policy, in general, considered two factors in determining the seriousness of the violation for the purpose of assessing a penalty. The first was the potential for harm to human health and environment. That is, the penalty should not depend on whether actual harm has occurred, because the existence or lack of harm may have been the result of good fortune on

16/ See 40 CFR 260.20. Contrary to what the EPA contends, it appears that the delisting procedures in 40 CFR 260.22, do not apply to wastes that fail the EP toxicity test, since such wastes are listed in Subpart C and not Subpart D of Part 261. See 45 Fed. Reg. 33111 (May 19, 1980).

the part of the violator, and it should not be the policy of the EPA to reward lucky violators by assessing lower fines. The second was the conduct of the violator, i.e., whether there has been only a minor deviation from regulatory requirements or a general disregard of the requirements. In addition, as also bearing upon the size of the appropriate penalty, the draft penalty policy would consider such other factors as the efforts made by the noncomplying firm to comply with the goals of RCRA in general, the noncomplying firm's voluntary efforts to rectify the damage, the noncomplying firm's control or lack of control over the circumstances leading to the violation, the recalcitrance of the noncomplying firm in complying with the Act, the noncomplying firm's history of violation, whether the violation was willful, and the non-complying firm's ability to pay.[17/]

While the evidence in this case does not support Respondent's claim that the danger of people coming into contact with the waste pile or tanks was so remote that there was no need for the 24-hour continuous surveillance or in place thereof, the fencing required by the standard, neither does it support the EPA's claim that the violation was sufficiently serious to

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17/ See Cellofilm Corporation, supra at 6-7. Similar criteria have also been used to determine the appropriate penalty under other statutes administered by the EPA. See e.g., the EPA's guidelines for assessing penalties under the Federal Insecticide, Fungicide and Rodenticide Act, Section 14(a), 7 U.S.C. 136 l(a), 39 Fed. Reg. 27712 (July 31, 1974). The statute there requires the Administrator to consider the "gravity of the violation" but "gravity" and "seriousness" are close enough in meaning to justify use of the same criteria in determining the one as the other.

merit the $3,150 penalty proposed by the EPA. The area was not a heavily travelled area and, indeed, appears to be one where people usually did not go. Also to be considered is the evidence presented by Respondent showing that the low concentrations of cadmium in the waste piles made the waste nonjurious to humans. This waste is classified as hazardous because the cadmium content is sufficient to meet the characteristics of EP toxicity.[18/] EP toxicity is designed to identify wastes likely to leach and contaminate groundwater. It is not particularly helpful in determining the toxicity of the waste pile to humans who may be exposed to it.[19/] The main routes by which cadmium enters the body are inhalation and ingestion.[20/] It seems most unlikely that anyone is likely to either inhale or ingest the contaminated sand and silicia combination.[21/] Consequently, it does appear that leaving the waste pile largely unsecured created only a minor risk of harm to humans. There still remains of course, the risk entailed by coming into contact with the waste in the tank. Again, however, the risk

18/ See 40 CFR 261.24. Cadmium is listed as a toxic constitutent in 40 CFR Part 261, Appendix VIII, which list is used as one of the criteria in identifying hazardous waste, see 40 CFR 261.11. The sand pile itself, however, does not appear to be specifically listed as a hazardous waste in 40 CFR, Part 261, Appendix D, but to be classified as a hazardous waste because it exhibits the characteristic of EP toxicity. See Respondent's Ex. 3.

19/ There is no evidence that livestock were likely to be exposed to the waste.

20/ Complainant's Ex. 6.

21/ The complainant originally alleged that the waste pile was subject to wind dispersal, indicating possibly that the particles may be fine enough to be borne in the air like dust. On Respondent's objection, however, that the waste was not dispersed by wind because it was "hydrophilic" (composed largely of water), the complaint was amended to allege that the pile was not being properly maintained to minimize the unplanned release into the environment.

falling into the tanks and becoming exposed to the waste seems low.

Taking into account the fact that the violation created only a minor risk of harm, and that it does not appear to have resulted from a negligent or indifferent attitude toward meeting the security standard, but from a good faith, albeit mistaken belief that the remote location made full compliance with the standard unnecessary, a minimal penalty of $500 is imposed for violation of that standard. It is, of course, recognized that a penalty must serve the purpose of insuring compliance with the law and so eliminating any economic incentives for not complying. It is believed, however, that compliance will be achieved by issuance of an order requiring Respondent to comply with the security standard, which order carries its own sanctions if disobeyed.[22/]

Respondent's violation of the maintenance and operating requirements stands on a different footing. The effect, of the violation is to enhance the risk that cadmium will leach into the groundwater. Respondent's defense that the waste is noninjurious offers no justification whatever for the violation, for the reasons already noted. Also, the record is barren of any effort by Respondent prior to the inspection to keep the waste from being released onto the surrounding soil, including the

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22/ RCRA, Section 300(a)(3), 42 U.S.C. 6928(a)(3), provides that a respondent who fails to take corrective action within the time specified in the order shall be liable for a civil penalty of not more than $25,000 for each day of continued noncompliance, and the Administrator may suspend or revoke any permit issued to the violator.

marshy areas in the back of the pile.[23] For all that appears here, in short, Respondent was simply inattentive to the hazard created by the waste pile. Hence, while the potential for harm is undetermined, the nature of the misconduct seems sufficiently grave to justify the penalty of $1,500 requested by the EPA. The penalty in this instance should be large enough to impress upon the Respondent the necessity for fulfilling all its obligations under the law.

Respondent has introduced evidence demonstrating that it has been actively engaged in developing a program designed to change the facility's operation so that no more hazardous waste would be generated and to remove the hazardous waste already stored at the facility.[24] These facts do show that Respondent has not been indifferent to RCRA's requirements, in general, and undoubtedly regards the waste pile and lagoons as only temporary measures, until the waste can be properly be disposed of. The standards, however, apply to the temporary as well as the indefinite storage of wastes, except to the extent that the requirements are modified by 40 CFR 262.34, pertaining to waste shipped off-site within 90-days after it has been generated.

In addition to the assessment of a penalty, the EPA's complaint, in accordance with the provisions of RCRA, Section 3008, contains an order

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23/ After the inspection, Respondent did clean up the erosion on the parking lot by loading the waste back on the waste pile, and putting a barrier to preclude the soil from again eroding onto the parking lot. Tr. 75-76. It does not appear, however, that Respondent has taken any other action to keep the waste from eroding.

24/ See Tr. 54-57, 80; Respondent's Exs. 5 and 6.

requiring compliance. Both sides seem to have directed their arguments entirely to the question of what penalty, if any, should be assessed. It is assumed that Respondent's objections to the order are the same as those raised with respect to the penalty, namely, that Respondent has not violated the standards, or that its violations were only very minor violations at best. While the granty of the violation was considered in determining the penalty, it does not appear to be a proper factor to be considered in determining whether a compliance order should be issued, at least on the facts in this case. Instead, it is found that a compliance order should be issued. Indeed, as already noted, the order is regarded as the principal means for obtaining Respondent's compliance with the security requirements.

CONCLUSION

It is concluded that Respondent has violated 40 CFR 265.14, and 40 CFR 265.31. It is further concluded, for the reasons above stated that $2,000 ($500 for the security violation and $1,500 for the failure to properly maintain and operate the waste) is an appropriate penalty and that an order in the form hereafter set forth should be issued.

ORDER[25/]

Pursuant to the Solid Waste Disposal Act, as amended, Section 3008, 42 U.S.C. 6928 (Supp. IV 1980), the following order is entered against Respondent, Gulf and Western Manufacturing Company:

1. (a) A civil penalty of $2,000 is assessed against Respondent for violations of the Solid Waste Disposal Act found herein.

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

(b) Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days after service of this order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America.

2. (a) Within thirty (30) days after service of this order upon Respondent, Respondent shall

(i) remove from the parking lot at its Middletown Facility, all hazardous waste which has eroded from Respondent's adjacent waste pile;

(ii) cause its Middletown Facility to comply with the security requirements of 40 CFR 265.14; and

(iii) cause the waste pile at its Middletown Facility to comply with the requirements of 40 CFR 265.31, with respect to minimizing the possibility of any unplanned non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment

(b) Within thirty-five (35) days after service of this order, Respondent shall certify to EPA the status of its compliance with the requirements established by clauses (i) through (iii) of the preceding paragraph 2 (a), above, of this order. This certification shall be in writing, addressed to

Director, Enforcement Division
U.S. Environmental Protection Agency
John F. Kennedy Federal Building
Boston, MA 02203
Attn: RCRA Compliance Clerk.

If the certification reports non-compliance with a requirement, the Respondent shall also report the reasons for the non-compliance, and the date on which Respondent expects to be in compliance. Such a report will not, however, excuse the noncompliance.

Gerald Harwood

Gerald Harwood
Administrative Law Judge

Dated: November 29, 1982