UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
ZACLON INCORPORATED,	)	Docket No. RCRA-V-W-92-R-9
	)	
Respondent	)	

Resource Conservation and Recovery Act--Part B Permit Application--Determination of Penalty-One-Time v. Multi-day

Circumstances considered to be "highly unusual" justifying waiver of multi-day penalty under RCRA Civil Penalty Policy (1990) for Respondent's failure to timely submit a Part B permit application or an equivalency demonstration in accordance with 40 CFR § 270.1(c). Alternatively, if circumstances were not sufficiently unusual to justify waiver of multi-day penalty, penalty policy would be disregarded to the extent it made assessment of a multi-day penalty mandatory.

Appearance for Complainant:

Jeffrey A. Cahn, Esq.
Associate Regional Counsel
U.S. EPA, Region V
Chicago, Illinois

Appearance for Respondent:

Richard P. Fahey, Esq.
Arter & Hadden
Columbus, Ohio

INITIAL DECISION
ON REMAND

The complaint in this proceeding under section 3008(a) of the Solid Waste Disposal Act, as amended, commonly referred to as RCRA (42 U.S.C. § 6928(a)), filed on December 24, 1991, charged Respondent, Zaclon Incorporated (Zaclon), with failure to submit a Part B post-closure permit application or an equivalency demonstration as required by 40 CFR § 270.1(c). Zaclon had allegedly failed to comply with a

letter from EPA, dated September 20, 1990, which requested that Zaclon submit a Part B permit application or an equivalency demonstration within six months. For this alleged violation, it was proposed to assess Zaclon a penalty totaling $81,100.

In its answer and request for a hearing, Zaclon admitted that it had submitted neither a post-closure Part B application nor an equivalency demonstration, but denied any obligation to do so and alleged that the proposed penalty was excessive.

After submission of required pre-hearing information by the parties, Zaclon filed a motion for accelerated decision, arguing that the post-closure requirements applicable to hazardous waste TSD facilities did not apply to Zaclon and that the complaint should therefore be dismissed (Motion, dated September 4, 1992). Zaclon, which had purchased the property from DuPont in 1987, asserted that it was not then, nor had it ever been, an owner or operator of a hazardous waste treatment, storage or disposal (TSD) facility. An asphalt/concrete pad, which had been used by DuPont to treat zinc process sludge and to render the sludge nonhazardous, had been closed in accordance with an approved closure plan and to the satisfaction of both the Ohio EPA and the U.S. EPA in 1986. An April 1987 letter from U.S. EPA stated in part that "we" are satisfied that the closure was in accordance with the approved closure plan. DuPont was reminded, however, that it had interim status for units that underwent closure and was subject to corrective action requirements as outlined in the Hazardous and Solid Waste Amendments of 1984 (HSWA).

Section 3005(i) of RCRA, 42 U.S.C. § 6925(i), added to RCRA by HSWA, essentially required all land treatment units which received waste after July 26, 1982, to comply with corrective action requirements applicable to new land treatment or disposal units. EPA implemented this provision on December 1, 1987 (52 Fed. Reg. 45788, et seq., December 1, 1987), specifying, inter alia, that "(o)wners or operators of surface impoundments, landfills, land treatment units, and waste pile units that received wastes after July 26, 1982, or that certified closure (according to § 265.115) after January 26, 1983, must have post-closure permits, unless they demonstrate closure by removal as provided under § 270.1(c))5) and (6)." 40 CFR § 270.1(c). Zaclon argued that any residual obligations under HSWA were the responsibility of DuPont.

On September 17, 1992, Complainant filed a motion in opposition to Zaclon's motion and a cross-motion for accelerated decision. Complainant contended, inter alia, that Zaclon was then the owner of a facility which contained a waste pile, and that the waste pile was closed after 1983. Accordingly, Complainant asserted that prior ownership of the pile was not relevant. By an order, dated October 6, 1993, the ALJ held that the residual obligation to either obtain a post-closure permit or to demonstrate that closure by removal met the requirements of Part 264 accompanied ownership of the property and that Zaclon was thus an owner as defined in 40 CFR § 270.2.[(1)] Therefore, Zaclon's motion to dismiss was denied and Complainant's motion for accelerated decision as to liability was granted. On October 18, 1994, Complainant moved to reduce the proposed penalty to $37,600, which motion was granted by an order, dated October 28, 1994.

A hearing on this matter, limited to penalty issues, was held in Chicago, Illinois, on November 9, 1994.

In an initial decision, issued March 19, 1996, it was concluded that a penalty could not be exacted for Zaclon's failure to timely comply with the September 20 letter, because the letter and the regulation under which the letter was issued (40 CFR § 270.1(c)) constituted a "collection of information" within the meaning of the Paperwork Reduction Act, 44 U.S.C. §§ 3501 et seq., an OMB control number was not displayed in the body of the regulation as required by the OMB regulation, 5 CFR § 1320.7 (1983), and the letter neither displayed an OMB control number nor stated that it was not subject to the PRA. Therefore, the assessment of a penalty was held to be barred by Section 2(a) of the PRA (44 U.S.C. § 3512), and the complaint was, accordingly, dismissed.

Upon Complainant's appeal, the Environmental Appeals Board (EAB), adopted a

rationale not advocated by Complainant, and held that the PRA was not a bar to the imposition of a penalty against Zaclon, because the only mandatory requirement was to have a permit and information necessary to obtain a Part B permit was set forth in Section 270.14, which did display an OMB control number in the body of the regulation. Section 270.14 is not cited in the section of the regulation, 270.1(c), which Zaclon is alleged to have violated nor is it cited in the September 20 "call-in" letter. The EAB recognized that both the permitting process and the optional equivalency demonstration involved collections of information subject to the PRA. The EAB also recognized that, although the requirement for a permit was mandatory, Zaclon had no obligation to apply for a permit until EPA requested it to do so. The EAB's basic premise, however, appears to be that the OMB approval of the collection of information at Section 270.14 for the Part B permit application carried with it an approval of the collection of information at issue here.[(2)] Additionally, although Zaclon's failure to timely respond to the September 20 "call-in" letter is the central basis for this proceeding, the EAB held that optional procedures in connection with an equivalency demonstration could not serve as a basis for a penalty and thus, section 2(a) of the PRA (44 U.S.C. § 3512) was not a defense to the assessment of a penalty herein.[(3)] In re Zaclon, Inc., RCRA (3008) Appeal No. 96-1, Remand Order (EAB, January 30, 1998). The matter was remanded for the assessment of an appropriate penalty.

By a letter, dated March 23, 1998, Complainant forwarded a statement as to further proceedings, which pointed out that the penalty issue had been fully tried and briefed and argued that the full amount of the proposed penalty of $37,600 should be assessed. In a letter, dated March 20,1998, Zaclon stated that the record had been fully developed and briefed and that it was prepared to submit the matter for decision on the existing record. Zaclon asserted, however, that there was no justification for multi-day penalties and that the penalty should not exceed $1,800.

Based upon the entire record, including the briefs and proposed findings and conclusions of the parties, I make the following:

FINDINGS OF FACT [(4)]

1. Zaclon Incorporated is a corporation incorporated under the laws of the State of Ohio. Zaclon owns and operates a facility located at 2981 Independence Road, Cleveland, Ohio. Although Zaclon is a large quantity generator of hazardous waste, it does not have, nor is it required to have, a RCRA permit, because all hazardous waste is disposed of off site.

2. Prior to 1980 and continuing through June 11, 1987, the facility referred to in the preceding finding was owned and operated by E.I. DuPont de Nemours & Company (DuPont) as a chemical manufacturing plant. Chemicals manufactured at the plant included zinc chloride and zinc ammonium chloride.

3. In 1980, as required by RCRA, DuPont filed a notification of hazardous waste activity and a Part A permit application and thus qualified for interim status in accordance with RCRA § 3005(e). Operations covered by interim status included a waste pile for the treatment of hazardous waste generated during the production of chemicals. Treatment consisted of mixing muds from the zinc chloride filters and wastewater treatment sludges with lime on a diked concrete pad so as to render the waste nonhazardous.

4. By letters, dated October 23, and October 31, 1986, DuPont's closure plan for the waste pile, dated May 10, 1985, was approved by the Ohio EPA (OEPA) and U.S. EPA, respectively. Thereafter, DuPont closed the waste pile by removing all waste material and decontaminating the waste pad and containment structure. DuPont certified that closure was in accordance with the closure plan on December 5, 1986.

5. In a letter, dated March 5, 1987, OEPA informed DuPont that all necessary activities concerning closure and withdrawal of its Ohio Waste Installation & Operation Permit had been completed. DuPont was further informed that it would maintain the status of a generator only with respect to less than 90-day storage.

By an undated letter, apparently received by DuPont on April 15, 1987, DuPont was informed by U.S. EPA that "we are satisfied that the facility [described herein] was properly closed in accordance with the approved closure plan." DuPont was reminded, however, that its facility still had interim status for the units that underwent closure and consequently, was subject to corrective action requirements as specified in the Hazardous and Solid Waste Amendments of 1984.

6. Zaclon purchased the facility identified in the previous findings on June 12, 1987. Insofar as pertinent here, the purchase agreement contained the following provision:

Closure of RCRA Facility

The Cleveland Plant has an asphalt/concrete pad which had been used for mixing lime with zinc process sludge to render the sludge non-hazardous under RCRA. That usage was terminated in 1986. Our closure plan was approved by Ohio and U.S. EPA offices. Cleanup under that plan was completed to the satisfaction of Ohio EPA (the lead agency) which provided us a letter so stating. The U.S. EPA has agreed to sign off pending its final site inspection.

Additionally, an excerpt from the agreement in the record provides that DuPont retained all liabilities with respect to environmental claims of governments or third parties which seek to address or impose sanctions with respect to acts, conditions or omissions occurring prior to the closing date (R's Exh A).

7. By a letter, dated July 8, 1988, the U.S. EPA enclosed a report of an RFA/VSI of the Zaclon facility, conducted on June 15, 1988, and informed DuPont that at the present time, the Agency believes that no further action with respect to RCRA corrective action is warranted. With respect to the former hazardous waste management unit at issue here, the RFA/VSI report states that this unit was formerly the location of a hazardous pile which was ordered closed in accordance with a CAFO signed by U.S. EPA and DuPont in 1986.[(5)] In accordance with the closure plan, the waste was removed and the area was decontaminated to background levels which were determined to be clean.

8. By a letter, dated September 20, 1990, the U.S. EPA invited Zaclon's attention to the Hazardous and Solid Waste Amendments of 1984 and pointed out that, according to our records, your facility closed a hazardous waste pile following a closure plan approved by U.S. EPA on October 30 [October 31], 1986. The closure was in accordance with Part 265 Interim Status Requirements. The letter pointed out that section 3005(i) (added to RCRA by HSWA) required land disposal units, including waste piles, which received hazardous waste after July 26, 1982, to comply with, inter alia, groundwater monitoring and corrective action requirements applicable to new units. The letter stated that EPA implemented this provision in the December 1, 1987, Codification Rule (enclosed). The mentioned regulation specified that land treatment units, which received wastes after July 26, 1982, or which certified closure (according to § 265.115(c)) after January 26, 1983, must have post-closure permits, unless they demonstrate closure by removal as provided in § 270.1(c)(5) and (6). 40 CFR § 270.1(c), effective December 31, 1987 (52 Fed. Reg. 45788, December 1, 1987). Zaclon was informed that the letter constituted a formal request for the submission of a post-closure permit application or, if it believed that Part 264 closure standards were met, it could petition for an equivalency determination. The permit application or an equivalency demonstration were to be submitted within six months of receipt of the letter.

9. The return receipt for the September 20 letter is undated and it is not clear precisely when Zaclon received the letter. It is clear, however, that Zaclon did not comply therewith, failing to submit either a Part B permit application or an equivalency demonstration within six months after the letter was received. Mr. James B. Krimmel, president and one of two owners of Zaclon, testified that he was not aware of the letter until the notice of violation (complaint) was received in January 1992. He stated that the September 20 letter was eventually located in a RCRA file in the environmental manager's office and that the person who was the environmental manager at the time the letter was received had been terminated.[(6)]

10. Zaclon submitted an equivalency demonstration by letter, dated June 2, 1992, which was approved by EPA on September 25, 1992.

11. As indicated at the outset of this opinion, the order, dated October 6, 1993, rejected Zaclon's argument that any residual obligations arising from the closure remained with DuPont as the owner at the time. Instead, the HSWA obligation to either obtain a post-closure permit or to demonstrate that closure by removal met the requirements of Part 264 was held to accompany ownership of the property, thus making Zaclon an owner or operator within the definition at 40 CFR § 270.2 (note 1, supra).

12. Mr. Harry D. Campbell, Jr., an EPA environmental protection specialist, calculated the revised proposed penalty in this proceeding (Tr. 31, 35). The proposed penalty was revised principally because of a footnote in the October 6 order to the effect that, because the Agency accepted the equivalency demonstration, there was no harm or potential harm to the environment, and that, measured solely by alleged harm to the regulatory program, the penalty seemed excessive (Tr. 36, 37). Like the penalty initially proposed, the revised penalty was based on the RCRA Civil Penalty Policy (October 1990). Mr. Campbell explained that there were four primary components of the penalty policy: 1)the gravity or seriousness of the violation; 2) the multi-day component; 3) adjustment factors; and 4) economic benefit derived from the violation (Tr. 35; Penalty Policy at 1).

13. The gravity-based penalty component is based upon two factors: potential for harm and extent of deviation from the statutory or regulatory requirement (Penalty Policy at 2, 12). Because of the footnote in the October 6 order, Mr. Campbell did not consider that there was any harm or potential harm to human health or the environment (Tr. 37, 38, 42). He did, however, consider that there was some harm to the RCRA regulatory program, which he thought was minor. Information requested by the September 20 "call-in" letter, i.e., a Part B permit application or an equivalency demonstration, was not submitted within the six-month period (by April 1, 1991) and indeed, there was no response whatsoever to the letter. Mr. Campbell, therefore, concluded that the extent of deviation was major (Tr. 38, 39, 65, 66).

14. The determinations in finding 13, resulted in Zaclon's violation being placed in the minor/major category of the penalty matrix (Tr. 38, 40, 41). This cell of the penalty matrix specifies amounts ranging from $1,500 to $2,999 (Penalty Policy at 2, 19). Mr. Campbell testified that he selected $1,800, because of Zaclon's size, having 50 some employees, and presumed sophistication, in that the company employed an environmental manager (Tr. 41, 42).

15. The next step in the penalty calculation was the determination of a multi-day penalty. Mr. Campbell pointed out that the minor/moderate [major] designation carried with it a presumption that multi-day penalties were appropriate and would be assessed for days 2 through 180 unless the case manager can identify case specific facts to overcome the presumption and obtain the concurrence of EPA Headquarters.[(7)] The minor/major cell in the multi-day penalty matrix contains amounts ranging from $100 to $600 and Mr. Campbell selected $200 as the appropriate daily penalty (Tr. 43, 44, 45). Although by his reckoning Zaclon was out of compliance approximately 480 days from April 1, 1991, until the equivalency demonstration was submitted on June 2, 1992 (actually 427 days) he emphasized that under the penalty policy, the matter of whether to assess penalties beyond 180 days of violation was discretionary with the case manager. He concluded that no additional deterrence of future violations would result from assessing penalties beyond 180 days in this instance.

16. The gravity-based penalty was thus $1,800 plus 179 X $200 ($35,800), which equals $37,600. Mr. Campbell interpreted the penalty policy as prohibiting downward adjustments for good faith based on efforts to achieve compliance after a violation has been detected (Tr. 46). The Penalty Policy states that no such adjustment should be made because the gravity-based penalty matrix assumes good faith efforts by respondent to comply after EPA discovers a violation (Id. 33).

17. Mr. Campbell considered the evidence was evenly balanced and did not make any [upward] adjustments for degree of negligence and/or willfulness. Zaclon had no history of noncompliance and no adjustments were made for that factor (Tr. 47). An ABLE determination had been made based on Zaclon's tax returns (apparently for the years 1987 through 1990) which indicated that there was an 80 percent probability that the company could pay an $81,100 penalty over a five-year period (Tr. 47, 48, 75). Mr. Campbell testified that he was unaware of any [additional] financial information submitted by Zaclon as to its financial condition since 1992 (Tr. 49, 85). A Dun & Bradstreet report, dated October 21, 1994 (C's Exh 11), was, however, obtained, which shows projected sales in the $15,000,000 to $20,000,000 range (Tr. 48, 49). The report states that Zaclon was not rated [as to financial condition] because D&B lacked a current financial statement from the company. The economic benefit from Zaclon's noncompliance or delayed compliance was considered to be insignificant and no adjustment for that factor was made (Tr. 49, 50).

18. Mr. Joseph M. Boyle, chief of the RCRA enforcement branch in Region V, reviewed and approved the complaint and the initial and revised penalty calculations in this proceeding (Tr. 88, 96, 98, 99). He testified that both calculations were in accordance with the 1990 RCRA Civil Penalty Policy (Tr. 99, 108-09). Mr. Boyle had reviewed and commented on drafts of the 1990 penalty policy which had been developed to increase the deterrent effect of RCRA penalties (Tr. 99, 100, 104). The policy sought to achieve this objective chiefly by recognizing the length of time violations persisted and, in effect, mandating the assessment of multi-day penalties for a specified length of time for certain violations (Tr. 105-06). Regarding the recalculation of the penalty, he considered that the footnote in the October 6 order was a finding that there was no actual environmental harm, but nevertheless contended that a [finding of a] moderate potential for harm [as in the initial penalty calculation] was justified (Tr. 114, 115-16). He maintained that the two penalty calculations were based on the proper exercise of judgment inherent in applying the policy to specific instances of noncompliance (Tr. 118).

19. Mr. Krimmel testified that Zaclon manufactured six lines of special[ity] industrial chemicals with zinc products being "our" biggest line (Tr. 121). He stated that Zaclon also produced potassium silicate, halogen 10 brightening agent, and a line of paper treating chemicals for DuPont.

20. Regarding Zaclon's finances, Mr. Krimmel referred to a financial statement for the year 1991 which showed a loss of $350,000 (Tr. 126). While on cross-examination, he acknowledged that the statement was unaudited, he asserted that it was reliable and consistent with the final [audited] documents (Tr. 29, 30). He testified that Zaclon had been profitable in only three of the years since the purchase of the Independence Road facility, making small profits in two of the years and a couple hundred thousand dollars in 1990 (Tr. 126).

21. Mr. Krimmel had reviewed the Dun & Bradstreet report and pointed out that it showed "we" were notoriously late payers which he acknowledged to be true (Tr. 126-27). He stated that vendors and suppliers were typically paid 30 to 60 days late, because [our] cash flow is not good. Asked what the impact of a $37,600 penalty would be on Zaclon, he replied that "(i)t would hurt a great deal..." (Tr. 127). He believed they had an 80% probability of paying the penalty in five years. He testified that vendors were currently stretched to the limit and that [paying the penalty] would affect our capital budget and impair our ability to do improvements including environmental projects currently under way. One of these projects, which he estimated would eventually cost $200,000, was the elimination of discharges to the Cuyahoga River under an NPDES permit (Tr. 127-28).

Conclusions

1. Zaclon's failure to either submit an equivalency demonstration or a Part B permit application by April 1, 1991, as requested by the September 20 letter, was a violation of RCRA § 3005(i) and 40 CFR § 270.1(c).

2. For this violation, an appropriate penalty is the sum of $9,000.

Discussion

RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3), provides that any penalty in the compliance order [provided for by Section 3008] shall not exceed $25,000 per day of nonconformance for each violation of a requirement of this subchapter. Additionally, the cited section sets forth two criteria which the Administrator must consider in assessing a penalty: the seriousness of the violation and any good faith efforts to comply with applicable requirements.

As indicated (finding 12), the initial and revised penalty calculations were in accordance with the RCRA Civil Penalty Policy (October 1990). There being no response whatsoever to the September 20 letter within the specified six-month period and, indeed, for 427 days thereafter, the extent of deviation from the requirement, i.e., the submission of a Part B permit application or an equivalency demonstration, was properly considered to be major for both penalty calculations. In the initial calculation, the potential for harm was considered to be moderate, resulting in the violation being placed in the moderate/major cell of the penalty matrix and a gravity-based penalty of $9,500 being selected for the first day of violation. The proposed $81,100 penalty had then been computed by multiplying $400 times the 179-day period for which multi-day penalties were mandated by the policy and adding the resulting figure ($71,600) to $9,500.

Upon consideration of the footnote in the October 6 order to the effect that acceptance of the equivalency demonstration meant that there was no actual or potential harm to [human health or] the environment, the harm to the regulatory program was determined to place the violation in the minor/major cell of the penalty matrix and a gravity-based penalty of $1,800 was selected. To this figure was added $35,800, the sum determined by multiplying $200 times the 179-day multi-day penalty period.

The footnote in the October 6 order to the effect that there was no actual or potential harm to the environment is subject to the criticism that it fails to consider the risk, slight though it may have been, that the equivalency demonstration would not be acceptable. Accordingly, Mr. Boyle's contention that the violation may properly be regarded as representing a moderate potential for harm (finding 18) is accepted. If the violation is considered to be in the moderate/major category, the penalty policy mandates assessment of a multi-day penalty for days 2 through 180 of the violation, except when such penalties have been waived in highly unusual circumstances after consultation with EPA Headquarters (Id. 23, 25). This resulted in the initial penalty claimed of $81,100, which is clearly excessive, being simply punitive rather than remedial and deterrent.

Under all the circumstances, it is my determination to assess a one-time penalty of $9,000.[(8)] This is considered appropriate because Zaclon as a recent purchaser of the facility had reason to believe that the HWMU at issue had been closed to the satisfaction of U.S. EPA and the OEPA, and, of course, the equivalency demonstration, once submitted, was accepted, signifying that the waste pile of concern had been closed by removal to Part 264 standards. If these facts are not "highly unusual" within the meaning of the penalty policy, justifying waiver of multi-day penalties, then it is my decision to disregard the penalty policy as I am permitted to do by Rule 22.27(b) of the Rules of Practice. Moreover, the equivalency demonstration was submitted within six months of the time the complaint was issued. While the penalty policy precludes consideration as good faith efforts to achieve compliance after the violation is called to the violator's attention, Section 3008(a)(3) of the Act contains no such limitation and, for the reason noted, I am not constrained by the penalty policy.

Ability to pay is not a factor which the statute requires the Administrator to consider in determining a penalty and the penalty policy provides that the burden of demonstrating inability to pay is on the respondent (Id. 36). Zaclon hasn't shown that it is unable to pay a $9,000 penalty and this sum will be assessed.

Order

It having been determined that Zaclon Incorporated violated the Resource,

Conservation and Recovery Act as alleged in the complaint, a penalty of $9,000 is assessed against it in accordance with Section 3008(a) of the Act (42 U.S.C. § 6928(a)).[(9)] Payment of the full amount of the penalty shall be made by mailing or delivering a certified or cashier's check in the amount of $9,000 payable to the Treasurer of the United States to the following address within 60 days of the date of this order:

Regional Hearing Clerk
U.S. EPA, Region V
P. O. Box 70753
Chicago, IL 60673

Dated this 30th day of June 1998.

Original signed by undersigned

_____

Spencer T. Nissen
Administrative Law Judge

1. Section 270.2 defines owner or operator as follows: Owner or operator means the owner or operator of any facility or activity subject to regulation under RCRA.

2. Control Nos. referred in the preamble to the December 1, 1987 regulation were 2050-0009, 2050-0002 and 2050-0007 (52 Fed. Reg. 45797). OMB had assigned Control No. 2050-0007 to information collection requests in connection with Part B permit applications as early as 1985 (40 CFR § 270.10, 50 Fed. Reg. 28751, July 15, 1985). However, in order to demonstrate that Section 270.14 carried an OMB control number prior to the regulation of concern here (52 Fed. Reg. 45788, et seq., December 1, 1987), the EAB was reduced to citing the proposed rule at 51 Fed. Reg. 44418 (December 9, 1986), which concerns corrective action requirements in connection with Part B permit applications and, although it refers to Section 270.14, is not a basis for the rule at Section 270.1(c).

3. Section 2(a) of the Paperwork Reduction Act, 44 U.S.C. § 3512, entitled "Public protection," in effect at all times relevant to this proceeding, provided:

> Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter.

4. Findings herein will be sufficiently detailed that this decision "will stand on its own". Unless otherwise indicated, however, findings are based on those in the initial decision, dated March 19, 1996.

5. DuPont had apparently continued to operate the waste pile notwithstanding the requirements of RCRA § 3005(e)(2), added by HSWA, which provided that interim status shall terminate 12 months after November 8, 1984, unless the owner or operator applied for a final determination as to its permit and made certain certifications. In the CAFO, dated November 11, 1986, DuPont agreed to pay a penalty of $7,500.

6. A narrative explanation accompanying an initial penalty computation worksheet states that Zaclon's environmental manager believed that answering the request was DuPont's responsibility. Because of language in the purchase agreement to the effect that DuPont retained responsibility for acts, conditions, or omissions occurring prior to the closure date (supra note 6) and the arguments advanced by Zaclon in support of its motion to dismiss, this reported belief is plausible, having some basis in fact. The matter should, of course, have been investigated

rather than simply being ignored.

7. Tr. 42, 43, 67, 68, 69; Penalty Policy at 23, 25. EPA Headquarters consultation prior to waiver of multi-day penalties is only required in instances where multi-day penalties are mandatory under the policy and not in minor/major instances where multi-day penalties are presumed to be appropriate.

8. The EAB's observation (slip opinion, note 17 at 24), that Zaclon was in violation until it was excused from the obligation to have a permit by EPA's acceptance of the equivalency demonstration in September [September 25] of 1992, doesn't alter the fact that for practical purposes compliance was considered complete upon submission of the equivalency demonstration. The result would, of course, have been different had the equivalency demonstration been determined to be unacceptable.

9. Unless this decision is appealed to the Environmental Appeals Board (EAB) in accordance with Rule 22.30 (40 CFR Part 22) or unless the EAB elects to review the same sua sponte as therein provided, this decision will become the final order of the EAB and of the Agency in accordance with Rule 22.27(c).