UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	RCRA-III-070
WHEELING-PITTSBURGH STEEL CORP.	)	
	)	INITIAL DECISION
Respondent	)	

1. Resource Conservation and Recovery Act - Applicability of Regulations - The fact that a facility operator ceases to deposit waste in an existing storage facility prior to November 19, 1981, but fails to close such facility in conformity with the approved closure plan prior to such date will not remove such facility from the requirements of the regulations, particularly as they apply to groundwater monitoring.

2. Resource Conservation and Recovery Act - Closure Plans - If a facility operator elects to close a surface storage impoundment by removing all of the hazardous waste contained therein along with any contaminated soil or liner associated therewith, the Agency has the authority to require sampling of the remaining materials as a means of demonstrating the complete removal of the hazardous substances.

3. Resource Conservation and Recovery Act - Mitigating Circumstances - Financial difficulties alone will not excuse violations of the Act or the regulations promulgated pursuant thereto.

4. Resource Conservation and Recovery Act - Good Faith Efforts - Failure to comply with the clear requirements of an approved closure plan will not be excused on the basis that the facility operator honestly believed they were not necessary to accomplish the desired result.

5. Resource Conservation and Recovery Act - Penalty - A penalty is assessed for failure to comply with the terms of an approved closure plan.

Appearances:

Ralph W. Siskind, Esquire
U.S. Environmental Protection Agency
Philadelphia, Pennsylvania
For the Complainant

Leonard A. Costa Jr., Esquire
Dickie, McCamey & Chilcote
Pittsburgh, Pennsylvania
For the Respondent

INITIAL DECISION

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation Recovery Act of 1976, as amended, (hereinafter RCRA), §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 Wheeling-Pittsburgh Steel Corporation issued by the U.S. Environmental Protection Agency (hereinafter EPA) on December 1, 1982. The complaint alleged that Wheeling-Pittsburgh has a facility in Follansbee, West Virginia which conducts hazardous waste activities and had violated the Act by failing to perform the activities set forth in the closure plan developed by the Agency for the Respondent's hazardous waste management facility. Specifically, the Respondent maintained and operated a surface impoundment consisting of an earthen pit approximately 28 x 20 x 12 feet deep in which it stored its decanter tank tar sludge from coking operations, EPA hazardous waste #K087.

In its Part A application for interim status, which the Respondent currently enjoys, Wheeling-Pittsburgh Steel advised that they did not intend to use the storage pit after November 19, 1981 and would, from that

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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.

point forward, remove the decanter tank tar sludge from the coking facility and transport it directly to an improved EPA hazardous waste storage facility in the State of Pennslyvania. The Respondent indicated that it intended to close the storage pit as soon as approval therefore was obtained from the Agency. The closure plan initially filed by the Respondent with the EPA was found to be deficient in several regards and this fact was communicated to the Respondent and it was given a period of time in which to review the closure plan in accordance with the comments provided to it by EPA. The Respondent did submit a revised closure plan which the Agency likewise found to be deficient. Subsequent thereto and in conformity with the appropriate regulations, the Agency issued an amended closure plan which became the closure plan for the storage pit involved. The complaint alleges that the Respondent failed to comply with the provisions of the modified closure plan and, therefore, issued the complaint and compliance order which in addition to seeking a civil penalty of $20,000, required the Respondent to immediately commence activities in accordance with the provisions of the modified closure plan.

The Respondent filed an answer to the complaint and, although not denying the facts surrounding the allegations of the complaint, suggested that the Agency had no jurisdiction over its facility since it ceased to be used as a hazardous waste management facility prior to the effective date of the regulations which govern such activities and urged that the penalty assessed was out of line with the violations alleged and should be either substantially reduced or eliminated in its entirety.

Following an opportunity for the parties to settle this matter through informal negotiations, an exchange of pre-hearing information was accomplished and the matter went to hearing on October 31, 1984 in Washington, D.C.

Following the availability of the transcript, initial submissions of findings of facts, conclusions of law and briefs in support thereof, and replies were exchanged between the parties and filed. In rendering this Initial Decision, I have carefully considered all of the matters in the record, the briefs and suggested findings filed by the parties, and all proposed findings of fact or conclusions of law inconsistent with this Decision are rejected.

Factual Background

The Respondent, Wheeling-Pittsburgh Steel Corporation, owns and operates a business located on Route 2, Follansbee, West Virginia. The operation of this facility includes a surface impoundment which is used for the storage of hazardous waste, specifically decanter tank tar sludge from its coking operations. Respondent submitted to the EPA, in a timely manner, a "Notification of Hazardous Waste Activities" and a Part A application for this facility. On August 5, 1981, the EPA advised the Respondent that it appeared to qualify for interim status as defined in §3005 of the Act.

On October 13, 1981, Respondent submitted to EPA its proposed closure plan for the facility. Respondent stated it intended to discontinue the use of the facility on or before November 19th and to close the facility as soon as possible following EPA approval of the closure plan. Consistent with the requirements of the regulations, EPA published the closure plan and provided a thirty (30) day period for comment. In response to this public notice, Mr. Steven A. Hubbs, professional engineer from Forestville, Kentucky, responded concerning the closure plan and made several observations concerning deficiencies which he identified. On January 18, 1982, EPA sent the Respondent a letter

containing a determination that the closure plan was insufficient and provided comments on the plan. It requested a modified plan within thirty (30) days. Although the EPA comments identified a number of perceived deficiencies, the primary problem had to do with the failure of the plan to describe how the Respondent intended to assure itself and the Agency that no hazardous material would be left in the ground when they removed the hazardous waste since no testing was provided for, nor was there any indication of an evaluation of potential groundwater contamination. These comments were based, in part, on the review of the plan conducted by EPA Headquarters and an outside consultant hired by the Agency for this purpose.

On February 24, 1982, Respondent replied to the January 18th letter briefly addressing the five (5) areas of concern raised by EPA's comments. The reply did not expand upon the original description of the removal of the contaminated soil and groundwater monitoring.

On April 30, 1982, EPA sent the Respondent a modified closure plan, since the plan as re-submitted by the Respondent was not considered to be approvable. This approved closure plan prepared by the Agency included a detailed schedule including development and approval of plans for soil analysis and sub-surface monitoring.

On May 25, 1982, Respondent send a letter to EPA stating that it needed outside assistance to review and respond to the April 30, 1982 closure plan and requested an eight (8) month delay. The Respondent also advised the Agency that the impoundment would remain inactive and since almost all of the inventory had been removed and shipped off-site it believed that the environment would not be adversely impacted by the delay.

On October 26, 1982, Mr. Douglas Donor, an EPA compliance officer, telephoned Dr. William Samples, Respondent's manager of environmental control, concerning

the status of closure. Dr. Samples stated that there had been no implementation of the closure since the May 25, 1982 letter due to financial problems that his company, specifically, and the steel industry generally was at that time suffering from.

The parties met on January 26, 1983 to discuss the alledged violations, Respondent's closure activites and the possibility of settlement. In early February 1983, the Respondent submitted to EPA a document entitled: "Revised Plan for Closure of Hazardous Waste Storage Surface Impoundment". (Respondent's Exhibit 6.) The February plan was not processed under the regulations and was not an approved closure plan. This revised plan submitted by the Respondent provided that the waste would be removed along with a layer of soil and that EPA could request that Respondent collect three (3) samples for analysis and that they would analyse the samples to determine if the surrounding soils were sufficiently decontaminated and that removal and sampling would continue until there was no significant contamination. The plan stated that once this level of decontamination was reached, the impoundment would be filled with inert materials and graded to prevent run-on. The submittal estimated that the first removal phase would take approximately sixty (60) days.

On February 28, 1983, Complainant sent a letter to Respondent concerning this plan (Respondent's Exhibit 9). The letter provided that the Respondent should implement the first phase of removal as quickly as possible and that the question of the number and location of the soil samples were currently under review by the Agency. In a letter dated April 21, 1983, the Agency advised the Respondent of its position on soil sampling and provided them with a sampling grid which envisioned nine (9) sampling locations and the option of analyzing samples at three (3) depths.

At the hearing, Mr. Robert Dobson, the Respondent's superintendent of coke and sinter plants, testified that the removal of the hazardous waste and the initial layer of soil was completed in May of 1983 and that some time thereafter the sides of the excavation were sloped for safety reasons and slag was added to the concavity to bring it almost to existing ground level.

Mr. Donor of EPA testified that the Respondent did not reply to the April 21, 1983 letter concerning sampling and did not advise the Agency of the May 1983 completion of removal of wastes and soil and did not collect and analyze any soil samples from the excavated impoundment. In March of 1984, the Agency advised the Respondent that it intended to perform a routine RCRA inspection of the facilities and the Respondent suggested that while they were there, they would like them to inspect the excavated storage facility to assure themselves of the completeness of their clean-up activity. The inspectors did so and confirmed Mr. Dobson's statements concerning the removal of inventory and sloping of the impoundment, but they were not, however, able to take soil samples which could be used to determine whether there was contamination remaining in the surrounding soil because of the slag which the Respondent has placed in the excavated impoundment prior to the inspector's arrival. Although the regulations provide for a 180 day prior notice of intent to close a management facility, the Agency in this instance advised the Respondent that they would waive the 180 day requirement and, as indicated above, suggested to them that they immediately begin to remove the hazardous waste and accomplish the required sampling.

Pursuant to 40 C.F.R. §265.228, the owner of a facility has two options when it elects to close the management facility. It can either: (1) "remove all materials including underlying and surrounding contaminated soil and be subject to no further regulation, or" (2) not remove all the materials, then close and provide post-closure care as for a landfill". The Respondent's

original closure plan merely stated that they intended to remove all of the hazardous material in the impoundment with a backhoe or clam shell and also remove the soil material directly in contact with the waste to the extent that no contaminated soil is expected to be present upon closure of the storage facility.

The failure of this plan or any subsequent plan provided by the Respondent to address the notion of soil sampling of the excavated impoundment prior to its ultimate closure was represented as one of the Agency's primary concerns throughout the original proposal submitted by the Respondent. The Agency felt that, absent some sampling regime, neither it nor the Respondent could be assured that there did not remain in the surrounding soil some of the toxic constituents of waste involved. It is this failure to do sampling which provides the primary focus of controversy among the parties to this proceeding. As indicated above, should a facility operator fail to assure the Agency that they have, in fact, removed all of the contaminated materials and any residual substances associated therewith in the course of closing the facility, they must provide post-closure care which in this case consists of the establishment of a groundwater monitoring system. Essentially a groundwater monitoring program involves the drilling of monitoring wells both up-gradient and down-gradient from the closed facility and the regular testing of the water obtained from these monitoring wells to assure the Agency and the facility owner that no hazardous waste materials are escaping from the immediate area of the closed facility. In this case, the Respondent neither took samples of the surrounding soil prior to refilling the excavation nor have they indicated any willingness or intention to establish any sort of a groundwater monitoring program.

Discussion

The Respondent, in its answer, throughout the trial and in its post-hearing briefs and findings, continued to argue that the surface impoundment which is the subject of this proceeding is not governed by RCRA or any of the regulations promulgated pursuant thereto because the company ceased placing hazardous waste in the impoundment prior to November 19, 1981 when the regulations became effective as to the requirements for a groundwater monitoring program.

Since this appears to be in the nature of a threshold issue, it needs to be disposed of at the outset of this discussion. The regulations and the statutes recognize that hazardous waste management facilities can consist of a variety of facilities. There are treatment facilities, storage facilities, generating facilities and disposal facilities. In this case, it is beyond argument that the impoundment in question is a storage facility. Given that characterization, it is unquestioned that the fact that an operator of a facility ceases to place materials into a storage facility at a certain time does not in any way change the character of that facility, and that a storage facility once established continues to be a storage facility until it is closed in a manner consistent with the regulations as they regard closure and post-closure requirements.

In his reply memorandum, counsel for the Respondent laments the fact that the Agency did not include any case law in its brief in support of its proposed findings of fact and conclusions of law. I find this criticism to be ill-founded, since he did not submit a brief at all in support of his findings of fact or conclusions of law. In any event, there is, in fact, a case directly on point which settles the question of the applicability of the

regulations to the Respondent's facility. In the case of Environmental Defense Fund, Inc. v. Lamphier, 714 F.2nd 313 (1983), the Court held that the operator of an industrial waste disposal business was not exempt from the Resource Conversation Recovery Act merely because no waste had been brought to the facility after March 1980, because the operator continued to store substances which were deposited at the facility prior to that date. This holding clearly refutes the arguments of the Respondent that somehow the fact that they ceased placing additional hazardous waste in its storage facility after November 19, 1981 in some way insulated that facility from the operation of the regulations in question. It is also noteworthy that the facility in question was not completely cleaned up, even in the Respondent's view, until May 1983, well beyond the date upon which the groundwater monitoring requirements became effective. I am of the opinion that, even as this Decision is being written, the facility in question has not been "closed" as that term is utilized in the regulations since, in order for a facility to be officially closed it must be done in strict compliance with the closure plan which has been prepared for that specific facility. In this case, the relevant closure plan is the one prepared by the Agency following the rejection of the Respondent's amended closure plan. This conclusion is inevitable given the language of 40 C.F.R. §265.112(d) which states in part that: "If the Regional Administrator does not approve the plan, the owner/operator must modify the plan or submit a new plan for approval within thirty (30) days. The Regional Administrator will approve or modify this plan in writing within sixty (60) days. If the Regional Administrator modifies the plan, this modified plan becomes the approved closure plan." It is relatively immaterial whether or not the Respondent accepted or agreed with certain conditions of the modified plan, as proposed by the Administrator, since that plan has become the approved closure plan without the concurrence of the facility operator.

It is, therefore, readily apparent that the Respondent did not comply with the terms of the approved closure plan and, in fact, did not even comply with the provisions of its own modifications to that plan which the Administrator subsequently found to be insufficient. In this regard, I am referring to the modifications submitted by the Respondent to the Agency which suggested that they would take several soil samples from the bottom and sides of the excavated impoundment. The record in this case is undisputed in that the Respondent did not take any soil samples in the course of attempting to close its storage facility but rather relied entirely upon the notion that all of the hazardous materials associated with the stored wastes could be entirely removed based solely upon visual inspection of the surrounding soil remaining after the removal of the hazardous waste itself. The Respondent's argument that the groundwater monitoring requirements also do not apply to this facility are likewise unpersuasive since the requirements for having such a program in effect was required as of November 19, 1981 and the material and the associated soil in the surface impoundment was not removed until May of 1983.

As pointed out above, under the circumstances of this case, the Respondent had two (2) choices in closing the subject facility. It elected to comply with neither. The Respondent at the trial and in its briefs argued that the regulations do not authorize the Agency to require a sampling regime in conjunction with the closure of a surface waste management facility and, therefore, the requirements set forth in the closure plan as amplified by the sampling grid sent to the Respondent by counsel for the Complainant were of no force and effect. Therefore, the Respondent had no obligation to comply therewith. While it is true that the regulations do not specifically provide for sampling under these circumstances, it is entirely reasonable and a logical interpretation of the regulations as written, that such a sampling requirement is within the

authority of the Agency. In cases such as this, in order for a facility operator to be excused for the requirement of installing a rather expensive groundwater monitoring system, it must demonstrate to the Agency that it has, in fact, removed all of the stored waste and any contamination of the surrounding soil associated therewith. The Agency takes the position, and apparently so does the consultant for the Respondent, that the only way one can be sure that all of the hazardous materials have been removed from the site is by subjecting the remaining soil to some sort of sampling program. While reasonable men could certainly differ as to the exact location and number of the samples required to make this demonstration, I do not think any one could seriously argue that some form of sampling is not required in order to satisfy the requirements of the regulations. I, therefore, find that the Respondent's arguments in this regard are unpersuasive and shall not be further considered.

I am of the opinion and so find that the Respondent in this case has violated the provisions of the approved closure plan as alleged in the complaint issued herein. There now remains the matter of assessing an appropriate penalty in this case.

Section 3008(c) of the Act states, in part, that when determining a penalty for violations of the Act, the Administrator shall take into account the "seriousness of the violation and any good faith efforts to comply with the applicable requirements". Unlike other statutes, allowing for the imposition of civil penalties which the Agency administers, there is no requirement in this Act that the Administrator must take into account the Respondent's ability to pay or the effect of the payment of such penalty on its ability to stay in business. In its briefs following the hearing, Respondent never argues that it could not afford to pay the penalty in question but rather that the Agency's method of calculating it were in error and, therefore, the penalty should be either substantially reduced or eliminated entirely.

Respondent's arguments in this regard seem to involve its mis-guided notion that the absence of any demonstrated injury to man or the environment requires that only a minimal penalty be assessed. This argument has been dispelled in the holdings of every Administrative Law Judge in the Agency and is not even worthy of serious debate. The penalty policy recognizes that in many cases, actual injury to man and the environment will not exist and, therefore, it is the potential for such damage or injury that it contemplates.

As of the date of issuance of the complaint in this matter, the Agency had not formally adopted a final penalty policy for violations of RCRA. (It has since done so.) In December 1980, however, EPA distributed a draft penalty policy which has been consistently used by the Agency and by the Judges of the Agency as the guidance for establishing an appropriate penalty in these cases and its use has been accepted by the Administrator for that purpose. I will, therefore, refer to that draft penalty policy in determining an appropriate penalty to be assessed in this case.

In the normal case, the Agency will provide a witness at the hearing who, either alone or in conjuction with others, determined the penalty as set forth in the complaint, along with a rather detailed rationale as to how the ultimate number was arrived at applying the criteria set forth in the draft penalty policy. Unfortunately in this case, the Agency did not produce such a witness but rather attempted to have this testimony be given by a person who had little or nothing to do with the determination of the amount of the penalty and his anticipated testimony on that subject was, therefore, excluded. Although the Agency's methodology in determining a proposed penalty to be placed in a complaint is very helpful to the Court in making its own decision on this matter, its presence is not essential to this determination. I will,

therefore, make an independent evaluation of the amount of penalty to be assessed in this matter by applying the facts, as they have been described above, to the guidance supplied by the draft penalty policy.

The draft penalty policy in general considers two (2) factors in determining the seriousness of the violation for the purposes of assessing a penalty. The first is the potential for harm to humans and the environment, and the second is the conduct of the violator, i.e., whether there has been only a minor deviation from regulatory requirements or a general disregard of them. In order to determine the potential hazard to human health and the environment, one needs to examine the characteristics of the waste and the circumstance under which the violations occurred. The hazardous waste of concern in this matter is decanter tank tar sludge from coking operations. This sludge is a hazardous waste due to its listing in the regulations and the basis for such listings is the presence in the waste of phenol and napthalene which are considered hazardous constituents and make it a toxic waste. A toxic waste "is one shown to have carcinogenic, mutagenic or teratogenic effects on humans or other life forms, as described in 40 C.F.R. §261.11(a)(3)". Exhibits in this case show that the waste in question is in its appearance much as its name would imply, that it is a black tar-like substance which becomes fluid when heated and solid when chilled. It consists of 97 per cent carbon materials and the other three (3) per cent consist of the phenol and napthalene which are the toxic consituents of concern here. The ratio of napthalene to phenol is approximately two to one. Both napthalene and phenol are toxic to humans and aquatic life and based on the relative concentrations of these compounds in the waste in question and their solubility in water, there is a high potential that significant concentrations of phenol and napthalene could migrate from the waste if it were not properly managed.

Phenol is extremely soluble in water having a solubility of about 67,000 ppm and napthalene is considered as having rather low solubility in water of about 34 to 40 ppm. I am, therefore, of the opinion that the toxic constituents of this hazardous waste do have the potential for causing serious injury to both man and the environment and will be considered in that light when examining the penalty policy.

The record also is clear that the soil in which the impoundment is located is highly permeable since it consists primarily of dumped fill material, unsegregated wastes and soil. Nothing in the record would suggest that there is any impermeable layer below the impoundment which would prevent the ultimate migration of any waste leachate from this facility from finding its way into the groundwater, surface waters or wells. I am, therefore, of the opinion that the potential for harm to man or the environment, given all of the above, is of a rather high level.

As to the second aspect considered by the policy, that is the conduct of the violator, one can perhaps best describe the Respondent's conduct by detailing what it failed to do rather than what it did do. The Respondent failed to conduct even a minimal sampling program to reinforce its notion that it had gathered up all of the hazardous waste and its constituents when it excavated the impoundment. It made no provision for the implementation of a groundwater monitoring program given the absence of any scientific demonstration that removed all of the hazardous waste and its constituents. It did not, as it said it would, grade the material which it ultimately placed in the excavated pit to conform to ground contours to prevent run-on but rather left the area as a concavity which, of course, would encourage the accumulation of water both from rainfall and run-on. It further failed to place any sort of impervious cap over the excavated area which would further prevent the intro-

duction of surface or precipated waters to the area of the excavation and further guard against the possibility of water leaching out any remaining toxic constituents (into the substrait). The Respondent failed to notify the Agency when it had finished its initial excavation so that it could have come and observed, first hand, the extent of the waste and soil removal accomplished by the Respondent and taken appropriate soil samples if it felt such an activity was appropriate. Rather the Respondent completed its excavation activities to the extent it felt necessary and then proceeded to grade the walls of the excavation to a slope and fill the remaining cavity partially with slag material therefore rendering it practically impossible for the EPA inspectors to obtain soil samples, which may have buttressed the contention of the Respondent that it had removed all hazardous materials.

Despite the continued insistence of the Agency and its consultants, which concerns were communicated to the Respondent on several occasions, that they did not feel that a simple "eye-ball" survey of the excavated area would be sufficient to demonstrate the removal of all materials, the Respondent continued to hold to its belief that simple visual removal of the tar-like materials and some portion of the surrounding soil would be sufficient. Given the physical characteristics of the waste in question, it is conceivable that the Respondent is correct in its assertion that it did remove all materials, but when one is dealing with a toxic substance having the potential for serious harm such as we have here, mere speculation is not sufficient. The sampling program which the Agency had suggested, although not cheap, would not have been prohibitively expensive and would have saved the Respondent the cost of this litigation and the payment of the penalty which I will ultimately determine to be appropriate in this case.

Mr. Robert Helwick, who represents the consultant hired by the Respondent to prepare its Part A application and its closure plan, testified in this matter and held himself out to be an expert on the management of hazardous waste and the EPA regulations associated therewith. Upon examination by the Court and when asked whether there was anything irrationale about the Agency wanting the Company to do some sampling as part of its total clean-up, the witness stated that he has no problem with that and, in fact, may even agree with it. (Tr. 136), Given that answer, the witness was then asked why a sampling program was not included in the closure plan that he prepared for the Agency and he responded that his reading of the regulations did not require that such a sampling program be done and therefore he did not include it at that time. My reading of the closure plan prepared by Mr. Helwick and his firm reveals that the attention given to the closure of this facility did not appear to be a high priority item when the Part A application was originally submitted. Approximately five (5) sentences out of the twenty-two (22) page closure plan actually discussed how the facility intended to close the management site and the important matters not included in that plan are about as long as the plan itself. The exhibits associated with this case amply demonstrate the deficiencies with which the Agency, both at the regional and Headquarters office, and its outside consultants identified in its review of the plan. Although the plan stated that the total closure could be accomplished within sixty (60) days, it actually took the Respondent many months to complete the closure. As an excuse for this extended schedule, the Respondent pled economic hardship. Although no documentation to support the nature of the Respondent's financial position during the time in question was presented, either in the form of oral testimony or exhibits, Respondent appeared to argue that the Court should take judicial notice of the newspaper and other media

reports of the general poor financial shape of the domestic iron and steel industry in this country. Since I was not in a coma at that time, I do recall that the iron and steel industry was experiencing substantial difficulties during that period but one does not have any way of assessing the relative economic health of all of the companies engaged in that business and, therefore, although I have no reason to doubt the veracity of the Respondent's witnesses which testified on this question, I do not find significant evidence in this case to allow me to make a finding that the Respondent's failure to comply with even the most fundamental aspects of the closure plan can be excused for lack of money.

The draft penalty policy, referred to above, has as its main analysis feature a series of matrixes which contain therein dollar amounts determined by a review of the two (2) aspects of the violation identified above, i.e., potential for damage and the nature of the conduct associated with the violation involved. In order to utilize these matrixes one must first determine in which class the violations fall since there are different matrixes for different classifications of violation. In this case we have violations concerning the failure to install a groundwater monitoring system and a failure to conform to the closure requirements as identified in the final closure plan. Both of these violations are characterized as Class 1 violations and, therefore, reference to that matrix will be made for purposes of this determination. The matrix is divided into nine cells with the seriousness of both axis divided into "major", "moderate" and "minor" classifications, with a specific range of dollar amounts associated with each of the nine cells contained in the matrix as described. For example, if one would determine that the potential for damage would be in the major category and the deviation from regulatory requirements also to be in the major category, the associated cell would

suggest a penalty ranging from $20,000 to $25,000. Since the complaint in this matter suggests a penalty of $20,000 one must assume that the Agency decided that the violation was in the major category of both aspects and chose to utilize the lower portion of the range suggested. Given the acute toxicity of the hazardous components of the waste involved, I am of the opinion that the potential for damage to both man and the environment would fall into the major category. As to the conduct aspect of the violation, I am of the opinion that the Respondent exercised good faith when they excavated and removed from the premises the hazardous waste and a fair portion of the surrounding soil. Its primary deviation from the requirements was the failure to conduct a sampling program at the time the excavation took place or alternatively implement a groundwater monitoring program. Although the list of what the Respondent failed to do in this case is lengthy, the ultimate failure has to do with the lack of sampling or other monitoring activities which may have supported the Respondent's contention that it had, in fact, removed all of the waste materials and any contamination in the surrounding soil associated therewith. The category associated with this violation should be in the moderate range. Reference to the matrix given those findings suggest a penalty of from $15,000 to $19,000. Considering the factors which the statute require to the facts in this case, I am of the opinion that a penalty in the amount of $17,500 is appropriate and that a compliance order in the form hereinafter set forth should be issued.

ORDER[2/]

Pursuant to the Solid Waste Disposal Act, §3008, as amended, 42 U.S.C. 6928, the following Order is entered against Respondent, Wheeling-Pittsburgh Steel Company:

1. (a) A civil penalty of $17,500 is assessed against Respondent for violations of the Solid Waste Disposal Act found herein.

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

2. Upon receipt of this Order, Respondent shall take the following actions at its facility:

(a) If Respondent believes that it can meet the requirements of regulation 40 C.F.R. §265.228(b), it must:

(i) Remove the slag from the impoundment within thirty (30) days of this Order.

(ii) Within 45 days of this Order collect at least five (5) soil samples from the bottom of the impoundment at locations approximately those proposed by EPA in the April 21, 1983 letter and at a depth which

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[2/] Unless appealed in accordance with 40 C.F.R. 22.30 or unless the Administrtor 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).

is equivalent to the original excavated depth of the impoundment. The original excavated depth is that which was reached by the Respondent when it had completed its removal activities in May of 1983.

(iii) Within 45 days of this Order, collect: (a) at least four (4) soil samples at midpoint of the sloped sides of the impoundment, one from each side of the impoundment, at a depth which is below all fill material, and (b) at least four (4) soil samples from the perimeter outside of the disturbed area, one from each side of such area, at a depth of two (2) inches.

(iv) Analyze the samples collected under paragraphs 2(a)(ii) and (iii), above, for phenol and napthalene and report the results to EPA within 90 days of this Order.

(v) If the results of the analysis indicate no soil contamination, Respondent is not subject to further regulation at the surface impoundment.

(vi) If the results of the analyses indicate soil contamination, Respondent can either continue excavation and sampling or can implement the requirements in regulation 40 C.F.R. §265.228(c).

(b) If Respondent does not believe that it can meet the the requirements of regulation 40 C.F.R. §265.228(b) or choses not to attempt to meet those requirements, it must:

(i) Submit a proposed closure and post-closure plan to EPA within 60 days of this Order addressing the requirements of regulation 40 C.F.R. §265.310.

(ii) Submit a schedule to EPA within 30 days of this Order providing details of proposed compliance with the requirements of regulation 40 C.F.R. Part 265 Subpart F.

(iii) Implement the plans approved in paragraph 2(b)(i) and (ii), above.

Thomas B. Yost
Administrative Law Judge

DATED: February 5, 1985