7/31/90

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

IN THE MATTER OF)
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BRUNSWICK MERCURY MARINE) Docket No. RCRA-VI-433-H
PLANT 14, Stillwater, OK)
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Respondent)
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Resource Conservation and Recovery Act (RCRA): § 3008: Under the specific circumstances of this case, a civil penalty of $11,360 is appropriate.

Appearances:

Bennett Stokes, Esquire, Associate Regional Counsel, U. S. Environmental Protection Agency, Region VI, 1445 Ross Avenue, Dallas, Texas for complainant.

Allen Mitchell, Esquire, Post Office Box 190, Sapulpa, OK, and Henry Kolb, 1939 Pioneer Road, Fond Du Lac, Wisconsin, for respondent.

Before: J. F. Greene
Administrative Law Judge

INITIAL DECISION

This proceeding was brought pursuant to section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6928 (hereinafter "RCRA" or "the Act"). Section 3008(a)(2) of the Act, 42 U.S.C. § 6928(a)(2), provides that the United States Environmental Protection Agency, (hereinafter "EPA" or "complainant"), may, after notifying the State, enforce the requirements of Subtitle C of RCRA in a State which has received authorization to carry out a hazardous waste management program under section 3006 of RCRA, 42 U.S.C. § 6926.

From January 14, 1981 through June 24, 1983, the State of Oklahoma received authorization to carry out various phases of the federal hazardous waste management program. Eventually, on January 10, 1985, Oklahoma was granted final authorization, as published in the Federal Register, Vol. 49, No. 250, page 50362, and is currently authorized to carry out its own hazardous waste management program.

EPA gave the required notice to the State on June 12, 1984, of the enforcement action involved herein. Subsequently, a Complaint, Compliance Order and Notice of Opportunity for Hearing issued, charging Brunswick-Mercury Marine Plant #14 (hereinafter "respondent"), in Stillwater, Oklahoma, with

violations of certain requirements of RCRA and regulations, promulgated thereunder, as well as Sections 1-2001 through 1-2014 of the Oklahoma Controlled Industrial Waste Disposal Act, Okla. Stat. Ann. Title 63 (West 1981), and regulations promulgated pursuant thereto as the Rules and Regulations for Industrial Waste Management (hereinafter "Rule" or "Rules"). These statutes and regulations govern the treatment, storage, and disposal of hazardous wastes.

Specifically, the complaint charges that respondent committed the following violations: (1) failure to have an adequate written waste analysis plan at the facility, in violation of 40 C.F.R. § 265.13(b) and Rule 7.1.6; (2) failure to have an adequate written inspection schedule at the facility, in violation of 40 C.F.R. § 265.15(b) and Rule 7.1.6; (3) failure to have adequate documents pertaining to job positions, descriptions, and training at the facility, in violation of 40 C.F.R. § 265.16 and Rule 7.1.6; (4) failure to have an adequate closure plan at the facility, in writing, in violation of 40 C.F.R. § 265.112(a) and Rule 7.1.6; and (5) failure to implement a proper groundwater monitoring program, in violation of 40 C.F.R. § 265.90(a) and Rule 7.1.6.

In its answer, respondent denied the alleged violations involving its waste analysis plan, inspection schedule, and training records, and pleaded that revised versions of these

documents, which purportedly complied with the regulations, had been submitted to the Oklahoma State Department of Health (hereinafter "OSDH"). Respondent specifically denied the closure plan charge, stating that it had revised its plan to conform with the regulations. Respondent also specifically denied that its groundwater monitoring system was inadequate. Several arguments in favor of the adequacy of its existing system were offered.

Respondent's renewed motion that this matter be dismissed for lack of formal notice of the deficiencies noted in its complaint at least thirty days prior to issuance of the enforcement action is hereby denied. This motion was denied by Order dated June 26, 1985, and again at the original hearing. (TR 9) For the same reasons expressed in the Order and at the hearing, respondent's motion is again denied.

Respondent is a corporation which owns and operates a facility located in Stillwater, Oklahoma to construct and produce outboard engines and stern drives. The facility has a waste water treatment system which contains a chromium destruction unit; the unit converts hexavalent chromium into trivalent chromium hydroxide sludge, which is then stored on site in a clay-lined surface impoundment identified by respondent as the Controlled Industrial Waste Storage Site (CWSS). This waste water treatment sludge is a listed hazardous waste, and bears EPA hazard-

dous waste number F019. 1/

The alleged violations which are the subject of this action were first noted during an inspection of respondent's facility by EPA and OSDH on December 9, 1983. The alleged violations were then reported to respondent by letter dated February 6, 1984. A second inspection of the facility took place on May 17, 1984, during which the same violations were again noted.

DISCUSSION AND CONCLUSION

a. Waste Analysis Plan

Complainant contends that respondent violated 40 C.F.R. § 265.13(b), which requires the owner or operator of a facility that treats, stores or disposes of hazardous waste, to develop and follow a written waste analysis plan. Such plan must describe the procedures which will be used to carry out and comply with the general waste analysis regulations. Specifically, complainant's hazardous waste inspector testified that, during the May 17, 1984 inspection of the facility, respondent's waste analysis plan did not specify the following: parameters for which each hazardous waste was to be analyzed, the test methods which

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1/ See 40 CFR § 261.31.

would be used to test for these parameters, and the sampling method which would be used to obtain a respresentative sample of the waste to be analyzed. (CX 1; TR 23) This information is specifically rquired by 40 C.F.R. § 265.13(b) (1)-(3) to be included in the waste analysis plan. The testimony also shows that these alleged violations had been noted during a December 9, 1983 inspection. (CX 29; TR 27-28)

Respondent argues that it had a waste analysis plan in effect at the time of the December, 1983, inspection which OSDH had found acceptable on March 8, 1983. The record shows that OSDH did inspect the facility on November 8, 1982 and notified respondent on December 9, 1982 that a waste analysis plan was required. (RX 2) Respondent submitted a plan, and, by letter dated March 8, 1983, OSDH replied that this area of noncompliance had been corrected. (RX 2C)

However, on February 6, 1984, OSDH notified respondent that as a result of the December 9, 1983 inspection, OSDH and EPA had determined that the waste analysis plan at the facility was not adequate. Respondent's plant engineer replied to this notification by letter dated March 2, 1984, pointing out that the waste analysis plan had been acceptable in March, 1983. (RX 27) In this letter, respondent also stated that whatever had to be done to comply with the State and federal regulations

would be done. (Id.)

No revision had been made to the plan, however, by the time of the subsequent inspection two months later, more than three months after the notification by OSDH of the violation. (CX 1; TR 23) In its answer to the complaint, respondent maintained that the waste analysis plan has since been amended and now conforms with the applicable rules and regulations.

Complainant has presented direct evidence that the plan did not contain information which the regulations specifically require. Respondent does not argue that this evidence cannot be relied upon or is inaccurate; rather, it states that this same plan was previously acceptable and that it was amended subsequently to meet complainant's objections. This defense does not go to the issue of whether the plan at the facility during the two EPA inspections contained all of the information required by the regulations. Accordingly, since the only direct evidence on this point indicates that respondent's waste analysis plan did not fully comply with the regulations at the time of inspection, it must be found that a violation of § 265.13(b) has been established.

b. Inspection Schedule.

Complainant charges that respondent also violated 40 C.F.R. § 265.15. That regulation requires the owner or opera-

tor of a facility that treats, stores or disposes of hazardous waste to develop and follow a written schedule for inspecting all monitoring equipment, safety and emergency equipment, security devices, and operating and structural equipment that are important to preventing, detecting or responding to environmental or human health hazards. 40 C.F.R. § 265.15(b)(1). This regulation also requires that the schedule must identify the types of problems, such as malfunctions or deterioration, which are to be looked for during inspections. 40 C.F.R. § 265.15(b)(3).

Complainant's inspection report indicates that respondent did maintain a log that included the date and time of inspections, name of the inspector, and notations of observations made. However, respondent did not maintain a written schedule calling for inspection of its monitoring equipment, safety and emergency equipment, security devices, and operating and structural equipment, according to complainant's inspection report. (CX 1) Testimony supports the inspection report (TR 26k). Further, respondent's schedule did not identify the types of problems, such as malfunctions or deterioration, to be looked for during an inspection. (CX 1) These same violations are noted in the report of the May 17, 1984 inspection. (CX 1)

Respondent argues that it had provided the OSDH with an inspection log as a result of an inspection on October 16, 1981. The record shows that OSDH accepted respondent's log by letter

dated October 4, 1982; no mention was made that the log was inadequate during the November 8, 1982 inspection by OSDH. (RX 1A, 2)

On February 6, 1984, however, OSDH notified respondent that, as a result of the December 9, 1983 inspection, OSDH and EPA had determined that the inspection log at the facility was inadequate for the reasons subsequently charged in the complaint. Respondent replied that the inspection log had been previously accepted by OSDH but that respondent would do whatever was necessary to comply with the State and federal regulations. (RX 27) However, no revision had been made by the date of EPA's inspection. (CX 1; TR 26) In its answer to the complaint, respondent states that it has revised and amended its inspection schedule and submitted it to OSDH. Respondent also maintains that this revised schedule complies with the regulations.

Complainant presented direct evidence that the inspection schedule did not contain information which the regulations specifically require. Respondent does not argue this point; rather, it states that the schedule was previously acceptable and that the schedule was subsequently amended to meet complainant's objections. This does not, however, go to the issue of whether the schedule at the facility during EPA inspections contained all the information required by the regulations. Accordingly, since the only direct evidence on this point indicates that re-

spondent's inspection schedule did not comply with the regulations, it is found that a violation of § 265.15(b)(1) and (3) has been established.

c. Documents for Personnel Training.

Complainant charges that respondent also violated 40 C.F.R. § 265.16. That section requires that facility personnel successfully complete a program of classroom instruction or on-the-job training that teaches them to perform their duties in such a way as to ensure the facility's compliance with the regulations. 40 C.F.R. § 265.16(a)(1). This regulation also requires that certain documents relating to job titles, job descriptions, and descriptions and documentation of the required training be kept at the facility. 40 C.F.R. § 265.16(d).

Complainant's inspector testified that respondent did not have a personnel training program at the time of the inspection, (TR 27), and that, although there was documentation of a program at the facility during the subsequent inspection, the documents were not sufficient to meet the regulations. (Id.) The testimony shows that the program in effect at the time of the later inspection included only management personnel. No records of training involving the hourly employees was included in the program. (Id.)

The report of the December 9, 1983 inspection however, indicates that there was documentation of a personnel training program at the facility. The only indication of a violation is a hand-written notation which reads "not adequate." (CX 29) The report of the subsequent May 17, 1984, inspection notes the presence of the required documentation but also notes that the training program was administered only to management personnel. (CX 1)

Respondent argues that it instituted a personnel training program in response to a November 8, 1982, inspection which OSDH accepted in March, 1983. The record does indicate that OSDH inspected the facility on November 8, 1982 and notified respondent on December 9, 1982 that it must to train its personnel at the facility. (RX 2) Respondent instituted a training program, and, by letter dated March 8, 1983, OSDH stated that this area of noncompliance had now been corrected. (RX 2C)

On February 6, 1984, however, OSDH notified the respondent that as a result of the December 9, 1983 inspection, the OSDH and the EPA had determined that the personnel training records had to be amended to include job titles and descriptions of employees involved with hazardous waste management. (RX 3) Respondent replied to this notification, as it had to notification of the alleged violations involving the waste analysis plan and inspection schedule, by letter dated March 2, 1984,

pointing out that the training program had been accepted by OSDH, but that respondent would do whatever was necessary to comply with the State and federal regulations. (RX 27)

Although revisions were made to the program, it was still considered inadequate during the May 17, 1984 inspection, since the plan included only management personnel and did not provide for training of hourly employees. (CX 1)

The evidence concerning whether the training program in place at the time of the December 9, 1983 inspection met the regulations is contradictory. Complainant's inspector testified that no program was in place; the report of the inspection, however, indicates that a program was in place, but that it was not adequate. No specifics are given. The letter from OSDH of February 6, 1984 states that the training record must be amended to include job titles and descriptions, but the report of the December 9, 1983 inspection indicates that the records contained job title and descriptions. Given these discrepancies, a violation of 40 C.F.R. § 265.16 at the time of the December 9, 1983 inspection cannot be found. However, the report of the May 17, 1984 inspection and complainant's testimony regarding this inspection, are consistent. Both indicate that the training program at the facility during the later inspection included only management personnel and that no training program was in place

for hourly employees. Section 265.16 applies, by its terms, to "facility personnel." 40 C.F.R. § 265.16(a)(1). No basis appears for distinguishing management from hourly personnel in connection with training pursuant to this regulation.

In its answer to the complaint, respondent maintains that it has since amended its training documents, and that they now conform with the applicable rules and regulations. However, since complainant has presented direct evidence that the training program in effect during the May 17, 1984 inspection did not comply with the regulations, and respondent has not introduced evidence to the contrary, it is found that respondent was in violation of 40 C.F.R. § 265.16.

d. Closure Plan.

Complaint also charges that respondent violated 40 C.F.R. § 265.112. This regulation requires among other things, that the owner or operator of a facility that treats, stores or disposes of hazardous waste must have a written closure plan. The plan must be kept with all revisions at the facility until closure is completed and certified. It must also identify those steps necessary to close the facility completely or partially at any point during its intended operating life. 40 C.F.R. § 265.112(a)

Complainant's inspector testified that respondent's closure plan did not contain a description of decontamination of equipment used to handle hazardous wastes. (TR 23) However, the report of the December, 1983, inspection, suggests that the plan at the facility did contain such a description. (CX 29) Indeed, according to the checklist in the report, the only required information not in the plan was an estimate of the expected year of closure. (Id.) A handwritten notation at the end of the report says that the plan was "inadequate." (Id.)

The report of the May, 1984, inspection does not specify any deficiencies in the closure plan, although this report does not include a checklist of the plan's contents. The only indication that the closure plan was considered inadequate is a handwritten note at the end of the report which states that the closure plan is "inadequate." (CX 1) Yet another hand-written note states that the closure plan is attached to the report. However, no plan was attached to the report as submitted in evidence. (Id.)

Consequently, the only allegations of violations of 40 C.F.R. § 265.112(a) alleged by complainant which are supported by any evidence are the lack of an estimated date as to when the facility will be closed, and a lack of description of decontamination of equipment. Of these, the only evidence supporting the contention

that the plan did not contain a discussion of decontamination of equipment used in handling the hazardous waste is the testimony of complainant's inspector.

This testimony, however, is contradicted by the written report of the December, 1983, inspection. Further, the report of the May, 1984, inspection contains no documentation at all on this subject. The documentary evidence of the report, written contemporaneously with the inspection, must be considered more reliable than testimony given some time later. Accordingly, based upon the reports of the two inspections, and based further upon complainant's failure to explain why the reports make no mention of the lack of decontamination equipment information on the closure plan, if there was such a lack, it is found that respondent's closure plan was not inadequate in this connection.

The report of the December, 1983, inspection does, however, indicate that the plan did not contain an estimated year of closure. (CX 29) Such an estimate is required by subsection (a)(4) of 40 C.F.R. §265.112. The report of the May, 1984, inspection and the testimony contain no discussion on this point. Consequently, the only evidence on this issue indicates that the closure plan did not contain an estimated year of closure, as required by the regulations.

Respondent argues that a closure plan was in effect at the time of the December, 1983, inspection which OSDH had found ac-

ceptable on March 8, 1983. The record does indicate that OSDH inspected the facility in November, 1982, and notified respondent on December 9, 1982, that closure cost estimates for all elements in the plan had to be included (RX 2) Respondent submitted these estimates, and, by letter dated March 8, 1983, OSDH stated that this area of noncompliance had now been corrected. (RX 2C)

However, on February 6, 1984, OSDH notified respondent that as a result of the December, 1983, inspection, OSDH and EPA had determined that the closure plan at the facility was inadequate because, among other reasons, it did not include an estimated year for closure. (RX 3) Respondent's plant engineer replied by letter dated March 2, 1984, that the closure plan had been acceptable in March, 1983. (RX 27) but also stated that respondent would do whatever was necessary to comply with the State and federal regulations. (Id.) No revision had been made to the plan, however, by the time of the May, 1984, inspection. (CX 1; TR 23) In its answer to the complaint, respondent main- respondent maintains that it has since amended its closure plan, and that now it conforms with the applicable rules and regulations. Nothing in the record contradicts this contention.

Complainant has presented direct evidence that the plan did not contain information which the regulations specifically require.

Respondent does not meet this evidence; rather, it states that this same plan was previously acceptable but was subsequently amended to meet complainant's objections. This argument does not go to the issue of whether the plan at the facility contained all the information required by the regulations at the time of inspection. Accordingly, since the only direct evidence on this point is that respondent's closure plan did not contain an estimated year of closure, it is found that respondent violated 40 C.F.R. § 265.13(b).

e. Groundwater Monitoring System.

The complaint charges that respondent also violated 40 C.F.R. § 265.90(a). This section states that the owner or operator of a surface impoundment which is used to manage hazardous waste must implement a groundwater monitoring program capable of determining the facility's impact on the quality of groundwater in the uppermost aquifer underlying the facility.

The standards used to determine whether a groundwater monitoring system is adequate are set out in 40 C.F.R. § 265.91. This section requires the installation of at least one upgradient well (i.e., in the direction of increasing static head) sufficient to yield groundwater samples representative of background groundwater quality in the uppermost aquifer, unaffected by the facility. 40 C.F.R. § 265.91(a)(1). This section also

requires the installation of at least three downgradient wells (i.e., in the direction of decreasing static head), sufficient to ensure that they immediately detect any statistically significant increase in amounts of hazardous waste or its constituents that migrate from the waste management area to the uppermost aquifer. [Id. at (b)].

In order to determine whether the groundwater samples taken from the wells show contamination greater than the background levels, section 265.92 requires owners or operators to obtain and analyze samples from the groundwater sampling and analysis plan. 40 C.F.R. § 265.92(a). The plan must include means to determine the concentration or value of at least thirty-one parameters specified in the regulation and its appendices. [Id. at (b)(1)-(3)].

Complainant does not dispute that respondent has maintained four wells around the CWSS since its creation in 1977. The basis for the alleged violation is the charge that this system is incapable of determining the facility's impact upon the quality of groundwater in the uppermost aquifer. Complainant also contends that the system is inadequate because respondent failed to analyze groundwater samples for all the parameters specified in 40 C.F.R. § 265.92, thereby making it impossible to determine whether any increase in contaminants over background groundwater quality has occurred. Complainant points out further that the

wells have yielded water samples which show levels of hexavalent chromium in excess of those considered safe for drinking under the Safe Drinking Water Act.

As evidence that respondent's wells are incapable of determining the effect of the CWSS on the groundwater in the uppermost aquifer, complainant notes that the wells have dried up at various times since their installation. As such, it is argued, the wells were not drilled deep enough to intersect the uppermost aquifer.

There is evidence that some of the wells were dry for substantial periods since the effective date of RCRA and the groundwater monitoring regulations. Indeed, all of the wells were dry from January, 1981, until December, 1981, a period which encompasses the date the RCRA requirements became effective. (CX 26) Moreover, the west well went dry on July 9, 1983, and remained so at least through April, 1985; the east well went dry on September 28, 1983, and remained dry at least through April 15, 1985; and the south well went dry on January 24, 1984, and remained dry at least through January 24, 1985. (RX 39, 43)

It is not disputed that the wells were dry for long periods. Rather, respondent argues that the wells did intersect the uppermost aquifer, which respondent's expert, testified was not the regional water table, but a perched water table located approximately ten feet below the surface. (TR 189-191) He

further testified that this perched water table was created by a larger storage pond maintained by respondent just west of the CWSS. (TR 192, 206)

Complainant argues that a perched water table created by man-made water source does not meet the definition of "aquifer" found at 40 C.F.R. § 260.10. Even if it does, complainant maintains, the wells were still insufficient to determine the facility's impact on the groundwater because they were consistently dry for so long. This argument is persuasive.

The definition of "aquifer" found at 40 C.F.R. § 260.10 includes a geologic formation capable of yielding significant amount of groundwater to wells or springs. A water table whose source is a man-made storage pond is not capable of yielding significant amounts of groundwater. In fact, if respondent's statements are correct, the perched water table is totally distinct from the from the regional water table. Therefore, there is no way this perched water table could include significant amounts of groundwater. Further, if, as respondent maintains, the wells actually intersect this perched water table, the wells should have had water in them. But they did not contain water for substantial periods of time.

Moreover, there is evidence to suggest that the wells were not properly placed if they were to conform with 40 C.F.R. § 265.91(a)(1) and (2). Complainant's expert geohydrologist

logist testified that the wells, as positioned, did not constitute a system with at least one upgradient well and at least three downgradient wells. (TR 39-40) Respondent's own expert, Dr. Kent, acknowledged that the north and south wells are not directly downgradient. (TR 194) Finally, respondent does not dispute complainant's contention that the facility never tested all the parameters required by 40 C.F.R. § 265.92 to determine the levels of contaminants in the groundwater. Consequently, respondent counld not have determined whether any additional contamination had occurred.

In the alternative to its contention that the wells as installed actually do intersect the uppermost aquifer, respondent argues that it was under no obligation to comply with the groundwater monitoring regulations issued pursuant to RCRA. Respondent bases this argument upon the fact that it had expressed a desire to delist the hazardous waste in the CWSS, and that OSDH had advised that "enforcement discretion" would be used while the delisting petition was pending before EPA.

The record does show that a delisting petition was filed by respondent with EPA (letter from respondent to OSDH dated February 14, 1983, RX 2B). In reply OSDH asked for a copy of the petition "[t]o avoid enforcement action." (RX 2C) In a letter dated April 21, 1983, OSDH advised that "[OSDH] will wait for a

ruling from the EPA to determine the status of your groundwater water monitoring. You are to continue present monitoring and parametric coverage in the interm." (RX 2D) An OSDH official testified that the decision not to enforce the groundwater monitoring requirements was based upon his conversations with Mr. Gerald Fontenot, former head of the EPA RCRA Enforcement Section, (TR 93-96) wherein Mr. Fontenot advised the use of "enforcement discretion" with respect to respondent's groundwater monitoring system. (TR 94) Subsequently, EPA notified respondent that the petition would not be granted unless additional information was provided in November, 1983, only one month before the inspection upon which this action is partly based. (CX 18)

While respondent's evidence and arguments on this point do not excuse the shortcomings of the groundwater monitoring system at the facility after the effective date of the regulations, and while there is little doubt that EPA may enforce RCRA regulations against facilities which are also subject to State regulatory authorities, Wyckoff Co. v. Environment Protection Agency, 796 F.2d 1197, 1201 (9th Cir. 1986), they must be given consideration in setting a penalty for such violation.

Respondent also argues that the facility's CWSS complied with all applicable regulations when it was constructed in 1977, and that OSDH expressly permitted continued operation of and testing of the same parameters. The record does contain a letter from OSDH dated January 11, 1980, which advised respondent that permission to continue storing hazardous waste in the CWSS was being extended for three years. (RX 20) The same letter also incorporates the parameters to be tested as outlined in the original 1977 authorization. (RX 18, 20)

There is no question, however, that respondent was subject to the RCRA requirements when they became effective on November 19, 1981. RCRA, by its terms, applies to all owners or operators of facilities that treat, store or dispose of hazardous waste. 42 U.S.C. § 6924. Respondent was under an obligation to comply with these requirements at that time irrespective of its continuing relationship with State authorities. Respondent was required to have a groundwater monitoring system that met the requirements of 40 C.F.R. §§ 265.90 and 265.91, and to test for all parameters specified in § 265.92. Accordingly, it is found that respondent was was a person, as that term is defined by RCRA and regulations issued pursuant thereto, that respondent was subject to RCRA and regulations issued pursuant thereto, and that respondent violated 40 C.F.R. § 265.90 by

failing to have a groundwater monitoring system capable of determining the facility's impact on the quality of groundwater in the uppermost aquifer underlying the facility.

CIVIL PENALTIES

a. Waste Analysis Plan Violation.

Complainant proposes a penalty of $1300 for the violation involving the waste analysis plan. (CX 3) This amount is based upon the view that the violation has minor potential for harm and is a moderate deviation from the regulatory framework. (Id.) It appears that the violation, which involves inadequate documentation, does in fact have minor potential for harm.

With respect to extent of deviation, EPA's civil penalty policy states that a deviation will be considered moderate when the violator significantly deviates from the requirements as they were intended to be implemented. The deviation is major when the requirements are not met to such an extent that there is substantial noncompliance. The deviation is minor when most of the requirements are met, but some are not. (CX 2 at 8-9)

It is determined that respondent's waste analysis plan included some of the information required by the regulation, but that three specific requirements were not included. This failure is sufficient to constitute a moderate deviation from the regulatory framework. Therefore, it is determined that the appropriate base penalty for this violation is $1000.

In its argument concerning the penalty for this violation, complainant seeks the addition of a ten percent enhancement for lack of good faith efforts to comply, and a twenty percent enhancement for a history of noncompliance, for a total proposed penalty of $1300. (CX 3) Complainant provides the following justification for these enhancements:

> Violation was noted in Nov. 1982, Dec. 1983, and May 1984 inspection. Also addressed in Feb. 1984 warning letter. Still noncompliant." (Id.)

It is noted, however, that, with respect to the waste analysis plan violation observed during the November, 1982 inspection, OSDH accepted respondent's revised plan submitted in response to notice of the violation. (RX 2C) Therefore, it seems neither fair nor reasonable to include in the penalty an added amount for bad faith and history of noncompliance based upon the violation found in December, 1983, or the February, 1984,

1984, notification of the violation. Furthermore, with respect to the proposed enhancement for lack of good faith effort to comply, complainant has not overcome evidence that respondent made an effort to comply with the violation observed by OSDH during the November 9, 1982 inspection, that OSDH accepted the respondent's revised plan, (RX 2C) and that respondent asserts that it brought the plan into compliance after the February, 1984, notification.

It is important to note that two OSDH officials--the Director of the Industrial Waste Division and the head of the Compliance Monitoring Enforcement Section of the Industrial Waste Division--both testified that respondent had never shown any bad faith in attempting to comply with the regulations. (TR 98-99, 249) The record suggests no reason to suppose that the testimony of these officials is not credible. Accordingly, it is found that respondent has not shown bad faith in its effort to comply with the regulations, and that an added penalty would not be appropriate. With respect to the proposed added penalty for a history of noncompliance, it is also significant that the history in question amounts to a failure to comply by May 17, 1984, with a violation of a regulation noted at the December 9, 1983, inspection. Since respondent was not advised of this violation until receipt of the February 6, 1984 letter, it is found that the existence of the violation during the May, 1984, inspection,

three months after respondent was notified of the violation, does not support an additional penalty in this case.

The appropriate penalty, therefore, for the violation established, is found to be $1000.

b. Inspection Schedule Violation.

Complainant proposes a penalty of $2700 for the violation involving the inspection schedule, (CX 3) based upon the view that this violation has minor potential for harm but is a major deviation from the regulatory framework. (Id.) It is clear that the violation, which involves inadequate documentation, has a minor potential for harm. However, complainant's belief that the violation amounts to a major deviation from the regulations is not well founded. Respondent's inspection log, while not a complete inspection schedule, included substantial portion of the total information required. Certain information required by the regulations, however, was not included, such as an inspection schedule for particular equipment. This constitutes moderate deviation from the regulatory framework. It is therefore found that the appropriate penalty, as provided by the penalty matrix in the EPA's civil penalty policy, and taking all circumstances into account, is the midpoint of the base range, or $1000.

In its computation of the proposed penalty for this vio-

lation, complainant added a ten percent enhancement for lack of good faith efforts to comply, and a ten percent enhancement for a history of noncompliance, (CX 3) based upon the same justification used in connection with the waste analysis plan violation. (supra, 25-27). There appears to be no reason to reach a different result respecting the proposed enhancements than was reached earlier. Accordingly, it is determined that the proposed additional amounts for lack of good faith effort and history of noncompliance are not justified.

c. Documents for Personnel Training.

Complainant proposes a penalty of $2925 for the violation relating to personnel training documents, based upon the view that there is minor potential for harm but a major deviation from the regulatory framework. (CX 3) It seems clear that the violation, which involves inadequate documentation, has a minor potential for harm, particularly in the circumstances here. And, while the personnel training records do not show that hourly employees received training, they did include some of the required information. In these circumstances, and because a significant portion of the required information was present, it is found that the violation in fact amounts to a moderate deviation from the regulatory framework. This conclusion is supported by the testimony of an EPA enforcement officer to

the effect that he would have assessed a penalty based upon a moderate rather than a major deviation from the regulatory scheme. (TR 127) Accordingly, it is found that the appropriate base, as provided by the penalty matrix in EPA's civil penalty policy, is the mean amount of $1000. (CX 3)

Again with respect to this violation, complainant proposes the addition of civil penalty amounts over and above its initial request for alleged lack of good faith and history of noncompliance. For the reasons given in connection with the foregoing two violations (supra, 25-27), these additions are rejected.

d. Closure Plan Violation.

Complainant proposes a penalty of $360 for the closure plan violation, (CX 3) based upon the assumtion that this violation has minor potential for harm and is a minor deviation from the regulatory framework. (CX 3) It seems clear that the potential for harm is indeed minor, and that the violation is a minor deviation from the regulatory requirements, the only violation established having been failure to include an estimated year of closure. It is therefore found that the appropriate base penalty for this violation is $360.

e. Groundwater Monitoring System Violation.

Complainant proposes a $25,000 penalty for the groundwa-

ter monitoring system violation. This amount is based upon complainant's view that the violation has major potential for harm and constitutes a major deviation from the regulatory requirements. (CX 3) It is concluded that this violation does have major potential for harm. There is evidence that the monitoring wells yielded samples showing levels of hexavalent chromium in excess of those considered safe for drinking water under the Safe Drinking Water Act. (CX 26 at 9-19 - 9-21, 9-25) Further, the fact that the wells have been dry for long periods in the past limits attempts to ascertain whether further contamination has taken place.

As to whether deviation from the regulatory framework is major, it would be difficult to disagree that, because the purpose of the framework is early detection of deleterious changes in the groundwater underlying the facility, any system which cannot do this must be a "major" deviation from the original purpose. However, this respondent had installed a system, and was measuring the parameters which it had been given to understand must be measured in 1977 as well as in 1983 after a delisting petition had been filed with EPA. (see supra, 21-23). It is concluded that the deviation here falls midway between major and moderate, and is found to be "moderate/major." If a penalty commensurate with this extent of deviation were to be imposed, it would fall halfway between the matrix penalties for moder-

ate and major, i. e. $19,999/$20,000, or $19,999.50.

Throughout this proceeding, however, it has been clear that respondent has relied upon information and advice from the State OSDH. Nowhere is this reliance more clear, and as much to respondent's detriment, as it is in connection with the groundwater monitoring violation. The record shows that respondent was led to believe, indeed was specically told, that "regulatory discretion" would be used in connection with its monitoring system pending disposition of the petition (see supra, 21-23). The record does not support the notion that the delisting petition was a merely a ruse to postpone the time for correcting the groundwater system deficiencies. Clearly OSDH officials not think the petition was groundless, or they would not have been willing to await the result from EPA. They need not have informed respondent that OSDH would

> . . . . wait for a ruling from the EPA to determine the status of your groundwater monitoring. You are to continue present monitoring and parametric coverage in the interm. (RX 2D)

Neither does the record show that respondent sought to delist knowing it could not succeed. In the absence of such a showing, or at least a strong implication, the full penalty dictated by the penalty policy matrix as discussed above cannot be imposed. For the same reasons, no finding can be made that respondent

may be assessed additional penalties for having profited by the delay. If the material were to be delisted, it is possible that no additional expense would have to be incurred in connection with the groundwater monitoring system. Although EPA and OSDH exchanged letters detailing their differences over whether to enforce the regulations against the respondent while the petition was pending, testimony shows that neither OSDH nor EPA ever communicated this concern to the respondent, which had been told that it what it was doing was acceptable for the present. (TR 135; RX 24, 25) Consequently, respondent could have reasonably believed, and, it is found, did believe, based upon this record, that no action was necessary.

This is not to say that ignorance of RCRA is an excuse, or that failure to comply with federal hazardous waste obligations may be overlooked. A penalty must be imposed, but must be imposed with a measure of discretion that takes the situation fairly into account. This is not the first occasion when a member of the regulated community relied upon advice, which it had every reason to consider current and coordinated with federal hazardous waste regulators, given by State hazardous waste officials, but it is one of the more compelling. It is simply unfair in this situation to penalize to the full extent of the matrix, much less with additions for bad faith, history

of noncompliance, and profit. 1/ Public confidence, and the confidence of the regulated community in the administrative regulatory process, requires the adjustment made here. Consequently, a penalty of $8000 for this violation is found to be appropriate.

While this decision was in preparation, it was learned that five of respondent's original exhibits from the second set of hearings, RX 39 through RX 43, could not be located by the Regional Hearing Clerk (October 6 - November 2, 1989).

In December, 1989, RX 42 was located. On December 20, 1989, and in mid-January, 1990, respondent was asked to supply copies of the remaining four exhibits, but none were supplied. On February 14, a conference call was held with respondent and counsel in Region VI to determine whether copies could be located. The parties were given through March, 1990, to furnish copies. Counsel in Region VI wrote that none could be found. Respondent has not replied. Consequently, no reliance has been placed upon the missing exhibits.

1/ This holding applies to the specific facts at hand. It should not be cited for general effect, or cited in any other case where the facts are not exactly the same.

As part of its proposed Order, EPA would also require respondent to conduct and implement a hydrogeologic survey, drill new wells in order to implement a satisfactory groundwater monitoring system, and develop and implement a water sampling system in order to measure possible contamination. 40 C.F.R. § 265.117 requires that post-closure care must continue for thirty years after the date of complete closure. One facet of post-closure care is groundwater monitoring and reporting in accordance with 40 C.F.R. §§ 265.90, et seq. 40 C.F.R. § 265.117(a)(1). Therefore, respondent will be required to install an acceptable groundwater monitoring system if the waste has not been delisted, and monitor water samples in order to ascertain possible contamination. The record already contains, however, Dr. Kent's hydrogeologic survey and two supplements thereto, which should be sufficient to satisfy the concern regarding a hydrogeologic study.

ORDER

Pursuant to Section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928, the following ORDER is entered against Brunswick Mercury Marine Plant #14:

1. a. Respondent is assessed a civil penalty of $11,360.

   b. Payment of the full amount of the penalty shall be made within 60 days after service of this ORDER upon respondent by forwarding a cashier's or certified check payable to the United States of America and addressed to:

      Environmental Protection Agency
      Region 6
      Regional Hearing Clerk
      P. O. Box 360582M
      Pittsburgh, PA 15251

2. Within thirty (30) calendar days of the effective date of this ORDER, respondent shall develop and submit to EPA a list of proposed indicator parameters capable of detecting leakage of hazardous waste or hazardous constituents into groundwater. The parameters should be representative of waste constituents at least as mobile as the most mobile constituents that could reasonably be derived from the facility's waste, as well as organic solvents used at the facility, and should be chosen after considering:

   A. The types, quantities, and concentrations of constituents in wastes managed at the facility;

B. The mobility, stability, and persistence of waste constituents or their reaction products in the unsaturated and saturated zones beneath the waste management area;

C. The detectability of the indicator parameters, waste constituents or reaction products in groundwater;

D. the concentration or value and the natural variation known or suspected) of the proposed monitoring parameter in background groundwater.

The list should include the basis for selecting each proposed indicator parameter, including any analyses or calculations performed. The basis for selection must include chemical analysis of the facility's waste and/or leachate as appropriate.

The list should also include parameters to characterize the site-specific chemistry of groundwater at the site, including but not limited to the major anions and cations that make up the bulk of dissolved solids in water (i.e., CL-, Fe, Mn, Na+, SO4, Ca+, Mg+, K+, No-3, PO4+, and ammonium).

3. Within thirty (30) days of this ORDER respondent shall submit to EPA a plan for the design and installation of a monitoring well network that will meet the following requirements:

A. The upgradient wells must be capable of yielding samples that are representative of background ground-water quality in the uppermost aquifer and are not affected by the facility. The number and location of the wells must be sufficient to:

(1) characterize the spatial variability of background water; and

(2) meet the needs of the statistical test proposed pursuant to paragraph 6.

B. The downgradient wells must be capable of immediately detecting any statistically significant amounts amounts of hazardous waste or hazardous constituents that may have migrated from the facility into the groundwater system.

C. The monitoring system should be designed to operate for a period of no less that thirty years.

The plan should include the following elements:

A. A description and map of proposed well locations, including a survey of each wells's surface reference point and the elevation of its top of casing.

B. Size and depth of wells including expected well completion depths and screened interval.

C. Description of well-intake design, including screen slot size and length; filter pack materials and method of filterpack emplacement.

D. Type of proposed well casing and screen materials. The choice of well materials should be made in light of the parameters to be monitored for and the nature of the leachate that could potentially migrate from the facility. The well materials should: 1) minimize the potential of absorption and desorption of constituents from the samples; and 2) maintain their integrity for the expected life of the system.

E. Methods used to seal the well from the surface and prevent downward migration of contaminants through the well annulus.

F. Description of the methods or procedures used to develop the wells.

When developing this plan, respondent shall refer to 40 C.F.R. Part 265, Subparts F, and G.

4. Also within thirty (30) days of this ORDER the respondent shall submit a sampling and analysis plan which will result in the taking of representative groundwater samples for analysis and comparison of upgradient and downgradient water quality.

The plan should include the following elements:

A. Well evacuation procedures including volume to be evacuated prior to sampling and handling procedures for purged well water.

B. Sample withdrawal techniques. Sampling equipment and materials (tubing, rope, pumps, etc.) shal be selected to yield representative samples in light of parameters to be monitored for. The sampling protocol will include field measurement of pH, conductivity, and temperature for each sample.

C. Sample handling and preservation techniques including provision for field-filtration of samples as appropriate.

D. Procedures for decontaminating sampling equipment between sampling events.

E. Procedures for measuring groundwater elevations at each sampling event.

F. Chain of custody procedures to be used for all phases of sample management.

G. Laboratory analytical techniques, including

EPA approved analytical methods and quality assurance, quality control procedures.

H. Procedures for performing a comparison of upgradient and down-gradient groundwater to determine whether contamination has occurred. The procedures should include:

(1) A proposed method (statistical or otherwise) to compare upgradient and downgradient well water that provides a reasonable balance between the probability of falsely identifying and failing to identify contamination.

(2) An accelerated sampling schedule to establish data for the comparison. In no instance shall sampling exceed 2 months.

(3) A proposed method for data organization and presentation.

When developing the sample and anlysis plan and data presentation, format, respondent should propose methods deemed acceptable after consultation with EPA.

5. By no later than 60 days after EPA approval of the well network plan, respondent shall complete the installation of the well network.

6. By no later than thirty (30) days after the installation of the monitoring network, respondent shall implement the sample and analysis plan, perform the comparison and submit the results

to EPA for review.

7. If there is a statistically significant difference between upgradient and downgradient well water, the respondent will develop a groundwater assessment plan capable of determining the following:

A. The extent of migration of hazardous constituents into groundwater.

B. Waste/leachate characteristics including specific gravity, viscosity, solubility in water, and chemical constituents.

C. Soil properties including cation exchange capacity, organic content, and temperature.

The plan should describe the methods proposed to accomplish the above objectives including indirect and direct techniques. The sampling and analysis plan developed pursuant to paragraph 6 above, should be revised to meet the new objectives of this monitoring phase. The plan should include an expeditious schedule for the implementation of the above assessment, and should be submitted to EPA no later than fifteen (15) days after the confirmation of leakage.

8. Within thirty (30) calendar days of EPA approval of the assessment plan, respondent will begin to execute the plan according to the terms and schedules contained therein. Within

twenty (20) days of the completion of the assessment, respondent will submit the results to EPA, including all raw data collected all calculations performed, and an interpretation of the the findings.

9. Based upon the results of the study, respondent will fulfill its informational obligations pursuant to § 270.14(c)(7) or (8) and submit the results to EPA no later than two months after the completion of the groundwater assessment described in paragraph seven.

10. All plans, reports, and schedules required by the terms of this ORDER are, upon approval by EPA, incorporated into this ORDER. Any noncompliance with such approved studies, reports, or schedules shall be termed noncompliance with this ORDER.

11. In the event of agency disapproval (in whole or in part) of any plan required by this ORDER, EPA shall specify any deficiencies in writing. The respondent shall modify the plan to correct the deficiencies within thirty (30) days from receipt of disapproval by EPA. The modified plan shall be submitted to EPA in writing for review.

Should the respondent take exception to all or part of EPA's disapproval, the respondent shall submit to EPA a written statement of the grounds for the exception. Representatives of EPA and respondent may confer in person or by tele-

phone in an attempt to resolve any disagreement. If agreement is reached, the resolution shall be reduced to writing and signed by representatives of each party. In the event that resulution is not reached within 15 days, the respondent shall modify the plan as required by EPA.

12. In the event that EPA believes the respondent has failed to:

A. Comply with the milestones contained in paragraphs 3, 7, 8, or 10; B. Provide the plans and information described in paragraphs 2, 4, 5, 6, 8, 9, 10, or 11 and 12;

EPA will notify the respondent of the failure and shall provide respondent fifteen days in which to remedy the failure. If respondent does not remedy the failure within fifteen days, it shall pay stipulated penalties from the date of the violation as follows:

A. $500 per day for failure to comply with a milestone listed above;

B. $100 per day for failure to provide a plan or information listed above.

13. Notwithstanding compliance with the terms of this ORDER,

respondent may be required to take further actions as necessary, including additional groundwater monitoring and/or assessment, to come into compliance with RCRA, or other applicable State or federal law.

14. Respondent shall provide access to its property and/or its facility, as described previously herein, to EPA and OSDH employees, contractors and consultants at all reasonable times and shall permit such persons to be present and move freely in the areas in which any work is being conducted pursuant to this ORDER.

15. Upon request, respondent shall split samples with EPA and OSDH or their representatives from any samples collected pursuant to this ORDER. In order to facilitate such efforts, respondent shall provide at least three (3) days advance notice of any sample collection dates that may differ from those dates set forth for sampling in the EPA approved proposal.

16. Respondent shall insure that all actions required by this ORDER are undertaken in compliance with all applicable federal, state, and local laws.

J. F. Greene
Administrative Law Judge

July 31, 1990
Washington, D. C.