12/12/94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
HARMON ELECTRONICS, INC.	)	
	)	**Docket No. RCRA-VII-91-H-0037**
Respondent	)	
	)	
	)	

Pursuant to Section 3008(a) of the Resource Conservation Recovery Act, (RCRA), 42 U.S.C. § 6928(a), respondent is found in violation of the following: (1) Section 3005 of RCRA, 42 U.S.C. § 6925, 40 C.F.R. Part 270, for operation of a hazardous waste landfill without a permit or interim status; (2) 40 C.F.R. Part 265, Subpart F, for failure to have a groundwater monitoring program for a hazardous waste landfill; (3) 40 C.F.R. Part 265, Subpart H, for failure to establish and maintain financial assurance for closure and post-closure and liability coverage for sudden and non-sudden accidental occurrences of a landfill; and (4) Section 3010(a) of RCRA, 42 U.S.C. § 6930(a), 40 C.F.R. Parts 260 through 265, for failure to timely register as a hazardous waste generator.

INITIAL DECISION

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: December 12, 1994

Appearances:

For Complainant:

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INTRODUCTION

This proceeding had its genesis in a complaint issued by the United States Environmental Protection Agency, Region VII, (sometimes complainant or EPA), on September 30, 1991, pursuant to Section 3008(a) of the Resource Conservation and Recovery Act (sometimes RCRA or Act), as amended, 42 U.S.C. § 6928(a). Complainant alleged the following four counts against Harmon Electronics, Inc., (respondent): (1) operation of a hazardous waste landfill without a permit or interim status in violation of Section 3005 of RCRA, 42 U.S.C. § 6925 and 40 C.F.R. Part 270; (2) failure to have a groundwater monitoring program for a hazardous waste landfill in violation of 40 C.F.R. Part 265, Subpart F; (3) failure to establish and maintain financial assurance for closure and post-closure of its landfill in violation of 40 C.F.R. Part 265, Subpart H; and (4) failure to timely notify EPA and/or register as a hazardous waste generator in violation of Section 3010(a) of RCRA, 42 U.S.C. § 6930(a) and 40 C.F.R. Parts 260 through 265. For these alleged violations, complainant proposed a total penalty of $2,777,324.

On May 15, 1992, respondent served its answer to the complaint. EPA then filed a motion for partial accelerated decision (PAD) as to liability for all counts and a motion to strike affirmative defenses dated August 21, 1992. Respondent served its opposition to complainant's motions on October 7, 1992.

On August 17, 1993, the undersigned Administrative Law Judge (ALJ) issued an order granting complainant's PAD for counts I, II

and IV. Regarding count III, complainant sought an accelerated decision on liability not only for failure to establish and maintain financial assurance for closure and post-closure but for failure to obtain liability coverage for sudden and non-sudden accidental occurrences as well. The ALJ granted the former request. However, the latter allegation was lacking from the complaint and thus, denied. Moreover, the ALJ granted complainant's motion to strike certain affirmative defenses, including respondent's statute of limitations defense.

To cure its pleading deficiency for count III, complainant filed a motion for leave to amend its complaint on October 29, 1993. In this motion, complainant also adjusted the proposed penalty to $2,343,706 as a result of changes in the method of calculating the economic benefit of noncompliance. On November 11, 1993, respondent responded in partial opposition regarding the pleading deficiency. On December 2, 1993, the ALJ granted complainant's motion to amend the complaint. Respondent served its amended answer on December 17, 1993.

On December 10, 1993, complainant renewed its PAD motion for count III based upon failure to obtain coverage for sudden and non-sudden accidental occurrences, in violation of 40 C.F.R. Part 265, Subpart H. After respondent served its opposition of December 30, 1993, the ALJ granted complainant's motion in an order dated January 4, 1994.

An evidentiary hearing was held January 12-14, 1994, to determine only the appropriateness of the $2,343,706 proposed

penalty. Following the evidentiary hearing, the United States Court of Appeals for the District of Columbia issued a decision in 3M Company (Minnesota Mining and Manufacturing) v. Browner, (3M), 17 F.3d 1453 (D.C. Cir. 1994), reh'g en banc denied, (May 9, 1994), holding that (1) the general five-year statute of limitations period in 28 U.S.C. § 2462, applies to all federal agencies' actions, including penalty assessment proceedings and (2) the statute of limitations begins to run from the time the violation first accrued. The ALJ, accordingly, issued a notice and order on March 10, 1994, instructing the parties to advise the ALJ in their briefs to what extent, if any, 3M affects the subject proceeding.

As stated above, respondent has already been found liable for the violations alleged in EPA's complaint. Under the ALJ's previous two orders (August 17, 1993 and January 4, 1994), it was determined that no genuine issue of material fact existed concerning respondent's liability for all counts, and several affirmative defenses were stricken as a matter of law. Thus, the sole issue to be resolved here is whether or not $2.3 million dollars is an apposite penalty in light of the relevant facts and law.

In this regard, it must also be determined whether or not the penalty EPA seeks is supported by a preponderance of the evidence.[1] "Preponderance of the evidence" is the degree of relevant evidence

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[1] The applicable section of the Consolidated Rules of Practice, 40 C.F.R. § 22.24, provides in pertinent part, that: "Each matter in controversy shall be determined by the Presiding Officer upon a preponderance of the evidence."

which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

Before going further, it is appropriate to address a procedural matter. In respondent's post-hearing reply brief, served on July 11, 1994, it included a motion to dismiss this proceeding based on the statute of limitations in 28 U.S.C. § 2462 in light of the 3M decision. Complainant responded on July 21, 1994. Respondent's motion was denied in an order dated July 25, 1994.

All proposed findings of fact and conclusions of law inconsistent with this decision are rejected by the ALJ. Further, it is not required that the ALJ engage in the unnecessary herculean task of deciding every single issue raised in these proceedings. It is sufficient that there be a resolution of only those major questions requisite for a decision.

FINDINGS OF FACT

Based upon a review of the evidence, the following are the findings of fact.[2] Respondent is a Missouri corporation and a subsidiary of Harmon Industries. The former's facility, located in Grain Valley, Missouri, specializes in assembling control and

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[2] The findings necessarily embrace an evaluation of the credibility of the witnesses testifying on particular issues. This involves more than merely observing the demeanor of a witness. It also encompasses an evaluation of their testimony in light of its rationality or internal consistency and the manner in which it blends with other evidence. Wright & Miller, Federal Practice and Procedure: Civil, § 2586 (1971).

safety equipment for the railroad industry. More specifically, respondent solders electrical equipment onto raw circuit boards which are used to prevent trains from colliding. (Tr. 368.)

Respondent receives its raw circuit boards from Harmon Industries' Warrensburg, Missouri facility. It then attaches resistors, diodes and micro-processor chips resulting in a completed circuit panel. After the assembly process is complete, flux[3] accumulates on the circuit board in the area of the soldering connection. The flux must be cleaned from the boards before further assembly and testing can occur. (Tr. 611.)

Since the beginning of respondent's operations in 1973 until November 1987, it used the following solvents to remove the flux: 1,1,1-trichloroethane (TCA), freon, trichloroethylene (TCE), toluene, xylene and methylene chloride. (RX-6 at 2-1; Tr. 371.) All these solvents are listed as hazardous substances. Respondent's employees removed the flux by dipping a brush into a small jar containing the solvent and then wiping the solvent across the board. This cleaning method was customary practice in the industry. (Tr. 369.)

Sometime in November of 1987, the upper management of respondent learned that its employees were improperly disposing of these cleaning solvents. Apparently, whatever solvent remained in the discarded jars was poured into 3-5 gallon pails. Then, approximately once every 1-3 weeks, maintenance people would simply

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[3] Flux is a substance which facilitates the soldering of metal surfaces to be joined. (Tr. 612)

throw the solvents out the door of the manufacturing facility onto the ground. (Tr. 503.) Gene Harmon (Harmon), the chairman and CEO of Harmon Industries, walked through the facility once a week, and was aware these solvents were being used, but neither he nor anyone in management knew the solvents were being disposed onto the ground. Harmon assumed the employees continued to use the solvent until it was all depleted, and any remainder evaporated. (Tr. 399-400.) Approximately, 30 gallons per month of hazardous waste were dumped in this manner. (Tr. 198.)

Respondent's management immediately halted this disposal practice and began an investigation into possible harm from this action. Initially, it conducted an investigation by taking water samples from the fire pond[4] and a lake situated downgradient and across the street. Respondent's testing results revealed no contamination across the street and a minimal amount in the fire pond. (RX-2; Tr. 376.) Thus, respondent decided to hire a consulting firm to determine the extent of the contamination.

Internally, respondent instituted in-house changes. First, in December of 1987, it eliminated the use of the hazardous solvent cleaners by switching to a water soluble flux. This process change had been in the planning stages for several years in reaction to the belief that these solvents would eventually become illegal. However, the technology to make the change did not exist previously. (Tr. 378-79.)

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[4] The fire pond is the name given to a pond located on respondent's property in an area downgradient of the assembly building where the solvents were disposed. (RX-6, Figure 3.)

In January of 1988, respondent hired various consultants to examine soil and groundwater samples. It was learned that there was a low level of contamination in the immediate area of disposal. This area was designated as the "hot spot." However, the full extent of contamination was still unknown. (RX-3; RX-4; Tr. 377.)

During May of 1988, a RCRA compliance inspection was conducted at the Warrensburg facility by the Missouri Department of Natural Resources (MDNR). As a result of the inspection, this facility was cited for 10 violations of Missouri's hazardous waste management laws. However, MDNR only requested that the deficiencies be corrected. A copy of the inspection report, dated June 6, 1988, was sent to EPA. (CX-8.) The report stated that aside from the aforementioned violations basic waste management practices were found to provide adequate protection against unplanned releases of hazardous waste. (CX-8 at 7.) Further, this facility had timely filed notification of hazardous waste activity. (Tr. 114-15.)

Also in May of 1988, respondent hired International Technology Corporation (IT) to further define the breadth of contamination. Robert Kent (Kent) and Michael Bentley (Bentley) were the leaders of the investigation. Kent was qualified as an expert in hydrogeology and geology, and Bentley in the field of hydrogeology. After analyzing the previous collected data, IT developed its own environmental assessment of respondent's property known as the Phase I report. (RX-6.)

The Phase I report indicated that the soil was contaminated with the following hazardous cleaning solvents: freon, TCA,

toluene, methyl chloride and xylene. Samples I and II of table 1 yielded the highest concentrations, which was the hot spot. The analytical results from samples I and II of subsurface soil revealed a range of concentration for freon of up to 37,900 parts per billion (ppb); for TCA of up to 128,000 ppb; for toluene of up to 40,200 ppb; for methyl chloride of up to 2,950 ppb; and for xylene of up to 23,200 ppb. (RX-6 at 3-2, Table 1.) All of the above substances can have a deleterious effect on human health. Exposure to these compounds can occur either through inhalation of vapors, contact with skin, ingestion of contaminated aquatic organisms and/or contaminated water. (RX-6 at 4-1 to 4-5.) TCA and toluene exceeded acceptable levels for ingestion of contaminated water and/or aquatic animals. (RX-6 at 4-1 to 4-3.) Xylene and toluene exceeded acceptable levels for drinking water. (RX-6 at 4-3 to 4-5.)

Initial geology reports uncovered three basic layers. First, from the surface to 1 foot below, there is a brown silty top soil. Second, underlying this layer is a stiff clay region ranging from 8-17 feet below the surface. The bottom layer is a mixture of soft shale and hard limestone bedrock. Due to the low permeability of the limestone layer, water wells are uncommon in the area. (RX-6 at 2-5 to 2-6.)

This report also established a conceptual model of the extent of contamination based upon how these solvents would migrate. (RX-6, Figure 3.) IT's model hypothesized that after the solvents were dumped outside, a certain amount would evaporate, while the

remaining amount would migrate down through the upper soil zone until reaching the low permeable layer of limestone and shale. At this juncture, the solvents would migrate west along the border point of the soil and limestone layer until surfacing at the fire pond. The migration would then cease. (Tr. 417-19.)

After providing IT's toxicologist with a list of the solvents at issue and their respective concentrations, it was concluded these levels did not present a danger to people from either skin exposure or from drinking groundwater. However, the toxicologist's conclusions were based upon Kent's professional opinion that (1) there were no water wells in the area from which anyone was drinking and (2) even if groundwater were present, the solvents would not penetrate the low permeable layer of limestone. (Tr. 420.) The toxicologist's preliminary risk assessment was reflected in Phase I's conclusion which stated at this point in time the past disposal practices do not appear to pose an adverse impact on human health or environment. (RX-6 at 5-1.)

On June 27, 1988, MDNR had a meeting with respondent and IT at the former's request. During this conference, respondent disclosed voluntarily to MDNR its illegal disposal practice. (Tr. 40-41, 427.) One of the MDNR representatives present was Kristan Goschen (Goschen). At the time, Goschen's primary duties were to conduct RCRA compliance evaluation inspections and complaint investigations. During the meeting respondent provided MDNR with a copy of the Phase I report, outlining its past history of waste management, generation practices, and what occurred with their

solvents. (Tr. 41.) Moreover, MDNR informed respondent that it would be required to comply with all applicable RCRA regulations. (Tr. 45.)

A compliance inspection of respondent's facility was conducted by Goschen on August 1, 1988. Following the inspection, he determined that the applicable regulations for respondent's facility would be the requirements regarding hazardous waste generators as well as treatment, storage and disposal facilities. (Tr. 45-46.) His compliance inspection report (RX-14) cited respondent for operation of a hazardous waste facility without a permit, which included all 40 C.F.R. Part 265 standards (Tr. 53), and failure to register as a hazardous waste generator. (RX-14 at 4.) In order to comply with the notice of violation (NOV), and properly ship its stored hazardous waste off-site, respondent registered as a hazardous waste generator on August 8, 1988. (RX-8.)

In a letter dated August 25, 1988, to MDNR, respondent indicated the steps it had taken to comply with the NOV from the inspection. Since it no longer generated any hazardous waste streams, respondent believed the regulations for generators were no longer applicable. (RX-12 at 1.) Additionally, to continue with its site investigation, respondent submitted to MDNR a proposed work plan, which included a groundwater monitoring plan on September 27, 1988. (Tr. 430.)

MDNR responded to both the corrective action required by the compliance inspection and the proposed plan on October 17, 1988.

(CX-6.) This letter stated that respondent had satisfactorily addressed most of the violations. (CX-6 at 1.) For respondent's proposed remediation plan, MDNR requested additional documents on sampling and analysis of subsurface materials and waters in order to better define the extent of contamination for purposes of developing a closure plan.

Around October or November of 1988, respondent resubmitted a detailed plan, entitled Phase II investigation (RX-17.) It was designed to evaluate the breadth of contamination through installations of soil borings and monitoring wells. On February 15, 1989, MDNR provided respondent with its review of this plan, and stated that it appears sufficient to assess the extent of contamination. However, MDNR also suggested several technical comments and sought a response to them. In accordance with MDNR's request, it resubmitted its Phase II plan on March 14, 1989, answering MDNR's comments. (RX-23.) After reviewing the revision, MDNR approved the Phase II plan on April 3, 1989, subject to the incorporation of an additional requirement. (RX-24 at 1; Tr. 435.) Prior to implementing the Phase II plan, Sandra Carroll (Carroll) from MDNR visited respondent's site on April 21, 1989. (Tr. 436.) During this site review with Kent, she noted that it was agreed to eliminate a background (upgradient) well and two other wells that MDNR had suggested. (RX-27; Tr. 437.) Carroll acquiesced to eliminating the proposed upgradient well because, as Kent explained to her, the placement of the upgradient well would be in a separate

groundwater regime from the one contaminated and, therefore, would not provide any useful data. (Tr. 438-39.)

On May 16, 1989, MDNR again approved the Phase II plan subject to the inclusion of one added requirement. (RX-29.) MDNR approved this plan without the inclusion of an upgradient well as agreed by the previous site review of April 21, 1989. Respondent's Phase II plan, as approved, proposed the installation of three monitoring wells. (RX-28, Plate I.) These wells were installed and operational in June of 1989. (RX-72 at 1-7; RX-74 at 2-1.)

After implementing the Phase II investigation, respondent sent its results to MDNR on September 28, 1989. The sampling tests identified similar hazardous solvents in the groundwater beneath the facility as found in Phase I's soil tests. This report outlined that the groundwater region is only present in a shallow perched zone down to a depth of 18 feet. At further depths, there is unweathered dry bedrock. (RX-31 at 2-1.)

This report also confirmed the general absence of water well resources in the area. Prior to 1987, the four residences located across the way from respondent received their water from delivery trucks. In January 1987, a public water supply line from Independence, Missouri was connected to provide water. Nevertheless, in the surrounding area land records listed six water wells. Of these wells none was closer than one-half mile, and the public records did not indicate the presence of any significant aquifer. (RX-31 at 4-2.)

The results of soil and sediment tests from soil boring number 5 again exhibited that the most highly affected area was the hot spot at depths between 10 and 18 feet. (RX-31 at 6-6, Table 3.) Below 18 feet, low concentrations of only freon and TCA were detected. (RX-31 at 6-7.) Soil samples near the fire pond revealed low concentrations of the hazardous solvents. (RX-31 at 6-8.)

The groundwater analysis of samples uncovered the solvents in all three monitoring wells. (RX-31 at Table 4.) Like the soil samples, concentrations of the compounds decreased the further downgradient from the hot spot. Moreover, two surface water samples were taken. One was taken from a spillway of the fire pond and another was from a lake across the street. Neither surface sample revealed any contamination. (RX-31 at 6-10.)

The results of this investigation reaffirmed the conceptual model and initial conclusion in the Phase I report. (Tr. 659.) This report concluded, since the environmental risk presented by past disposal is minute, a viable option would be to leave the compounds in the ground with a very small risk of future environmental problems. (RX-31 at 9-2.) This conclusion was based upon the fact that (1) health concerns to either humans or aquatic life from exposure to the chemicals through likely pathways is virtually absent or within safe levels (RX-31 at 7-6 to 7-7, 9-2) and (2) neither the surface water nor the groundwater, which are generally lacking, exhibited any detrimental effects. (RX-31 at 9-2.)

MDNR reviewed the results in November 1989, and determined that respondent's facility was a hazardous waste land disposal facility. As such, respondent was required to comply with all applicable regulations. Although standard procedure was to issue an administrative order, MDNR recommended that respondent enter into a consent decree, in light of its voluntary disclosure and cooperation in completing the work requested. (RX-33 at 1.) Yet, respondent was reluctant to be classified as a hazardous waste land disposal facility, believing CERCLA or a specially tailored situation to be more appropriate. (Tr. 542-43.)

Peter Sam (Sam), an EPA compliance officer in Region VII, was responsible for calculating the proposed penalty in this matter. He became familiar with the violations at Grain Valley through his monthly conference calls with MDNR's Chief of Enforcement. (Tr. 103.) Using the RCRA Enforcement Response Policy, he classified respondent as a high priority class 1 violator because the latter's actions fit these definitional schemes. (Tr. 104-05.)

In light of what EPA believed to be violations of a serious magnitude, EPA sent MDNR a letter dated May 29, 1990, requesting MDNR to take expedited action against respondent within 30 days or EPA may initiate an enforcement action. (CX-3 at 1; Tr. 107, 109.) During Sam's monthly conference call with MDNR in June, MDNR had not been able to get respondent to comply with the RCRA regulations. (Tr. 109.)

Since EPA did not receive notice of respondent's compliance, on October 15, 1990, EPA again sent a letter to MDNR. However,

this time it was sent to the Director of the Environmental Quality Division. (Tr. 110.) This letter declared that if MDNR failed to take formal action within 30 days, which included monetary penalties, then EPA would initiate an enforcement action. (CX-3 at 4; Tr. 110.) After 30 days passed, Sam recommended to management to start an enforcement action to protect human health and environment, in light of what he viewed as serious violations. (Tr. 110.)

On January 25, 1991, MDNR met with respondent to discuss its closure plan. Gene Williams (Williams), an MDNR employee, was present at the meeting. He was first assigned to the Harmon case in January 1991, to determine whether their groundwater system was adequate. (Tr. 60.) Williams' purpose for attending the meeting was to inform respondent what was expected of them for adequate groundwater monitoring. When the issue of an upgradient well arose, Williams explained that an upgradient and other additional wells were needed to fully define the extent of contamination. (Tr. 62.)

In June of 1991, respondent submitted its Phase III site investigation plan. (RX-61.) The Phase III plan focused on further evaluation of subsurface conditions, and proposed to install an upgradient well, seven additional monitoring wells and eight additional soil borings in order to define the area of contamination. At the time, there existed three monitoring wells and six soil borings. (RX-61 at 2, Figure 1.)

On September 10, 1991, Williams visited respondent's facility. During his inspection, the facility did not yet have an upgradient well installed. (Tr. 64.) Thus, at this point in time the groundwater monitoring system was not capable of adequately characterizing the impact of the contamination on the groundwater. (Tr. 78.)

On September 20, 1991, respondent received a draft consent decree from the Attorney General's Office to review. Four days later, MDNR sent to respondent its comments concerning closure and post-closure plan. Also, on September 30, 1991, EPA filed its complaint against respondent.

Sometime in 1991, Jack Williams (J. Williams), respondent's insurance agent, first inquired into obtaining sudden and non-sudden accidental insurance coverage for the facility. (Tr. 630.) In his opinion, J. Williams believed that there were only two "reasonably solvent and solid" insurance companies issuing environmental liability coverage. (Tr. 631.) However, J. Williams felt that neither of these policies satisfied the requirements because there was no coverage for defense costs, on-site occurrences or pre-existing pollution. (Tr. 630, 632, 635, 638.)

On November 25, 1991, respondent resubmitted its revised closure and post-closure plan. (RX-69.) This plan included an upgradient well which was installed on November 21, 1991. (RX-69, Figure 2; Tr. 64.) Also, in this plan was respondent's trust agreement executed on November 22, 1991, (RX-69, App. F), which satisfied the financial assurance requirements for closure and

post-closure care. Regarding coverage for sudden and non-sudden accidental occurrences, only two carriers offered this coverage. (RX-69 at 4-1.) Moreover, in light of its elimination of hazardous waste generation, respondent sought to obtain a variance from this requirement to balance the coverage with its perceived risk at the site.

MDNR responded to respondent's Phase III amended investigation plan (RX-68) in a letter dated December 24, 1991. (RX-70.) MDNR advised that this plan likely will necessitate added field work in order to fully comply with the interim status groundwater monitoring requirements. It went on further to state that this plan is a step toward achieving compliance.

On January 23, 1992, MDNR commented on respondent's closure plan of November 25, 1991. Concerning the latter's request for a variance from sudden and non-sudden accidental occurrence coverage, MDNR expressed that the variance provision is primarily used with operating facilities where releases of hazardous waste have not occurred. Thus, respondent's variance request was denied. (RX-71 at 5.)

In response to MDNR's comments, respondent resubmitted its revised closure plan on February 25, 1992, in which it reiterated its position requesting a variance from sudden and non-sudden accidental coverage. (RX-72 at 4-1.) MDNR gave final approval to the February 25 plan on July 15, 1992. (RX-79.) However, MDNR stated that respondent must still satisfy the financial liability requirements for 40 C.F.R. § 265.147 by obtaining sudden and non-

sudden accidental occurrence coverage or by an alternative method listed in this section. (RX-79 at 2.)

During March of 1992, respondent sent its 1991 annual report for groundwater quality assessment (RX-74) in accordance with MDNR's request. (RX-70 at 2.) This report provided an analysis on groundwater quality based upon 14 monitoring wells at the site for activities conducted prior to December 31, 1991. (RX-74, Tables 1-4.) Pursuant to 40 C.F.R. § 265.90(d), respondent elected to use an alternative monitoring program since hazardous waste had already been detected. The intent of the program was to determine to what extent the groundwater was affected and the rate and direction of the solvents.

In July of 1992, respondent delivered to MDNR its report summarizing the results of the Phase III investigation. (RX-75.) This report further defined the lateral and vertical extent of contamination. Based upon all the studies, it was Bentley's opinion that the past disposal practices of respondent did not pose a threat to human health or environment due to the following: the low levels of contamination in the soil and groundwater; the absence of pathways to reasonable groundwater receptors; and the lack of both groundwater resources and water well users in the area. (Tr. 661-62.)

Around eight months later, in March of 1993, a consent decree was entered into between the State of Missouri and respondent. (RX-82.) At the execution of the decree, the latter had no financial liability coverage for sudden or non-sudden accidental

occurrences. However, the consent decree declared that no enforcement action would be brought against respondent for failure to have this coverage as long as there was documentation of an attempt to obtain such insurance on a semi-annual basis. (RX-82 at 3-4.)

During April and October of 1993, J. Williams made two follow-up inquiries on acquiring insurance coverage with the same result as in 1991. None of what he considered reliable and financially responsible insurance carriers provided coverage that met the applicable requirements under the regulations. (Tr. 641, 643.)

DISCUSSION AND CONCLUSIONS OF LAW

Before continuing further, the effect of the 3M decision on the subject proceeding must be addressed. 3M, supra, at 4, held explicitly that the five-year statute of limitations in 28 U.S.C. § 2462 applied to administrative penalty cases, and the statute of limitations begins to run from the date when the alleged violation was committed giving rise to the penalty. While 3M was a Toxic Substances Control Act (TSCA) case, the court, in interpreting the scope of § 2462, stated:

> The provision before us, § 2462, is a general statute of limitations, applicable not just to EPA in TSCA cases, but to the entire federal government in all civil penalty cases, unless Congress specifically provides otherwise.

Id. at 1461.

In light of this language, respondent argues strongly and for good reason that all of its violations herein are time-barred by

28 U.S.C. § 2462. The regulations implementing the requirements of which respondent was in violation all became effective between 1980-1982.[5] Respondent contends that all the violations were completed and instantaneous at the moment when they were required. As a result, complainant's failure to initiate a proceeding against respondent within five years from the date the violations first accrued back in 1980-1982 bars completely complainant's penalty action.

Complainant concedes that all the violations for which it seeks penalties first accrued between 1980-1982. However, complainant contends that all the offenses committed were continuing violations. To support its position, it points out that the issue of whether penalties could be assessed for continuing violations was not before the D.C. Circuit in 3M. In complainant's opinion, all of the violations continued at least until August 1988, when respondent first registered with MDNR and EPA as a hazardous waste generator. Thus, complainant's filing of its complaint on September 30, 1991, was initiated well within the five-year time limit mandated by 28 U.S.C. § 2462.

Respondent parries complainant's continuing violation argument with flat-out dicta contained in footnote 2 of 3M. In the initial

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[5] For counts I and IV - the regulations became effective on November 19, 1980. Section 3005(e) of RCRA, 42 U.S.C. § 6925(e) and 40 C.F.R. § 270.70; for count II - the regulations became effective on May 19, 1981. 45 Fed. Reg. 33232 (May 19, 1980); for count III - the regulations became effective for financial assurance for closure and post-closure care on July 6, 1982, and for sudden and non-sudden accidental occurrence coverage on July 15, 1982. 47 Fed. Reg. 15032 (April 7, 1982) and 47 Fed. Reg. 16544 (April 16, 1982).

3M proceeding, the ALJ ruled in the alternative that § 2462 would not bar any enforcement action for violations which occurred five years prior to EPA's filing its complaint because under Section 16(a)(1) of TSCA, each day 3M failed to submit a pre-manufacture notice would constitute a separate violation. Docket No. TSCA-88-H-06 (Interlocutory Order, August 7, 1989) at 45-46. In response, the D.C. Circuit stated, in footnote 2, "We have considerable doubt about this aspect of the ALJ's opinion (citing Toussie v. U.S., 397 U.S. 112, 115 (1970); U.S. v. McGoff, 831 F.2d 1071, 1079 (D.C. Cir. 1987)), but we pass over it," since neither the Chief Judicial Officer (sometimes CJO) nor EPA, when before the D.C. Circuit, relied on this part of the ALJ's determination. 17 F.3d at 1455 n.2 (emphasis added).

Respondent stresses the two cases cited in footnote 2 to buttress its position. In respondent's opinion, these cases establish that (1) there is no continuing violation and (2) even if a continuing violation exists, it does not operate to extend the five-year statute of limitations. Both Toussie and McGoff were similar to 3M in that the violations involved a failure to file or register as required by statute. Toussie was a criminal prosecution for failure to register for the draft by one's eighteenth birthday under Section 3 of the Universal Military Training and Service Act (UMTSA). In 1969, the government brought suit against Toussie, who turned 18 in 1959, alleging that the offense continued each day he failed to register. The Supreme Court found nothing in the UMTSA or the legislative history

supporting the government's claim that Congress intended failure to register to be a continuing violation. While the Court did not consider the offense a continuing one, it held that an offense should only be construed as continuing when "the explicit language of the substantive statute compels such a conclusion, or the nature of the crime involved is such that Congress must have assuredly intended that it be treated as a continuing violation." 397 U.S. at 115. McGoff was also a criminal proceeding for failure to register as required by the Foreign Agents Registration Act (FARA) of 1938, 22 U.S.C. § 611-621 (1982 & Supp. III 1985). Yet, unlike Toussie, the enforcement provision in § 618(e), explicitly stated failure to file was a continuing offense despite any applicable statute of limitations. For the reasons set forth below, plus the element of dicta, Toussie and McGoff are singularly unpersuasive.

The case at bar is readily distinguishable from Toussie and McGoff. First, both Toussie and McGoff involved criminal prosecutions. If any ambiguity exists in the scope of a criminal statute, then it should be resolved in favor of lenity. Rewis v. U.S., 401 U.S. 808, 812 (1971). This limitation would be even more so where the criminal offense is alleged to be continuing. Criminal penalties involve, as the Court has stated, "stigma, penalties and prison." U.S. v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952). Thus, without any evidence in the UMTSA or the legislative history supporting a continuing violation, the Court in Toussie explained the threat of criminal sanctions was incentive enough for compliance without the offense being a

continuing violation. 397 U.S. at 123. However, the same considerations do not apply to civil penalty proceedings. Civil penalties do not entail either the same coercive or draconian effect. If they did, then Congress would presumably have felt it unnecessary to impose criminal sanctions for knowing violations in addition to civil penalties for noncompliance. See In re Union Carbide Corporation, Docket No. TSCA-85-H-02 (Order, October 3, 1985) at 8.

Second, the violations here are inherently different from 3M, Toussie and McGoff. The violations in the above cases all stem from the single act of failing to register or provide notification as required by statute. After filing the appropriate form, no further action is required under TSCA, UMTSA or FARA. Whereas the violations in the instant matter resulted from the ongoing operation of hazardous waste landfill without a permit. The offense here was not simply an act of failing to file for a permit but a state of continued noncompliance with RCRA by treating, storing and disposing of hazardous waste without a permit.

Under rules of statutory construction the Supreme Court has stated, "[o]ur starting point is the language of the statute," Schreiber v. Burlington Northern, Inc., 472 U.S. 1, 5 (1985), but "in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." Dole v. Steelworkers of America, 494 U.S. 26, 35 (1990) (citations omitted). Both the language of

RCRA and legislative history of the Act support a finding of a continuing violation.

Complainant correctly notes that Section 3005(a) prohibits treatment, storage and disposal of hazardous waste without a permit, and by implication any such future action. Moreover, when hazardous waste is disposed without the appropriate preventive procedures in place, it remains on the property "insidiously affecting the soil and groundwater aquifers." Fallowfield Development Corp. v. Strunk, 1990 U.S. Dist. Lexis 4820 (E.D. Pa. 1990) at *29.[6] Consequently, the violation continues until the appropriate clean-up measures are erected or remediation occurs. Id.; See also Gache v. Town of Harrison, 813 F. Supp. 1037, 1042 (S.D.N.Y. 1993); City of Toledo v. Beazer Materials and Services, Inc., 833 F. Supp. 646, 656 (N.D.Ohio 1993) (quoting Fallowfield, 1990 U.S. Dist. Lexis 4820 at *29). The same result has also been reached under TSCA for improper disposal of polychlorinated biphenyls (PCBs). Failure to dispose of PCBs in accordance with the regulatory requirements constitutes a violation which continues as long as the PCBs remain out of service and in a state of improper disposal. In re Standard Scrap Metal Co., TSCA Appeal No. 87-4 (CJO, August 2, 1990) at 5, (emphasis added); In re City of Detroit Public Lighting Department, TSCA Appeal No. 89-5 (CJO,

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[6] Fallowfield was a citizen suit case pursuant to Section 7002(a)(1)(A) of RCRA, 42 U.S.C. § 6972(a)(1)(A). In order to sufficiently plead a violation under this section, the plaintiff must make a good faith allegation of an ongoing violation. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987).

February 6, 1991) at 7, reconsideration denied, July 9, 1991. Furthermore, pursuant to the Clean Water Act (CWA), an identical conclusion has been reached for allowing improperly discharged dredged or fill material in wetland areas to remain unabated. See U.S. v. Tull, 615 F. Supp. 610, 626 (E.D. Va. 1983), aff'd, 769 F.2d 182 (4th Cir. 1985), rev'd on other grounds, 107 S. Ct. 1831 (1987); U.S. v. Cumberland Farms of Connecticut, Inc., 647 F. Supp. 1166, 1183 (D.Mass. 1986), aff'd, 826 F.2d 1151 (1st Cir. 1987), cert. denied, 108 S. Ct. 1016 (1988).

The legislative history on the enactment of RCRA in 1976, emphasized that RCRA's purpose and overriding concern was to provide nationwide protection against the grave dangers of improper hazardous waste disposal through a regulatory scheme. H.R.Rep. No. 1491, 94th Cong., 2nd Sess. 3-4, 11, reprinted in 1976 U.S. Code Cong. & Admin. News 6238, 6241, 6249. It was also dramatically stated that allowing unregulated hazardous waste disposal practices to continue can result in defoliation of the environment and contamination of drinking water or the food chain. Id. at 11, 1976 U.S. Code Cong. & Admin. News at 6249. These effects remain unnoticed until appearing later in persons or the environment. Id. Therefore, in implementing this regulatory framework, it was stressed that for treatment, storage and disposal of hazardous waste a permit is required, and such waste will only be deposited at sites specifically designed for disposal in order to employ the "safeguards necessary to protect human health and environment." Id. at 28, 1976 U.S. Code Cong. & Admin. News at 6266. This

language evinces Congressional intent that unregulated hazardous waste management should be prevented, and the consequences of such action continue unless remediated.

As a public welfare statute designed to protect human health and the environment, RCRA should not be construed narrowly. Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); U.S. v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 49-50 (1st Cir. 1991); U.S. v. Sellers, 926 F.2d 410, 416 n.2 (5th Cir. 1991); U.S. v. Johnson & Towers, Inc., 741 F.2d 662, 666 (3d Cir. 1984). Respondent, however, seeks an interpretation that vitiates the public interest and goes against the stated purpose of RCRA. According to respondent, it had a one-time obligation to obtain a permit, which was a completed offense when it failed to comply back in 1980. But for this instance, it could have continued to treat, store and dispose of hazardous waste without a permit incorporating the safeguards necessary for protection of human health and environment. If this view were adopted, the regulatory framework of RCRA would be futile, as an offender could disregard these fundamental conditions without penalty simply by not complying within five years, while the consequences of hazardous waste disposal continued unabated. Settled principles of statutory construction compel avoidance of a result which runs counter to the broad goals which Congress intended to achieve, in the absence of an unmistakable directive that is lacking here. In re Alm Corp., Docket No. II TSCA-IMP 13-86-0121 (Initial Decision, November 30, 1989) at 9-10 (citing FTC v. Fred Meyer, Inc., 390 U.S. 341, 349

(1968)). As respondent's interpretation would undermine the purposes of RCRA, it is rejected. See In re A.Y. McDonald Industries, Inc., (McDonald) RCRA (3008) Appeal No. 86-2 (CJO, July 23, 1987) at 24, reconsideration denied, November 9, 1987.

The legislative history on the enforcement sections of RCRA further supports a continuing violation. As first enacted in 1976, Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), required the Administrator to provide notice to violators of any violation. If after 30 days the violation still continued, then the Administrator was authorized to issue an order requiring compliance within a specified time period. Pursuant to Section 3008(a)(3), a penalty would be imposed only if the offender failed to take corrective action within the time referenced in the order. The House Report explained that the justification for the penalties section, civil and criminal, "is to provide a broad variety of mechanisms so as to stop the illegal disposal of hazardous wastes." H.R.Rep. No. 1491, at 31, 1976 U.S. Code Cong. & Admin. News at 6269 (emphasis added).

In 1980, the enforcement provisions of RCRA were amended in response to the growing national problem of hazardous waste. S.Rep. No. 172, 96th Cong., 2nd Sess. 1, reprinted in 1980 U.S. Code Cong. & Admin. News 5019. The Senate Report on the legislative history explained the specific amendments to Section 3008. Id. at 3-4, U.S. Code Cong. & Admin. News at 5022. Section 3008(a) was changed to authorize the Administrator to issue compliance orders immediately instead of waiting 30 days. The report then stated, "this provision is aimed at stopping so-called

'midnight dumping' which may not continue at any location for more than 30 days, and to seek penalties for single occurrences, rather than just continuing offenses (emphasis added)." Id. Thus, the legislative history explicitly recognized that illegal disposal of hazardous waste was a continuing offense. In accordance with the legislative history, courts have also held continuing violations exist pursuant to RCRA.

The CJO expressed In re International Paper Company (IPCO), RCRA (3008) Appeal No. 90-3 (March 28, 1991), that noncompliance with RCRA and its implementing regulations is a continuing violation. In IPCO, citing to Section 3008(g), EPA initiated a complaint and compliance order against respondent involving substantially the same violations already decided according to a consent agreement and final order. While the CJO stated that compliance with RCRA is a continuing obligation, he disallowed the complaint (emphasis added). His rationale was that "to rely on § 3008(g) as allowing the Agency to file a new charge under § 3008(a) following a settlement of the § 3008(a) charge would effectively suspend the application of res judicata under RCRA in continuing violation cases." Id. at 14 (emphasis added). This was true especially in light of EPA's ability to enforce noncompliance with the order under § 3008(c).

Recently, the court in U.S. v. Ekco Housewares, Inc., 853 F. Supp. 975 (N.D.Ohio 1994), ruled that noncompliance with RCRA and its implementing regulations were continuing violations. The court found the respondent subject to a penalty under Section 3008(g) for

its continuous RCRA violations of at least 4,606 days: 1,486 days for failure to establish and maintain financial assurance for closure, 1,445 days for failure to maintain and establish financial assurance for post-closure care, and 1,675 days for violating its duty to establish and maintain liability coverage for personal injury and property damage resulting from operation of a surface impoundment. Id. at 980, 990-91.

Respondent, nonetheless, adheres to the position that, even if it had a continuing duty to comply with RCRA, this obligation does not extend the statute of limitations beyond the five-year period from when the violations accrued. However, respondent's argument once again runs contrary to the language and purpose of RCRA.

As part of the expansion in enforcement, Section 3008(g), Civil Penalty, was added to RCRA in 1980. This section mandated the following:

> Any person who violates any requirement of this subtitle 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 (emphasis added).

The goals of RCRA, as enunciated by Congress, supra, at 26-29, were to prevent the unregulated management of hazardous waste from occurring. Section 3008(g) encompassed these goals, as part of the enforcement overhaul in the 1980 amendments, by enabling the Administrator to assess per day penalties for continuing violations regardless of whether a compliance order was previously issued. Therefore, in order for there to be a daily penalty, logically

there must be a corresponding daily or continuing violation. Section 3008(g) makes this clear by declaring each day of such violation constitutes a separate violation. For this reason, each day the violation continues, a separate claim accrues extending the statute of limitations. See In re Union Carbide Corp., at 7; In re 3M Co., at 45-46 (applying same interpretation to nearly identical language in TSCA penalty section, Section 16(a)(1)).

It is concluded for purposes of the statute of limitations that a separate claim accrues and a new period begins each day a violation continues pursuant to Section 3008(g). Therefore, the complaint was timely filed in 1991, as all the violations continued at least until August 1988, when respondent filed its hazardous waste generator notification.

Complainant argues that if violations are deemed to be continuing the entire period of noncompliance may be considered when assessing penalties. Despite the finding of continuing violations, the five-year statute of limitations is still germane to the assessment of penalties in this proceeding. As stated, supra, at 21, the D.C. Circuit in 3M declared that the statute of limitations in 28 U.S.C. § 2462 pertains to the entire federal government in all civil penalty proceedings. Id. at 1461. Moreover, the application of 28 U.S.C. § 2462 with RCRA comports with prior holdings of this and other ALJ's. See In re Waterville Industries, Inc., Docket No. RCRA-I-87-1086 (Order, June 23, 1988) at 7; In re Tremco, Inc., Docket No. TSCA-88-H-05 (Order, April 7, 1989) at 11; In re Adolph Coors Co., Docket No. RCRA-VIII-90-09

(Order, March 1, 1991) at 21-22. Thus, any assessment of penalties can only extend as far back as September 30, 1986, which was five years prior to the filing of the complaint on September 30, 1991.

APPROPRIATENESS OF PENALTY

EPA seeks a proposed penalty of $2,343,706 for the violations herein. Under 40 C.F.R. § 22.24, EPA bears the ultimate burden of persuasion to establish that its proposed penalty is appropriate. The Administrator's authority to assess penalties is rooted in Sections 3008(a)(1) and (a)(3) of RCRA. These sections provide in pertinent part:

> [W]henever . . . the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation . . . .
>
> * * * *
>
> Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.

42 U.S.C. § 6928(a)(1), (a)(3). The discretion of the ALJ in calculating the appropriate penalty is described in 40 C.F.R. § 22.27(b):

> Amount of civil penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set

> forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

The Penalty Policy (sometimes Policy) guidelines supply a coherent, reviewable explanation of the penalty determination. In re Sandoz, Inc., RCRA (3008) Appeal No. 85-7 (CJO, February 27, 1987) at 8 n.11. However, the Policy guidelines do not rise to the level of binding regulations. As long as the ALJ considers the RCRA Penalty Policy, the ALJ has fulfilled his duty. In re Fair Haven Plastics, Inc., Docket No. RCRA V-W-88-R-005 (Initial Decision, April 27, 1989) at 45 (citing to McDonald, at 18). Thus, the ALJ's discretion in calculating the penalty is not hampered by the Penalty Policy provided he considers it adequately and explains his reasons for departing from it. Id.

I. The RCRA Civil Penalty Policy

The final Civil Penalty Policy (October 1990) sets out a penalty calculation method consisting of four steps: (1) determining a gravity-based penalty for a particular violation; (2) adding a multi-day component, if applicable, for serious violations; (3) adjusting the penalty for special circumstances; and (4) considering the economic benefit of noncompliance where appropriate.

In the initial step for computing the gravity-based penalty, two components are considered: "potential for harm" and "extent of

deviation" from RCRA or its regulatory requirements. These two factors represent the seriousness of the violation which must be taken into account in assessing a penalty pursuant to Section 3008(a)(3) of RCRA. These two components are then incorporated into a matrix from which the amount of the gravity-based penalty is determined. The "potential for harm" from a violation is broken down into two factors: the risk of exposure to hazardous waste posed by noncompliance and the adverse effect that noncompliance may have on implementing the RCRA program. The "extent of deviation" measures the degree to which the violator is in compliance or not in compliance with the requirements at issue.

Step two of the penalty calculation calls for a determination of whether a multi-day penalty is applicable. Multi-day penalties are mandatory when the gravity-based penalty matrix yields a designation of either major (potential for harm)- major (extent of deviation), major-moderate or moderate-major. In such cases a multi-day penalty is imposed for days 2 through 180 of the violation. Multi-day penalties after the 181st day are discretionary.

After determining the appropriate gravity-based penalty, reflecting any multi-day component, the penalty may then be adjusted upwards or downwards based upon particular circumstances surrounding the violation. These include but are not limited to: good faith efforts to comply/lack of good faith; degree of willfulness and/or negligence; history of noncompliance; ability to pay; environmental projects; and other unique factors.

Step four involves calculating the economic benefit from noncompliance where applicable. This gain is then added to the gravity-based penalty. A formula for computing the economic benefit is provided in the Policy.

II. Application of the Civil Penalty Policy

Under the Penalty Policy, a separate penalty should be assessed for each violation that results from an independent act (or failure to act) by the violator and that is substantially distinguishable from any other charge in the complaint for which a penalty is to be assessed. Respondent argues that the imposition of multiple penalties is inappropriate because the violations in count II and III stem from a "single transgression" - the operation of a hazardous waste landfill without a permit or interim status. Moreover, respondent claims that the Penalty Policy acknowledges that multiple penalties are also unjustified when failure to meet one statutory requirement, such as obtaining a permit or interim status, leads to numerous other violations of independent regulatory requirements.

Respondent's case fails to meet either of these exceptions to multiple penalties. First, violations of the permit requirement, the groundwater monitoring program and financial assurances all demand proof of independent acts substantially distinguishable from the other. Second, the Penalty Policy clearly states that EPA has the discretion to forego multiple penalties when the violator through ignorance of the law fails to comply with the initial requirement, and consequently, runs afoul of several other RCRA

requirements. (CX-11 at 21.) Respondent was certainly not ignorant of the law as evidenced by the timely compliance of the Warrensburg facility, supra, at 8. Instead, respondent believed incorrectly that a permit was not needed. This misbelief is reflected in Harmon's testimony stating that he knew hazardous solvents were being used; however, he simply assumed that they were completely used up and not disposed. Therefore, complainant properly exercised its discretion in not applying this exception to respondent.

A. Count I

For count I, operation of a hazardous waste landfill without a permit or interim status, complainant classified this violation as a major potential for harm and a major deviation from the regulatory requirements.

1. Potential For Harm

The first subfactor in evaluating the potential for harm is the likelihood of exposure to hazardous waste posed by noncompliance, and the degree of such potential exposure. Additionally, in determining the risk of exposure, the Policy states that the focus is on the potential for harm, and not whether actual harm has occurred. (CX-11 at 14.)

Respondent contends that the risk of exposure as a result of its improper disposal activities was minor. It relies on the Phase I-III reports in which its experts, Kent and Bentley, concluded that respondent's prior dumping of hazardous waste posed a minute risk to human health or environment. This conclusion was based

largely on what its experts believed were low levels of hazardous waste contamination, confined movement of the solvents due to the geographical conditions, and the general absence of water resources in the area.

Respondent argues stoutly that complainant lacked any evidence to support a major potential for harm finding save for Sam's testimony. In determining that the potential for harm was major, the Phase I and II reports were the only technical documents that Sam used. (Tr. 153, 157, 200.) In light of Sam's use of the above reports, respondent attempts to discredit his testimony, since he was neither qualified as an expert nor consulted any hydrogeology or geology experts before rejecting the expert conclusions of Kent and Bentley.

An important consideration supporting the likelihood of harm was the quantity of hazardous waste disposed. Respondent was disposing of roughly 30 gallons per month of hazardous solvents. In reviewing the Phase I and II reports, the reports revealed these releases of hazardous substances to the environment without specific measures to assess the extent of contamination. (Tr. 106.) Sam expressed concern specifically about the levels of freon, TCA, toluene, methyl chloride and xylene documented by the reports. (RX-6, Table I at 3-2; RX-31, Table III; Tr. 206-08.) Furthermore, the toxicity of the compounds and the presence of groundwater contamination also supported a major potential for harm finding. (Tr. 199.)

Despite Sam's lack of expert status, his findings were not unreasonable. In measuring the probability of exposure, there was a strong threat of exposure to the hazardous waste disposed. First and foremost, respondent was dumping 30 gallons per month of hazardous waste in an unregulated manner onto the ground. (CX-10 at 3; Tr. 198.) Although Kent stated that the level of contamination was low, nonetheless, it is significant that these reports acknowledged the groundwater and soil have been affected by respondent's past disposal. (RX-31 at 9-1; Tr. 442.) The permit requirements are aimed at preventing serious harm from hazardous waste disposal by ensuring that disposal occurs in a safe manner to protect human health and environment. Thus, despite respondent's characterization of the disposal as amounting to a small quantity generator, the fact remains that contamination has occurred without any procedures instituted for preventing potential exposure.

Respondent still attempts to minimize the seriousness of the violations by claiming no serious adverse harm has resulted. This argument, however, runs contrary to the Penalty Policy, which recognizes explicitly that the potential for harm is not based on whether actual harm occurred because the violator may have had no control in the actual outcome. Therefore, such violators should not be rewarded with lower penalties simply because no harm has resulted. (CX-11 at 14.) This is such a case; however, it should not be forgotten that soil and groundwater contamination have indeed occurred. The record reflects that the absence of serious harm is a result of geographical conditions, specifically, the low

permeability of the underlying bedrock and the lack of water resources in the area. Kent admitted that the toxicologist's conclusion in the Phase I report, finding the past disposal did not appear to have an adverse effect on human health and environment, was based upon these fortuitous geographical conditions. (Tr. 420.)

On the other hand, the likelihood of potential exposure to hazardous wastes was substantial without these geographical conditions. The record established that there were four residences located across from respondent, and six water wells within the area. One of which was only 1/2 mile away. Hence, respondent should not be rewarded simply because it was lucky enough that the contamination appears confined by the underlying bedrock and the absence of water resources used by the local inhabitants. See McDonald, at 39 (respondent should not be rewarded for complete disregard for the regulations simply because the tests failed to establish groundwater contamination).

Assuming arguendo, that the likelihood of exposure was minor, in light of the circumstances of this case, the risk of exposure is but one subcomponent used in determining the potential for harm. Potential for harm also includes the subcomponent of adverse effect on the RCRA program. Respondent has huffed and puffed about the absence of serious harm from its prior disposal practices. However, the stark reality of its situation is that respondent never sought to obtain a permit, and routinely disposed of approximately 30 gallons per month of hazardous waste. The Policy

recognizes operating without a permit or interim status as an example of a violation which undermines the statutory purposes for implementing the RCRA program. (CX-11 at 14-15.) In this regard it has been declared by the Environmental Appeals Board (EAB), that the permitting requirements go to the very heart of the RCRA program. If they are disregarded, intentionally or inadvertently, the program cannot function. In re Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1 (EAB, August 5, 1992) at 20 (citing to McDonald, at 25). Furthermore, unlike the case at bar, the same conclusion was reached by this ALJ where the violation was only failing to submit a revised Part A application for storage of hazardous waste. [T]he Act's regulatory program is based fundamentally on a facility's Part A permit application. * * * The Part A procedure is basic to regulating hazardous waste. Failure to receive accurate information concerning hazardous waste activities can seriously damage the regulatory program. In re Elwin G. Smith Division, Cyclops Corp., Docket No. RCRA-V-W-85-R-002 (Initial Decision, June 25, 1986) at 41, affirmed in part and amended in part on other grounds, RCRA (3008) Appeal No. 86-6 (CJO, August 14, 1990) at 15. Accordingly, respondent's actions had a substantial adverse effect on the statutory and regulatory procedures for implementing RCRA. It is concluded that the potential for harm was properly considered to be major.

2. Extent Of Deviation

The selection of the extent of deviation as major was also chosen correctly. The record establishes that respondent has never

acquired interim status or a permit as required before disposing of its hazardous waste. Plotting the major potential for harm along the vertical axis, in conjunction with the major extent of deviation on the horizontal axis, yields a penalty range of $25,000 to $20,000. (CX-11 at 19.) Therefore, the gravity-based penalty of $22,500 is considered to be appropriate.

3. Multi-Day Penalties

The Policy mandates multi-day penalties for days 2 through 180 of the violation whenever the gravity based penalty results in a major-major assessment. Reference to the matrix of multi-day penalties for major-major violations discloses a range of suitable penalties from $5,000 to $1,000. (CX-11 at 24.) Complainant selected the midpoint $3,000 and capped the period of violation at 180 days. It is found that complainant's choice of a $3,000 multi-day penalty is too great under the circumstances of this case. Respondent has voluntarily stepped forward and admitted to its past illegal disposal activities. In doing so, respondent has expended considerable sums of monies in investigation and remediation efforts before and after the issuance of EPA's complaint. Additionally, respondent has prevented future disposal by eliminating its hazardous waste generation. By its voluntary disclosure, the public and the environment have benefitted by obtaining compliance where there otherwise would not be. Accordingly, taken into account these considerations, the multi-day penalty is reduced from $3,000 to $1,000. A $1,000 multi-day penalty still reflects the serious nature of this violation and

deterrence of future noncompliance by demonstrating that voluntary disclosure will not absolve a violator of all past wrongdoing.

4. Adjustment Factors

Complainant reduced the penalty by 25 percent based upon the good faith of respondent. The specific considerations that merited this downward adjustment were the following: respondent's cooperation with MDNR officials, its voluntary disclosure of past illegal hazardous waste disposal and its site sampling investigation. (CX-10 at 3.)

Respondent argues that it should have received a larger reduction for its good faith efforts. First, respondent contends that Sam erroneously presumed that respondent was a sophisticated entity that should have complied with the regulations. (Tr. 115.) This assumption stemmed from his review of the inspection report for the Warrensburg facility, which revealed this facility's timely compliance, when it was generating similar wastes. (CX-8; Tr. 115.) Second, respondent claims that it should have received a good faith reduction for its voluntary elimination of its hazardous solvents at a cost of $800,000.

Complainant awarded respondent the maximum good faith reduction in ordinary circumstances. The Policy states any penalty reduction between 26 percent and the maximum 40 percent should be reserved for unusual circumstances. (CX-11 at 32.)

Sam admitted that he would have given a larger adjustment but for his assumption of respondent being a sophisticated entity in which timely compliance occurred at the Warrensburg facility.

(Tr. 240.) In addition, Sam acknowledged that he knew respondent had eliminated its hazardous wastestream before it disclosed its illegal disposal. (Tr. 243.) However, Sam did not make any further adjustment due again to his sophisticated entity presumption. Since the Warrensburg facility generated similar wastes, Sam assumed respondent may have planned to reduce the wastes before the violations were uncovered. (Tr. 244.)

These conjectures by Sam regarding respondent and the Warrensburg facility are not supported by the record. Rather, the record establishes independent business operations. First, although Harmon was the President of both the Grain Valley and Warrensburg facilities, there were separate plant managers in charge of operations and controls. (Tr. 401.) In addition, the Warrensburg facility is a separate subsidiary and operates on a free-standing basis with different functions. (Tr. 397.) Moreover, Harmon believed that the solvents at Grain Valley were being completely depleted without any disposal. (Tr. 400.) As respondent notes, it is illogical to assume that a sophisticated entity would knowingly risk the consequences of noncompliance when it was willing to comply at its Warrensburg facility. (Resp't Op. Br. at 49.)

Complainant has not produced any evidence to the contrary, but admitted respondent's voluntary disclosure was blighted by its status as a sophisticated entity. Second, in accordance with a good faith adjustment, the process change, eliminating use of the hazardous solvents, was done prior to disclosure of the violation.

Thus, respondent prevented recurrence of hazardous waste disposal by eliminating their use altogether. Where the violator self-reports a violation prior to its detection, the Penalty Policy advocates penalty mitigation especially when measures are instituted to prevent its recurrence. (CX-11 at 33). Since 1985, this process change had been planned but the technological means did not exist to accomplish the switch until 1987.

In light of the unusual circumstances above, the record establishes good faith efforts by respondent that went unaccounted. Respondent seeks the maximum reduction of 40 percent for its actions. However, the record also reflects that respondent is not deserving of the maximum reduction for its inattentive supervision by upper management of its disposal practices. Thus, an appropriate good faith reduction would be a 30 percent downward adjustment.

B. Count II

For count II, failure to have a groundwater monitoring system for the landfill unit, complainant categorized this violation as a major potential for harm and a major deviation from the statutory and regulatory requirements.

1. Potential for harm

Sam explained that he selected a major potential for harm because the Phase II report revealed groundwater contamination (Tr. 118, 120-21), without any monitoring system capable of either defining the rate or extent of groundwater contamination or adequately detecting continued contamination. (CX-10 at 6; Tr.

218.) Moreover, Sam stated that there was a high potential for these contaminants to reach sensitive environs, such as the Missouri River, given the topography of the area. (Tr. 118.)

Respondent argues that the potential for harm in failing to have a groundwater monitoring system was slight based again upon the results of its Phase I and II reports. In support thereof, Bentley explained these investigations revealed no threat to human health or environment because the levels of contamination in the groundwater were low, the likelihood for migration off-site was minimal due to the absence of pathways leading to other groundwater receptors, and there was no potential harm to any major drinking water supplies, which are not present in the area. (Tr. 661-62.) Similar to count I, respondent maintains that Sam gleaned his information about the contamination from the Phase I and II reports, but he rejects their expert conclusion without consulting any other experts.

Despite EPA's lack of rebuttal experts, complainant's classification of a major potential for harm was correct. Without an adequate groundwater monitoring system, to fully characterize the extent of contamination, respondent's expert conclusions on the potential for harm are simply hollow statements. The case of In re Buckeye Products Corp., (Buckeye) Docket No. V-W-84-R-004 (Initial Decision, December 11, 1984), is persuasive in that the respondent made substantially similar arguments, and a major potential for harm was assessed due to an inadequate monitoring system.

In Buckeye, the respondent was using lagoons for the treatment, storage and disposal of hazardous waste but delayed in installing its groundwater monitoring system. Respondent argued that no harm was created by its delays in monitoring because migration from the lagoons was either unlikely or would be diluted to nondetectable levels, and there was no potential harm to drinking water. The ALJ in that case concluded that these arguments were not supported by the monitoring and hydrogeological analysis which the regulations require. Therefore, the risk created by respondent's delay in installing a monitoring system was a major potential for pollution of the groundwater.

As in Buckeye, respondent here also contends that the potential for harm is insignificant because there is little chance of the hazardous substances to migrate off-site. First, the migration is contained vertically by the presence of the low permeable layer of bedrock. (Tr. 450.) Second, as tests in Phase II indicated, any migration horizontally downgradient toward the fire pond revealed diluted or extremely low levels. (Tr. 443.) Therefore, outside the small zone of shallow perched groundwater, there was no groundwater contamination that respondent could identify. (Tr. 456.)

The regulations allow for a partial or complete waiver of the groundwater monitoring system if respondent can produce written documentation certified by a qualified engineer that hydrogeological factors reduce the migration potential to a low probability. See 40 C.F.R. § 265.90(c); Buckeye, at 12. If

respondent believed the conditions at its site supported such a situation, it could have applied for a waiver of the regulations. However, respondent did not choose this path, and instead, proceeded ahead with implementing a full monitoring program. Moreover, respondent's hydrogeological studies were not so extensive that it could detect contamination without a fully adequate system in place. See In re Sandoz, Inc., Docket No. RCRA (3008) Appeal No. 85-7 at 10-11, 15-16 (potential for harm mitigated where prior hydrogeological studies enabled respondent to timely detect any possible leaks even without installation of a proper groundwater monitoring system). Furthermore, the Phase II report revealed the presence of freon and TCA below 18 feet, albeit in low concentrations, in the supposedly impermeable zone of limestone. Therefore, these findings suggested, absent a waiver, installation of an adequate monitoring system was necessary.

As to the level of groundwater contamination, respondent argues, according to the Phase II report, levels were so low that an acceptable option would be to leave the contaminants in the ground. However, at the time of this report, respondent did not have an adequate groundwater monitoring system to support this claim. At the time of the Phase II report, the record shows that only three wells and six soil borings had been installed. Monitoring wells are but an initial step in determining how respondent's landfill may affect the quality of the underlying groundwater. If an increased level of pollution over background levels is detected by monitoring wells, then a more detailed

program must be undertaken to analyze the possible effects upon the groundwater. Buckeye, at 13. As levels above background were uncovered, it was essential for respondent to do further in-depth studies. Hence, the conclusion in Phase II, concerning leaving the contaminants in the ground, was not an adequate substitute for the more thorough analysis required by the regulations. See Buckeye, at 14.

Respondent makes another identical argument to the one in Buckeye that there was no likelihood of harm to drinking water. However, the potential harm to drinking water is not the only consideration. This is clear, as the ALJ pointed out in that case, from the preamble to the regulation, 40 C.F.R. § 265.90(c), allowing a waiver from the requirements. The preamble stated that aquifers underlying a facility are not exempt from waiver requests simply because they may not be a source of drinking water. Such aquifers may have other uses worthy of protection, or be connected to other water supply wells or surface waters needing protection. 45 Fed. Reg. 33192 (May 19, 1980).

The ALJ's reflections have equal weight to the circumstances of this case. In exploring potential exposure, the Phase II report stated there is a stream that runs from respondent's facility to a small community park about one-quarter mile downgradient. (RX-31 at 7-5.) Therefore, fauna along the stream or children playing in it could be subjected to potential exposure. Despite the report's conservative estimate, using various models (RX-31 at 7-6 to 7-7), that exposure would be diluted to safe levels, this estimate is not

a replacement for the monitoring required by the regulation. Without an adequate monitoring system, the potential for harm was severe as respondent was not able to detect groundwater contamination from possibly spreading to other possible sources.

Overall, like the one in Buckeye, respondent here views the monitoring requirements as a superfluous precaution. Yet, unlike Buckeye, where it was not yet established if there were significant contamination, Kent established that the Phase II report showed contamination in the shallow perched groundwater zone. (RX-31 at Tables 3 & 4; Tr. 463.) Groundwater monitoring is intended to prevent significant pollution of the groundwater from occurring, or at least to uncover it in its incipiency when there is the greatest chance of being able to remedy it. Buckeye, at 15. As evidenced by the preamble to the regulation, "[I]f significant groundwater contamination occurs before detection, the difficulties of corrective action are made all the more severe." 45 Fed. Reg. 33193 (May 19, 1980). Respondent, however, takes a complacent reaction toward the monitoring requirements given the geological conditions and absence of water resources. On the other hand, its investigative reports kept indicating that further testing was necessary by the presence of contamination. The fact that the Phase III results[7] supported the Phase II report was irrelevant

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[7] This report was rendered in July of 1992, almost a year after the complaint was issued. Its results were based upon approximately seventeen monitoring wells and twenty-seven soil borings. (RX-75 at Sections 4.0 and 5.0.)

because there existed a major potential for harm for almost three years before this conclusion was ultimately reached.

The Penalty Policy again cites the failure to have a groundwater monitoring system as an example of a violation which has serious implications for implementing the RCRA program. Sam explained that this violation undermines the RCRA program because for landfill units monitoring wells are designed to assess and detect contamination. (Tr. 121.) Accordingly, the adverse effect on the RCRA program was substantial by failing to have a proper groundwater monitoring system to fully determine the extent of contamination.

2. Extent of Deviation

Complainant also categorized respondent's deviation from the regulations as being major. Respondent counterattacks by contending that it complied with the groundwater monitoring requirements by following the alternative groundwater requirements specified in 40 C.F.R. § 265.90(d). Under this scenario, respondent argues that compliance occurs in stages, and it complied with the first step of these regulations when it submitted the Phase II work plan in October of 1988. Thus, following the step-by-step approach in § 265.90(d), the extent of groundwater contamination does not have to be fully defined before compliance occurs.

Whether respondent qualifies for the alternative groundwater monitoring system in § 265.90(d) is immaterial. After its disclosure, respondent delayed two years before it installed its

first monitoring well in 1989. By falling within the alternative approach, respondent should not be given more reprieve for its two-year siesta than one who is late in implementing the usual monitoring system. See Buckeye, at 16 (delaying two years in having a groundwater monitoring program operative warranted a major deviation from regulatory requirements). Accordingly, respondent's deviation was properly classified as major.

3. Multi-Day Penalties

Being a major-major violation, a multi-day penalty is mandatory. Complainant again selected the mid-point of $3,000 and capped the period of violation at 180 days. The record reflects that respondent was highly cooperative with MDNR in attempting to implement its groundwater monitoring program. Respondent continually worked with MDNR to adjust this program in order to promptly correct the situation. As stated under multi-day penalties in count I, respondent's disclosure created a situation where both the public and the environment were able to benefit from respondent's compliance. Thus, only a $1,000 multi-day penalty is appropriate.

4. Adjustment Factors

Complainant reduced this penalty for respondent's good faith by 25 percent. The basis for this reduction was primarily the installation of three wells in 1989 in an attempt to define the rate and extent of contamination. (CX-10 at 6; Tr. 123.) Respondent argues that complainant has failed to take into account all of its good faith efforts to comply. Specifically, respondent

states that it installed over 26 other wells at the direction of MDNR which were not factored into its good faith efforts.

Respondent correctly argues that Section 3008(a)(3) of the Act requires consideration of any good faith efforts to comply with the applicable requirements. However, the Penalty Policy states that no downward adjustment should be made if the good faith efforts consist primarily of coming into compliance. (CX-11 at 33.) To the extent that the Penalty Policy limits these considerations, it is rejected as being inconsistent with the Act. In re Sandoz, Inc., at 19; McDonald, at 29 n.31. At the time of the complaint, respondent had installed only three wells. Nevertheless, the record reflects, since the time of respondent's discovery of its illegal activity, it submitted several plans and installed many wells in order to achieve compliance. This activity continued despite the presence of future litigation with EPA.

Some controversy centered on the failure of respondent to have an upgradient well installed until November of 1991. However, this delay is not attributable to respondent. Respondent presented unrebutted evidence concerning Carroll's acquiescence that an upgradient well was not needed in April of 1989. Williams of MDNR informed respondent at their January 25, 1991, meeting that an upgradient well was needed. Yet, from April of 1989, through January of 1991, respondent relied on the statement by Carroll without anyone from MDNR notifying respondent differently. Once informed, respondent submitted the proposed location of the upgradient in its Phase III plan of June 1991, (RX-61 at 3), and

installed it in November of 1991. Hence, given all of the above efforts, a 33 percent adjustment is appropriate.

c. Count III

For count III, failure to establish and maintain financial assurance for closure and post-closure care, and failure to obtain insurance coverage for sudden and non-sudden accidental occurrences, complainant assigned a major potential for harm and a major deviation from the statutory requirements.

1. Potential For Harm

The financial assurance regulations are designed to insure that there will be sufficient funds to properly close a facility. Additionally, the liability insurance is important to RCRA because it guards against the risk of uncompensated injuries from operation of hazardous waste facilities, and it also encourages owners and operators to run their facilities so as to reduce the risk of harm as well as saving insurance costs. Buckeye, at 19, (citing 47 Fed. Reg. 16545 (April 16, 1982)). Sam viewed the violation as a major potential for harm because contamination had already occurred without respondent having either financial mechanism. (CX-10 at 9; Tr. 124-25.) Therefore, if respondent lacked the money to close the facility or became bankrupt, then the taxpayers would have to bear the responsibility of closing the facility. (Tr. 125.)

Respondent contends complainant has not met its burden of establishing that there is a major potential for harm based upon the absence of these financial instruments. Specifically, respondent focuses on Sam's testimony relating that, if respondent

became bankrupt, then the taxpayers would bear the responsibility. Respondent points to its 10-K reports (CX-27), and argues these reports do not support such a conjecture.

Respondent's focus on complainant's statement regarding bankruptcy is misplaced because whether respondent had sufficient funds at the time is not the issue. The focal point is whether the required financial instruments are in place to insure that monies will be readily available for either closure or injury compensation, if needed. See In re Standard Tank Cleaning Corp., Docket No. II-RCRA-88-0110 (Initial Decision, March 21, 1991) at 29, aff'd, RCRA (3008) Appeal No. 91-2 (CJO, July 19, 1991). In this requirement, respondent was remiss, and such was the basis for assighing a major potential for harm. Furthermore, this violation is of the type which substantially undermines the implementation of RCRA. Accordingly, the assessment of a major potential for harm was not improper.

2. Extent of Deviation

Complainant's classification of a major deviation from the requirements was also correct. Although respondent eventually obtained financial assurance for closure in 1991, adequate coverage was lacking for five years (1986-1991), and no sudden and non-sudden accidental coverage exists. Such noncompliance can only be viewed as a major deviation.

3. Multi-Day Penalties

Regarding this major-major violation, complainant again selected a $3,000 multi-day penalty capped at 180 days. For the

rationale stated in both counts I and II, under multi-day penalties, the selection of a multi-day penalty should be $1,000.

4. Adjustment Factors

Complainant adjusted this violation upward by 25 percent. This upward adjustment was a result of respondent being notified by MDNR to comply with these requirements, but it failed to comply until only partially in 1991. (Tr. 125-26.) Moreover, on cross-examination, Sam explained, since respondent disclosed its disposal activities, it was hesitant to abide by the RCRA financial provisions. (Tr. 252-54.) Thus, Sam presumed respondent was "willfully reluctant" to comply with the financial regulations. (Tr. 126.)

The crux of respondent's attack to this upward adjustment was that it received no specific written request to comply with this requirement until September of 1991. After this request, it promptly complied with the financial assurance for closure/post-closure care and sought to obtain insurance coverage. Hence, respondent disputes EPA's characterizing it as "willfully reluctant" to comply with the financial requirements.

Respondent's alleged lack of notice is contrary to the record. First, Goschen explained that he cited respondent for operation of a hazardous waste facility without a permit, which included all Part 265 standards. (Tr. 53.) Second, if respondent had any doubt about its duty to comply with the financial requirements, this confusion was removed in MDNR's correspondence on November 1, 1989. In requiring compliance with all laws applicable to a hazardous

waste land disposal facility, this letter explicitly stated these regulations include groundwater monitoring, closure and post-closure care, financial assurance, and general facility standards. (RX-33 at 1.) Thus, respondent clearly was on notice of its obligations. However, respondent submitted two closure plans, in January and June of 1991, without seeking to meet its financial assurance obligations in either of the plans. Once respondent's first detailed closure plan was sent to MDNR in January, it should have been able to calculate its cost estimates for closure and obtain sufficient financial assurance. See 51 Fed. Reg. 16426, 16436 (May 2, 1986). Furthermore, the obligation to acquire financial assurance for closure and post-closure care is not dependent upon whether a closure plan has been submitted or approved by the regulatory agency, and the obligation exists even if a plan is not timely submitted or the closure plan is disapproved. Ekco Housewares, Inc., 853 F. Supp. at 979.

On September 24, 1991, MDNR commented on respondent's last submitted closure plan without any financial assurance. (RX-69 at 1-1; Tr. 251-52.) It was not until respondent received this specific prodding from MDNR that respondent attempted to comply. This is a luminous example of willful indifference or selective blindness to the financial assurance requirements.

Respondent also contends that complainant failed to consider its several good faith efforts to obtain the required insurance. First, respondent points to the unsuccessful attempts of its insurance agent in 1991, as well as April and October of 1993, to

procure insurance that satisfied the regulations. Second, when respondent found it "impossible" to obtain such insurance, it sought a variance. Third, in the consent decree with MDNR, the Attorney General's Office decided to forego an enforcement action based on respondent's inability to obtain the insurance as long as it provided semi-annual documentation of its continued efforts to comply.

While good faith and impossibility in obtaining this insurance are relevant considerations, neither are applicable to the facts surrounding this case. Respondent's first attempt to acquire this insurance was not made until 1991. The follow-up attempts were not made until over a year later. Moreover, respondent's search for insurance was limited to only three companies because in respondent's opinion these were the only financially responsible companies in the market supplying this insurance. (Tr. 631, 641.) Yet, this search did not include less rated carriers that may have been listed as solvent according to Best's manual. (Tr. 642.) To merit a reduction based on good faith or impossibility, a more thorough search was warranted.

Even if respondent had demonstrated the unavailability of this insurance, respondent is the architect of its own legal misfortune. Respondent's "impossibility" to obtain insurance was due in part to its history of noncompliance with RCRA, which resulted in contamination at its facility. Yet, a facility cannot by its own actions contribute to its own uninsurability, and then expect a good faith reduction in the penalty, if insurance is then

unobtainable. See U.S. v. T & S Brass and Bronze Works, Inc., 681 F. Supp. 314, 321 (D.S.C. 1988), modified on appeal, 865 F.2d 1261 (4th Cir. 1988).

Additionally, for its alleged good faith efforts, respondent cites In re Landfill, Inc., RCRA (3008) Appeal No. 86-8 (CJO, November 30, 1990) at 18, for the proposition that good faith efforts and the impossibility to obtain insurance were unique factors justifying a 40 percent reduction. Respondent's case bears no resemblance to Landfill. The 40 percent adjustment for unique factors was based upon impossibility and the respondent's reliance on the State agency's waiver of this requirement. No such waiver has been issued by MDNR here.

Further, respondent's consent decree is immaterial to EPA's enforcement action. EPA's statutory right to overfile is founded on the notion that it is entitled to bring enforcement actions in an authorized State, whenever the State, in EPA's opinion, has not exercised its enforcement discretion properly. In re Gordon Redd Lumber Company, RCRA (3008) Appeal No. 91-4 (EAB, June 9, 1994) at 19. Despite respondent's belief that it negotiated in good faith, EPA believed otherwise and properly exercised its right to overfile and seek penalties. No reduction from the 25 percent upward adjustment is warranted here.

D. Count IV

For count IV, failure to provide timely notification and/or register as a hazardous waste generator, complainant assessed a moderate potential for harm and a major extent of deviation.

Respondent does not dispute this classification. Therefore, it is accepted as reasonable.

1. Multi-Day Penalties

Reference to the multi-day penalty matrix for a moderate-major penalty suggests a range of $2,200 to $400. Complainant selected the mid-point, $1,300, and capped it at 180 days. A multi-day penalty of $400 is more fitting to respondent's actions. Less than a month after its voluntary disclosure to MDNR, respondent registered as a hazardous waste generator on August 8, 1988. This registration also effectuated prompt compliance with the NOV from Goschen's inspection on August 1, 1988. Taken into account the seriousness of the violation and future deterrence, a $400 multi-day penalty still reflects a fair amount, in light of respondent's timely efforts to rectify this violation well before any litigation.

2. Adjustment Factors

A downward adjustment of 25 percent was awarded based upon respondent's good faith for voluntary disclosure and notification of hazardous waste generation. Six months before respondent's disclosure to MDNR, it eliminated all hazardous waste generation by switching to a water soluble flux. Nevertheless, respondent still registered as a generator in order to properly ship and dispose of its remaining waste off-site. Therefore, for its elimination of hazardous waste generation, prompt remediation, and disclosure, a good faith reduction of 35 percent is warranted.

E. Economic Benefit

The parties submitted two contrary proposals for computing the economic benefit for noncompliance. Complainant also had two separate computations done. Initially, Sam calculated the economic benefit using the standard EPA BEN computer model. Using this system the following penalties were proposed for economic benefit: for count I $39,938; for count II $102,718; and for count III $476,288. (CX-10 at 2, 5, 8.) None was calculated for count IV. Accordingly, the total proposed economic benefit from noncompliance amounted to $618,914.

Timothy Petersen (Petersen), complainant's expert on economic benefit determination, explained how he computed the economic benefit realized by respondent from each of the violations. (CX-28; Tr. 274-92.) His methodology in calculating the economic benefit was very similar to EPA's BEN computer model. (Tr. 300.) Both models primarily calculate the economic benefit from expenses avoided or delayed through noncompliance. The main differences were that Petersen's computation was tailored to reflect the local tax rate and discount rate on loans rather than the national average used by the BEN model. (Tr. 294-95, 300-01.) Also, the one substantive difference was that Petersen viewed the cost of applying for a permit as an avoided cost instead of a delayed cost. Moreover, his calculations were higher than Sam's primarily because he selected March 1993 as the date of compliance rather than the

latter's choice of September 1991.[8] (Tr. 298-99.) Under Petersen's model, he derived the following economic benefit: for count I, $121,882; for count II, 166,116; and for count III, $687,953. (CX-28.) Thus, the total for all three counts was $975,951.

Respondent challenges complainant's underlying scenario used to calculate economic benefit - the operation of a hazardous waste landfill. Respondent acknowledges that the Penalty Policy requires EPA to evaluate the benefit that accrues to a violator from noncompliance with the regulations. However, contrary to the Penalty Policy, respondent argues that complainant assessed economic benefit on the operation of a permitted hazardous waste landfill instead of failure to comply with the regulations.

On cross-examination, Petersen explained the costs used to determine economic benefit are based upon a hypothetical compliance situation. (Tr. 307.) This compliance picture is determined by looking at the company's actions at the site, and their options at the time that it should have come into compliance. (Tr. 308.) Accordingly, respondent argues the focus of economic benefit computation should be on what action a rational company would have taken to abide by the regulations had the company complied on time. This approach, contends respondent, is the only method which truly

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[8] Even for those violations where no compliance has been achieved, the computation of economic benefit still requires a cut-off point. Sam selected the date of the complaint and Petersen selected the date of the consent decree.

reflects the actual economic advantage gained over competitors in the same situation.

Respondent's expert, Kenneth Wise (Wise), was of the view that for a company generating 30 gallons of hazardous waste a month in 1980, it had two alternatives to comply with RCRA: (1) off-site disposal and treatment or (2) construction of an on-site landfill. (RX-7; Tr. 328-29.) Wise explained thoroughly the costs associated with electing off-site treatment versus the operation of a landfill. His cost analysis comparison revealed that off-site disposal would have entailed a $0 start-up cost and $1,071 annually; and for on-site, $69,172 start-up and $51,510 annually. (RX-7; Tr. 328-32.) Wise further expounded, in calculating the costs for on-site disposal, he used the same base costs that EPA used in their analysis. (Tr. 330-32.)

In evaluating the two choices, Wise stated a rational businessman would choose off-site disposal because the costs initially and long-term are less. (Tr. 333.) He provided a detailed summary explaining that the economic benefit of noncompliance for off-site disposal from 1981 until 1987 would be $6,072. (RX-10.) This figure, like Petersen's, was tailored to reflect the local and federal tax rate. (Tr. 335.) Furthermore, this figure also incorporated the cumulative interest rate of short-term Treasury Bills to reflect what the money, that should have been used for compliance, would be worth through the years if invested. (RX-10; Tr. 336.) Thus, respondent maintains that this scenario is the one that truly exemplifies what a rational company

would have done to comply, and the corresponding advantage gained over its competitors. Respondent understands that for purposes of RCRA it was classified as a land disposal facility. Nonetheless, it argues calculating economic benefit based upon an on-site disposal facility does not accurately reflect what a rational company would have chosen to comply with RCRA.

This is a somewhat novel issue in that the parties contest compliance procedures rather than disputing the figures. Reference to the Penalty Policy explains that any significant economic benefit of noncompliance that a violator accumulates should be recaptured. (CX-11 at 25.) The economic benefit is designed to remove any incentive to violate the Act by requiring the violator to pay all expenses avoided or deferred through noncompliance. McDonald, at 32. If violators can profit from noncompliance, then there is little incentive to obey the regulations. (CX-11 at 25.) Despite these broad stated objectives, the Penalty Policy does not discuss what is the correct compliance scenario from which to compute economic benefit. It could be assumed that by omission, the Penalty Policy means economic benefit from noncompliance with the alleged violations.

McDonald provides guidance on this situation. There, the facts resulting in a RCRA violation resemble the circumstances giving rise to liability here. In McDonald, respondent was generating hazardous waste from its brass foundry operation and disposing the waste on-site. Respondent had not filed a notification of hazardous waste activity nor had it qualified for

interim status or been issued a permit. Consequently, it was found liable for several violations of RCRA. For the groundwater monitoring violations, EPA assessed an economic benefit as part of the proposed penalty. On appeal to the Chief Judicial Officer, respondent put forth the same argument made here. Namely, it could have complied with the regulations through off-site disposal and avoided the cost of groundwater monitoring altogether. In response to this argument the Chief Judicial Officer stated:

> To be sure, the economic benefit component should include only the cost of the cheapest mode of compliance. But it would be unreasonable to expect the complainant in RCRA penalty cases to prove that every conceivable compliance alternative would have been more costly than the one on which the economic benefit calculation is based. If McDonald's benefit was actually lower due to a cheaper means of compliance, McDonald had the burden to produce evidence to that effect, which it failed to do.

McDonald, at 33-34.

In this case, respondent has met its burden of establishing that off-site disposal was cheaper than operating a hazardous waste disposal facility. Wise contrasted the costs for off-site disposal versus on-site disposal. (RX-7.) In his testimony and exhibits, he demonstrated extensively that off-site disposal was less expensive than operation of a hazardous waste landfill. (RX-7; RX-10.)

Once respondent has met its burden of going forward, EPA has the burden of persuasion to rebut respondent's proposed economic benefit penalty. See In re Sandoz, Inc., at 20-23 (affirming denial of complainant's proposed economic benefit penalty where

respondent presented unrebutted evidence of specific costs incurred in implementing its groundwater monitoring system). Complainant has not rebutted respondent's evidence that off-site disposal was the cheapest means of compliance. In its brief, complainant argues that on cross-examination Wise did not consider the annual cost of $100,000 involved in respondent's process change. (Complainant's Op. Br. at 15.) Yet, this argument does not address the evidence presented on the costs associated with off-site disposal. Moreover, the total incurred cost for the process change as of January 1994, totaling $788,084, (RX-81), was still less expensive than Petersen's economic benefit estimate of $975,951. Besides this argument, complainant solely focused on respondent's failure to refute its evidence on the calculation of its economic benefit. Thus, while complainant's evidence satisfied its burden of going forward, it did not carry its burden of persuasion imposed by 40 C.F.R. § 22.24 in light of respondent's evidence on the cost of off-site disposal.

It is also noteworthy that two of complainant's witnesses acknowledged the alternative of off-site disposal and compliance with RCRA. On cross-examination, Petersen stated, although he considered other compliance options available to respondent, such as off-site disposal, he did not perform an economic benefit on these costs. (Tr. 309-10.) The reason being, in his discussion with EPA, they viewed this situation as the operation of a hazardous waste landfill. (Tr. 308.) Petersen's cost benefit estimate was derived only from this scenario. David Doyle, the

Chief of RCRA Compliance for Region VII, also conceded on cross-examination that had respondent shipped its waste off-site it would have achieved compliance without incurring the costs of obtaining a permit, groundwater monitoring and financial assurance. (Tr. 95.) Therefore, respondent's economic benefit from noncompliance is found to be $6,072.

ULTIMATE CONCLUSION AND ORDER

It is concluded for the four violations stated herein that the preponderance of the evidence establishes a condign penalty in this matter for each count is as follows:

Count I	$141,050
Count II	$135,005
Count III	$251,875
Count IV	$ 52,714
Economic Benefit	$ 6,072
Total	$586,716

IT IS ORDERED[9] that:

1. A civil penalty in the amount of $586,716 be assessed against respondent, Harmon Electronics, Inc.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service date of the final order by submitting a certified or cashier's check payable to Treasurer, United States of America, and mailed to:

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[9] Unless appealed pursuant to 40 C.F.R. § 22.30, or the Environmental Appeals Board (EAB) elects to review the same, sua sponte, as provided therein, this decision shall become the final order of the EAB in accordance with 40 C.F.R. § 22.27(c).

EPA Region VII
Regional Hearing Clerk
P.O. Box 360748M
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and the EPA docket number, plus respondent's name and address must accompany the check.

4. Failure upon the part of respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. § 102.13.

5. To the extent not done already, the following compliance order is also entered against respondent:

a. Immediately upon receipt of this order, respondent shall cease the placement and/or disposal of hazardous waste on the ground at its facility.

b. Upon approval of the closure and post-closure plan, respondent shall implement the plan according to the schedule contained therein.

c. Within sixty days (60) of completion of the closure and post-closure plan for the land disposal unit, respondent shall submit to both EPA and MDNR certification of closure as required by 40 C.F.R. §§ 265.115 and 265.120, and include all of the information and documentation as specified in 40 C.F.R. §§ 265.115 and 265.120.

d. Within forty-five (45) days of receipt of this order, respondent shall obtain, establish and maintain financial assurance

for closure and post-closure care in accordance with 40 C.F.R. §§ 265.143 and 265.145. Evidence of financial assurance must be submitted to both EPA and MDNR.

e. Within forty-five (45) days of receipt of this order, respondent shall establish and maintain liability coverage for sudden and non-sudden accidental occurrences, in accordance with 40 C.F.R. §§ 265.147(a) and 265.147(b) and submit evidence of liability coverage to both EPA and MDNR.

f. Within thirty days (30) of receipt of this order, respondent shall submit a groundwater monitoring plan to EPA and MDNR. The groundwater monitoring plan shall be developed in accordance with 40 C.F.R. Part 265, Subpart F. Upon approval of the plan, respondent shall implement the plan according to the schedules contained therein.

g. Respondent shall also complete any work required by MDNR under any work plans, permits, or any other submissions relating to closure of the facility and future compliance with RCRA which have been approved by MDNR.

h. Respondent shall notify EPA in writing upon completion of any of the work specified above or upon any future compliance with RCRA. This notification shall be submitted no later than thirty

(30) days following any compliance with this order to Peter Sam, Environmental Scientist, EPA, Region VII, RCRA Compliance Section, 726 Minnesota Avenue, Kansas City, Kansas 66101, and to Bruce Martin, Chief, Enforcement Unit, MDNR, P.O. Box 176, Jefferson City, Missouri 65102.

Frank W. Vanderheyden
Administrative Law Judge

Date: December 12, 1994