UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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U.S. ENVIRONMENTAL
PROTECTION AGENCY

IN RE	)	
	)	V-W-83 R-066
OHIO WASTE SYSTEMS OF TOLEDO, OHIO	)	
	)	INITIAL DECISION
Respondent	)	

1. Resource Conservation and Recovery Act - Failure to file an annual report relative to a groundwater monitoring system is a violation for which the assessment of a penalty is appropriate.

2. Resource Conservation and Recovery Act - Failure to describe in a contingency plan what actions facility personnel will take in the event of an emergency is a violation of 40 CFR §265.52(a) for which a nominal penalty is appropriate.

3. Resource Conservation and Recovery Act - Failure to locate monitoring wells downgradient from the waste management area is a potentially serious violation for which the assessment of a penalty is appropriate.

4. Resource Conservation and Recovery Act - The utilization of monitoring wells which are incapable of measuring groundwater elevations at the time of sample taking is assessed a penalty.

5. Resource Conservation and Recovery Act - Penalty Assessment - If events or circumstances which may substantially affect the amount of the penalty to be assessed arise subsequent to the issuance of the complaint, a motion for leave to file an amended complaint should be made or else the Agency may be foreclosed from seeking a penalty in excess of that proposed in the original complaint.

6. Resource Conservation and Recovery Act - Penalty Assessment - The use of an Agency penalty policy issued by EPA Headquarters which is consistent with the provisions of the Act and Congressional intent is approved. The use of a regional penalty policy not meeting these requirements is rejected.

7. Resource Conservation and Recovery Act - Penalty Assessment - Arguments made by the Agency in its post-hearing briefs to support a suggested penalty six times that proposed in the complaint and not addressed by Agency witnesses at the hearing will not be considered.

8. Resource Conservation and Recovery Act - Penalty Assessment - If new violations come to the attention of the Agency prior to hearing, a motion for leave to amend the complaint to include such violations should be made lest the court dismiss allegations of such violations or refuse to assess a penalty therefore, particularly if opposing counsel contests the viability of such allegations.

9. Resource Conservation and Recovery Act - Penalty Assessment - Failure of the Agency to note violations in previous inspections of the same violations cited in the complaint, based on a later inspection, will not excuse said violations, but may be considered by the court in arriving at the amount of an appropriate penalty.

10. Resource Conservation and Recovery Act - Penalty Assessment - Where the kinds of waste which a facility may legally receive are substantially proscribed by a state permit, the Agency should limit its consideration of an appropriate penalty to those wastes and not by those described in the facility's Part A application.

Appearances:

Lawrence W. Kyte, Esquire
U.S. Environmental Protection Agency
Chicago, Illinois
For the Complainant

John M. Edwards, Esquire
Smith & Schnacke
Columbus, Ohio
For the Respondent

INITIAL DECISION

This proceeding is a civil administrative action for a compliance order and assessment of penalties pursuant to sections 3008(a), (c) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6928(a), (c) and the Consolidated Rules of Practice, 40 C.F.R. 22 et. seq. The action was initiated by the Director of the Waste Management Division, United States Environmental Protection Agency (EPA), Region V (Complainant), on July 6, 1983 by filing a complaint and order against Ohio Waste Systems of Toledo, Inc. (Respondent) of Northwood, Ohio.

The complaint in this action alleges that Respondent has violated section 3004 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6924, and implementing regulations 40 CFR §265.52(a), 40 CFR §265.90(a) and (b), 40 CFR 265.91(a)(2), 40 CFR 265.92(e) and 40 CFR §265.94(a)(2). Section 3004 of RCRA directs the Administrator of EPA to establish performance standards for the owners and operators of facilities for the treatment, storage and disposal of hazardous wastes identified under the Act. 40 CFR Part 265 establishes standards of performance for existing hazardous waste management facilties (facilities) prior to an Agency decision on any permit applications submitted for such a facility.

40 CFR §265.51(a) requires every owner or operator to have a contingency plan for his facility which is designed to minimize hazards to human health or the environment from fires, explosions or unplanned releases of hazardous wastes. 40 CFR §265.52 states what the plan must specifically contain.

40 CFR §265.90(a) requires owner/operators of landfill facilities to implement a groundwater monitoring program capable of determining the facility's impact on the uppermost aquifer underlying the facility. 40 CFR §265.90(b) mandates the owner or operator to install, operate and maintain a groundwater monitoring program which meets the requirements of 40 CFR §265.91 and to comply with 40 CFR §§265.92 - 265.94. In short, 40 CFR §265.90(a) establishes a general standard of performance for the operator to attain for its groundwater monitoring system, while 40 CFR §265.92(b) mandates compliance with specific standards of performance in 40 CFR §§265.91 - 265.94.

The Respondent in its answer to the complaint denied all of the violations alleged in the complaint. On February 9, 1984, a hearing was conducted in the County Courthouse in Bowling Green, Ohio. Subsequent to the hearing, the parties submitted proposed findings and briefs in support of their respective positions, all of which I have carefully considered.

Statement of Facts

Respondent, Ohio Waste Systems of Toledo, Inc. owns and operates an existing hazardous waste management facility located at 6525 Wales Road in Northwood, Ohio. This facility is commonly known as Evergreen Landfill. Evergreen Landfill is both an existing hazardous waste storage and landfill facility which has achieved interim status for such types of activities under §3005(e) of RCRA, 42 U.S.C. 6905(e).

On March 17, 1983, three representatives of the Ohio Environmental Protection Agency (OEPA) inspected Evergreen Landfill. During that inspection they sought to determine if the Respondent was in compliance with the standards set forth in 40 C.F.R. 265. The State inspectors were Janet Badden, Kathern "Kate" Wilson, and Ben Chambers.

During the inspection, Ms. Badden reviewed the Respondent's contingency plan for the facility. Ms. Badden determined that the contingency plan was in violation of the requirements of 40 CFR §265.52(a).

The contingency plan inspected by Ms. Badden is substantially the same as the contingency plan entered into evidence as Complainant's Exhibit 9. The only difference between the two plans is that the name of the emergency coordinator's name is different.

The contingency plan reviewed by Ms. Badden did not describe the actions that the emergency coordinator and facility personnel must take to ensure that fires and explosions do not occur, recur, or spread to other hazardous waste in the landfilll. The plan does not describe any measures that facility personnel must take in the event of a fire or explosion regarding stopping operations or processes. The plan does not describe measures that facility personnel must take in the event of an emergency caused by fire or explosion regarding the removal or isolation of containers from the fire or explosion. The only action or measures contained in the contingency plan on March 17, 1983 regarding the event of a fire or explosion is to notify local fire and police. Subsequent to the March 17, 1983 inspection, Respondent amended this plan. The amended plan does not describe any additional measures that should be taken in event of a fire or explosion except evacuation procedures.

On March 17, 1983, Respondent had not implemented a groundwater monitoring program capable of determining Evergreen Landfill's impact on the quality of the groundwater in the uppermost aquifer underlying the facility.

At the time of the March 17, 1983 inspection, Respondent did not have a groundwater monitoring system consisting of at least three monitoring wells installed in the uppermost aquifer that were hydraulically downgradient from the limit of the waste management area at Evergreen Landfill. Respondent's groundwater monitoring system contained three residential wells located northwest of the landfill, and an office well located at the facility, north of the landfill disposal area, a residential well about a thousand feet to the east of the facility, a test well at the facility to the south

of the landfill's disposal or waste management area, and a residential well to the southwest of the facility. None of these wells were located at any limit of the waste management area (waste boundary or perimeter). Id.

At the time of the March 17, 1983 inspection, all parties assumed that the groundwater beneath the facility flowed in a northwest direction. This assumption was based upon literature which indicated the general flow of groundwater in the area was to the northwest. Also, Respondent's assumption was based on a consultant's review of historical well records to determine if they were consistent with their literature search. The consultants did not and were not able to rely on groundwater elevations taken at the time of their review. The historical well records Respondent's consultants used went back 30, and possibly 40, years.

Respondent's groundwater monitoring system was based upon the assumed flow to the northwest. The actual direction of groundwater flow beneath the landfill was to the northeast on March 17, 1983. Thus none of the residential wells used by Respondent for a groundwater monitoring system were hydraulically downgradient of the waste management area at Evergreen Landfill except the one residential well to the northeast of the facility. That single monitoring well was over a thousand feet from the waste management area at Evergreen.

As of March 17, 1983, Respondent had failed to determine the elevation of the groundwater surface each time a sample was obtained from monitoring wells in its then existing groundwater monitoring system. The records show that Respondent had sampled each of five different wells in its system four times between April 1982 and January 1983. Furthermore, Respondent's system was not capable on March 17, 1983 of measuring such elevations by

its own admission. In April 1983, Respondent's consultants, Dames & Moore, began the installation of a new groundwater monitoring system at the site. The consultants completed installation of the new monitoring well system on May 11, 1983. During the installation of the wells, Respondent discovered, by measuring the water levels in these wells, that groundwater at the site actually flowed to the northeast.

Respondent, prior to the hearing, had not submitted the annual report for groundwater monitoring as required by 40 CFR §265.94(a)(2)(iii). That report was due March 1, 1983. Respondent has submitted a groundwater monitoring report to the State of Ohio EPA.

For the above alleged violations, the Complainant sought a civil penalty in the amount of $20,000.00 but did not at the time of the filing of the complaint allocate any portion of the $20,000.00 among the several alleged violations as set forth in the complaint. A more detailed analysis of the penalty question will be discussed below.

Discussion of the Complaint

The first allegation in the complaint states that specific action to be taken by personnel in the event of an emergency, as of March 17, 1983 was not included in the facility's contingent plan as required by 40 CFR §265.52(a).

The Agency's concern about the deficiencies in the emergency response plan appear to be limited to the portion that describes what action the owners of the facility will take in the event of a fire. The Respondent in his plan states that in the event of a fire they will notify the local fire department and police department. The Agency witness that testified on this issue was Ms. Badden, an employee of the Ohio Environmental Protection

Agency, Northwest District, located in Bowling Green, Ohio. During Ms. Badden's testimony, the court asked her the following question: "Given the nature of this facility, Ms. Badden, what sorts of things would you expect to see in a report like that to make it adequate as far as you are concerned?" The witness answered: "More specific information on what the personnel at the facility would do in the event of a fire. They have fire extinguishers and fire equipment at the site. What actions would those facility personnel take to contain a fire other than the local fire department's role." The court then asked the witness to the effect that, assuming that an operator does not want to spend money to buy his own fire-fighting equipment and they note in their plan that if there is a fire, they will call the fire department, what would be wrong with that? The witness replied: "That is fine, but that we would assess the plan in that light--can the fire department get to the site in time to contain the fire, or should they have some sort of mitigative equipment on the site before there could be further damages. That is it, you have to assess it in that light." The witness also testified that there is nothing in the regulations that require the owner of the facility to have on his premises fire-fighting equipment, and that if their contingency or emergency response plan suggests that they will rely on a professional group such as the local fire department to take care of fires on their premises, that is okay but the Agency would assess the adequacy of that in light of certain factors such as to how long it takes the fire department to get to the premises.

The Respondent's witness testified that the fire department can get to their facility in 5 to 15 minutes and that they are in regular contact with the fire department and the fire department, in fact, uses their facilities

for purposes of conducting drills to train their firemen in how to respond to a fire at a hazardous waste facility. The position of the Respondent on this question is that, given the quick response time available by the local fire deparment and further since the fire department is intimately familiar with their facility and the location of all the materials, buildings, and equipment thereon, in the event of a fire they would leave it to the professionals to handle it rather than possibly endangering the lives of their personnel who are not trained fire-fighters. I see nothing wrong with that approach. The Agency's position is that had they known that that is what the Respondent intended to do, they would have evaluated its emergency response plan in that light. Given the plain language of the Respondent's emergency response plan, I do not see how the Agency or its agents could have evaluated the plan in any other light than that which the language of the plan suggests, that is, that in the case of fire they would rely on the fire department. It should also be noted that the plan does not simply say that if there is a fire we will turn our backs on the situation and rely on the fire department to take care of the problems. The plan states that if there is any potential hazard to humans or to the environment, the emergency coordinator should take proper precautions and notify the appropriate agencies listed in section 3.1.2 of the plan. The plan also indicates the Respondent has on hand a supply of emergency equipment including stretchers, first aid kits, emergency showers and fire extinguishers. Therefore, one can readily and reasonably surmise that if some unforeseen problem arises at the facility involving a fire, the Respondent does have the capability of taking mitigative action prior to

the arrival of the fire department, if necessary. I suppose that the Agency's position is that, that may well be true, but such mitigative action on the part of the Respondent's personnel must be described in the plan in order for it to be satisfactory and meet the requirements of the regulations. Given all of the factors surrounding this allegation of the complaint, I am of the opinion that it does not constitute a serious violation.

The next violation indicated in the complaint has to do with the failure of the Respondent to implement a groundwater monitoring program within one year after the effective date of 40 CFR 265 Subpart F. More specifically, the Respondent failed to install, operate and maintain a groundwater monitoring system that included an adequate number of hydraulically downgradient wells at the facility that were capable of adequately determining groundwater elevations. This violation is addressed in more detail in Counts IV and V of the complaint which indicates in paragraph 4 that the wells were not located at the waste management area "boundary" as required by 40 CFR §265.91(a)(2). Paragraph 5 reiterates the failure of the owner/operator to obtain the elevation of the groundwater surface at each monitoring well each time a sample was obtained as required by 40 CFR §265.92(e).

The record is clear that the following situation existed at the time of the March 17, 1983 inspection--the monitoring wells that the Respondent was using were located northwest of the facility. The wells were not installed by the Respondent, but were rather existing wells which were on private property and could only be sampled by turning on the faucet in the owner's home and taking a sample from the tap. Obviously, it was impossible,

given the nature of these wells, for any one to measure the elevation of the groundwater serving the wells since they were all underground and sealed. Prior to May 24, 1983, everyone involved in this matter, including the Company, the OEPA and the USEPA all thought that the downgradient direction of the groundwater was to the northwest. The use of these domestic wells by the Respondent was well-known to both the State's OEPA and the USEPA for some time prior to the inspection of the facility which gave rise to this case. The conclusion that the direction of the groundwater of the facility was to the northwest was based on independent study done by a consultant employed by the Respondent who examined several prior studies, historic documents and regional hydrological data.

It was not until the Respondent employed a second consultant for the purpose of improving its groundwater monitoring system was it discovered that, in fact, the downgradient direction of the groundwater from the facility was to the northeast, rather than to the northwest. As set forth in the complaint, documentation submitted by the Respondent indicates that new groundwater monitioring wells installed after March 31, 1983 meet the requirements of 40 CFR §265.19. The record also reflects that when the Respondent discovered that the three residential wells which it had been using for a number of years were not located downgradient from the facility, they instituted an expedited drilling and well installation program which cost twice as much as such a program would have cost had it been done on a non-expedited basis.

In this connection it should be noted that at the time in question the State of Ohio had some jurisdiction in the matter of hazardous waste facilities and an Ohio permit in addition to a Federal permit was required

by the Respondent in order for him to legally operate his facility. There was a great deal of confusion in the record as to just what impact this dual permitting situation had on the Respondent's actions in regard to the alleged violations as set forth in the complaint. The record reflects that both the USEPA and the OEPA had inspected Respondent's facility in prior years and despite the fact that nothing had changed between that time and the date of the 1983 inspection, neither the USEPA nor the OEPA noted any deficiencies in the Respondent's record keeping or groundwater monitoring system. The Complainant admits this, but argues that simply because they failed to note these deficiencies in prior inspections does not in any way condone the failure of the Respondent to properly follow the regulations and relevant statutes. As a technical matter, the Complainant is correct in this assertion. However, the Respondent's failure to feel that they were in violation of the law can be understood since they were dealing with a relatively new statute and a set of highly complex regulations. If the agencies of the government, both state and Federal, having responsibility to enforce those regulations, found no violations on prior inspections it would certainly lead a member of the regulated community to believe that what they had been doing in the past was satisfactory. In making that observation, I do not want to be understood to say that under such circumstances violations should be excused, but certainly these factors should be taken into consideration both by the Agency and the court in assessing a penalty.

Consequently, one must conclude that the Respondent had violated the groundwater monitoring regulations in that their wells were not able to determine the elevation of the groundwater and that they were not located downgradient from the waste storage facility as required by the regulations.

The next violation cited in the complaint has to do with the failure of the Respondent to submit an annual report for groundwater monitoring as required by 40 CFR §265.94(a)(2)(iii). In this regard, the Respondent admits that they did not file the required report with the USEPA, but, through a misunderstanding of the regulations and upon instructions from their head corporate office, felt that filing the report with the OEPA was all that was required and they did, in fact, file such a report in a timely fashion. Apparently, despite the fact that the State of Ohio and the USEPA have a memorandum of agreement as to the relevant duties of those two governmental agencies in regard to the enforcement of the hazardous wastes laws, no mechanism seems to exist that would require the State agency to forward to the Federal agency any reports that it receives from owners and operators of hazardous waste facilities in their State. Upon questioning by the court, the Agency witness on this issue stated that the material filed with the State of Ohio would have satisfied the Federal agency had it received the report, with the exception, of course, that the monitoring wells employed by the Respondent were not capable of determining the elevations of the groundwater. The Respondent argued that the quarterly reports which it did file with the USEPA contained essentially the same information as required by the annual report which they did not file with the USEPA. The USEPA counters this argument with the observation that although they did, in fact, possess raw data which would enable them to evaluate what was going on at the Respondent's facility, certain statistical information required in the annual report were missing from the quarterly reports and, therefore, the information contained therein is really not in the form that is required by the regulations. Obviously, the Respondent's

failure to file this annual report with the USEPA was not an intentional violation. As pointed out by the Complainant, intent is not a factor to be considered in the assessment of civil penalties or the citation of a violation under the Act. This observation is correct, however, intent and the extent of deviation from the regulations' requirements can be considered by the fact finder in assessing a penalty in such cases. It is quite likely that had the Respondent sent a duplicate copy of the annual report which it filed with OEPA to the USEPA, a violation in this regard may not have been alleged. Although the Agency says that the report would not have been satisfactory since it indicated that the wells were not capable of determining the elevations of the groundwater, this is a fact which had been known to the Agency for some time prior to the inspection and would not have provided them with any information that they did not already possess. I, therefore, feel that this deficiency is really not of particular moment.

The Penalty to be Assessed

As noted above, the complaint sought a civil penalty in the amount of $20,000.00, but did not break this penalty down and allocate portions of it to each of the counts in the complaint as is normally the practice with the USEPA. However, the testimony of the Complainant's witnesses indicated how they arrived at this $20,000.00 figure.

On January 25, 1984, the Complainant moved for an accelerated decision pursuant to 40 CFR §22.20. In that motion, the Complainant stated that, though the $20,000.00 proposed penalty was based on a calculated estimate of the cost saved by the delayed well installation by the Respondent, by using the draft penalty policy promulgated by the Agency in 1980, a penalty in the amount of $50,000

would be justified for the groundwater violations alone, and including penalties for the other minor violations, the proposed penalty could be in excess of $52,000.00. Additionally, in its post-hearing brief the Complainant is now seeking a penalty of $122,875.00. It is not clear to me how the USEPA wants me to address these ever-mounting proposed penalties. If the Agency had been serious about this new penalty, which is approximately six times of what it originally asked for in the complaint, a motion for leave to amend the complaint should have been filed prior to the hearing, setting forth the new proposed penalty with some justification therefore. Had that motion been granted, the Respondent would have been entitled to file an amended answer which I am certain would have addressed this new penalty amount in some detail. Since the Complainant elected not to follow what I consider to be proper procedure, I am going to ignore the suggested penalty of $52,000.00 and $122,875.00 for purposes of my consideration of what would be an appropriate penalty to be assessed in this case. This is important for purposes of a decision because the regulations state that although I am not bound by the amount of the penalty proposed by the Agency in that I may both either decrease it or increase it, if I do either of those I am obliged to state why I am making a change. Since I do not care to address three separate suggested penalties for purposes of my decision, I will only address the original and, as far as I am concerned, the only official suggested penalty in this case, that is $20,000.00.

Mr. Brossman who testified for the Agency on the question of the assessment of a penalty in this case stated that he arrived at the penalty in the case of the groundwater violations by establishing what the Respondent saved by not installing a proper monitoring system and arrived at a

figure of $8,000.00. He then doubled that number as a punitive measure arriving at $16,000.00 and then because the Respondent is part of a larger corporation which is well-established in the business of hazardous waste management he added another $2,000.00 of that figure coming up with a total of $18,000.00. He then calculated the proposed penalty for the failure to file an annual report to be $1,000.00, and the insufficient aspects of the contingency plan to be also $1,000.00, which when added to the previously calculated $18,000.00 resulted in the suggested total of $20,000.00.

At the outset of Mr. Brossman's testimony when he began to describe how the penalty was originally calculated and it became apparent that he was using some theory of savings as a method of calculating an appropriate penalty, the court inquired as to where he got the notion that that was a proper method of penalty calculation. He advised the court that it was based upon an internal memorandum prepared by Mr. Dimock of the Region V USEPA office. Although Mr. Brossman had no copy of that memorandum at the time of the trial, counsel for the Complainant subsequently provided both the Court and counsel for the Respondent with a copy thereof which is now entered into the record in this proceeding. §3008 of the Act, which addresses the question of assessment of civil penalties, states that the Administrator shall assess a penalty which he finds to be reasonable under the circumstances taking into account: (1) the seriousness of the violation, and (2) good-faith efforts on the part of the Respondent to comply. Nothing contained in the statute would suggest that it is appropriate for the Agency, in assessing a penalty under this statute, to use the economic savings incurred by a violator as a means of determining what the proper penalty is. Other statutes, specifically the Clean Air Act, do authorize

such a calculation, but no language to suggest that that is a proper method of calculating a penalty is present in the statute which is the subject of the proceeding. I, therefore, do not accept the Agency's method of determining the penalty in this matter as set forth in the complaint and as further elaborated on by the Complainant in its pre-trial exchange. The Agency did issue a penalty policy for RCRA Subtitle C violations in September 1980, which policy has been cited with approval not only by the undersigned but by other judges within the Agency as being a reasonable and proper guide for penalty assessment and calculation, being consistent with Congressional intent and the overall objectives of the statute.

Perhaps anticipating this objection, Mr. Brossman also made a calculation using that document and came up with a suggested penalty of $52,875.00. This penalty is broken down as follows. For the failure to have an adequate emergency response plan, Mr. Brossman suggested a penalty of $875.00 be assessed. He arrived at this figure by classifying the violation as a Class II violation and determining that both on the conduct and damage axis of the matrix contained in the policy to be minor in both cases he took the mid-range of the amounts set forth in that policy document which range from $100.00 to $1,650.00. As to the failure to file the annual report, Mr. Brossman testified that he felt that a penalty in the amount of $2,000.00 was appropriate since such failure constitutes a Class I violation but that the results both as to damage and conduct would be in the minor category thus giving him a range of numbers of $500.00 to $2,500.00. He elected to choose a figure of $2,000.00 which is closer to the maximum allowed under that document, justifying this elevation of the figure from the mid-point on the basis that by not making the report: "the Respondent had the benefit of not bringing this matter to our attention; that they were not getting water monitor". Just how this failure benefited the Respondent is not explained.

As to the groundwater monitoring deficiencies, Mr. Brossman testified that he felt that these were Class I violations and he considers both the conduct and the potential damage aspects to be Major, bringing him into a range of suggested penalties of from $20,000.00 to $25,000.00. He elected to choose $20,000.00 for each of the two aspects of the violation of the groundwater monitoring requirements: (1) being the failure to have the wells located downgradient from the site, and (2) being the inability of the wells to be able to determine the groundwater elevations. He then assigned a figure of $20,000.00 for each of these two violations to which he added $4,000.00 which represents a halving of the savings that he had previously calculated to which he added $1,000.00, because the company had ample time to drill these wells and put in a proper system and did not do so, coming up with a total of $25,000.00 for each violation. Adding all of these together we come up with the suggested total of $52,875.00.

As noted above, the Complainant in his post-hearing briefs now has suggested that a penalty in excess of $122,000.00 would be appropriate. How the Complainant arrived at this new figure is relatively inmaterial since I do not intend to address that number in any fashion. The procedure adopted by the Complainant in this case being one to more than double the penalty in a motion for accelerated decision and to multiply the suggested penalty six fold in its post-hearing brief is not an acceptable way of suggesting to the fact finder an appropriate penalty in these cases. The notion of a constantly moving target in the penalty area is both inappropriate and unfair to the Respondent in that he must constantly attempt to address an ever changing, ever increasing penalty calculation, the basis of which he was unable to explore on cross-examination.

Consequently, for the purposes of addressing the penalty assessment in this case I will not use the economic advantage method utilized by the Complainant when it first issued the complaint since it is not consistent with the requirements of the statute or the intent of Congress in this matter. I will however use the Agency penalty policy issued in 1980 as amended by a memorandum from Headquarters dated July 7, 1981. Apparently. the Complainant was either unaware of this amendment or choose not to use it since the figures Mr. Brossman testified about in his presentation in Court did not use the same nomenclature nor the same range of penalties as set forth in the amendment. Additionally the terminology used in the old penalty policy in describing the characteristics of the two axis of the matrix are different. The old policy calling the axis "major", "moderate" and "minor"; whereas the amended policy matrix identifies these cells as "major", "substantial" and "moderate". The overall philosophy adopted by both of these versions remains the same. However, the numbers one gets by applying the appropriate evaluations of the alleged violations are different. For example, a Class I violation which would be characterized under the old policy as being minor both as to the conduct and damage aspects suggests a penalty of from $100.00 to $1,500.00; whereas the new version would suggest a penalty of from $100.00 to $400.00 for the same type of violation. In addition to this version, the Agency has issued a document which it characterizes as the Agency's "final" RCRA penalty assessment policy which was issued on May 4, 1984. This policy was forwarded to the court and counsel for the Respondent by counsel for the Complainant and although I am delighted that the Agency has issued a final penalty policy, I will not utilize it since its adoption post-dates the issuance of the complaint and

the hearing on this matter and was not used by the Agency in either its original calculation or the subsequent calculations performed by Mr. Brossman in his testimony.

The first count in the complaint has to do with the deficiencies the Agency noted in the Respondent's contingency or emergency response plan which I do not feel to be particularly serious. As the Agency's witness testified, there is really nothing wrong with using the services of a local fire department to fight fires on a facility such as operated by the Respondent as long as the Agency is assured that the fire department can arrive at the scene in sufficient time to contain the fire before it gets out of hand. The Respondent said that not only can the fire department get to their premises rather quickly, somewhere between 5 to 15 minutes, but, in addition, the Respondent and the local fire department maintain an ongoing and close relationship to the point that the local fire department uses the Respondent's facility for purposes of training and drills and it is therefore intimately familiar with the layout and the situation that exists on the Respondent's facility and would, therefore, be even more effective in extinguishing any blaze that might break out. The Respondent also said that although they do have fire fighting equipment on the premises in the form of extinguishers, these are used primarily for putting out fires that may start in its trucks and other vehicles it uses on the premises. The Agency also found fault with the fact that the contingency plan did not say what else the Respondent's employees would do in case of fire such as halting the work at the facility and moving the wastes away from the site of the blaze should it occur. Although it is true that the plan does not address this matter in any meaningful way, it occurs to me that common

sense would suggest that the Respondent would not continue to operate in a normal fashion with a fire raging on its premises. It would certainly take the steps noted in its contingency plan in terms of assuring that no hazard to human health or the environment occurs and it would move any flammable materials away from the site of the fire should one occur. It should be noted, parenthetically, that in evaluating both this alleged violation as well as the others identified in the complaint, the Complainant's witnesses stated that they assessed the risk associated with the Respondent's facility based on its Part A application to the Agency, which, in essence, listed as potential materials to be treated, as all of those identified in the Agency's regulations as hazardous wastes. I do not feel that this is a reasonable approach since the Respondent pointed out that even though its USEPA Part A application does list a wide range of materials which it may ultimately store or dispose of on its premises, in actuality, they are only legally able to accept and dispose of a very limited number of wastes that are identified in its permit issued by the OEPA. The Respondent's witness testified that no flammable or ignitable wastes are taken onto the premises and that, therefore, the likelihood of a major fire occurring on the premises is extremely remote. I think that the Respondent's argument on this question is well founded and in addressing the penalty issue as it applies to this and other alleged violations in the complaint, I will be guided by the fact that the Respondent may only legally accept those limited wastes identified in its OEPA permit.

Accepting the Agency's evaluation of the deficiencies in the contingency plan to be a Class II violation of a minor character which corresponds to a "moderate" violation, using the terminology of the 1981 amendment, one notes

that the penalty spectrum for Class II violations of the moderate category range from $100.00 to $5,000.00. The amended policy does not set up a matrix as it does for Class I violations, but rather has a spectrum of suggested penalties ranging from $100.00 to $25,000.00 depending on the seriousness of the violation. Given all of the above, I am of the opinion that an appropriate penalty to be assessed for the failure of the Respondent to have a completely acceptable contingency plan would be $100.00.

The second item to be addressed is the failure of the Respondent to file an annual groundwater monitoring report with the Agency. The Respondent admits that it did not file such a report with the USEPA on the mistaken belief that new regulation changed requires such a report to be filed with the appropriate state agency rather than with the Federal government. The Respondent did, in fact, file the required report with the state agency and the testimony of the Complainant's witnesses were to the effect that with the exception of the fact that such a report indicates that the wells used by the Respondent were not capable of measuring the elevations of groundwater, the information contained therein would, for most purposes, be acceptable to them. This fact was well known to the Agency for at least a year prior to the bringing of this complaint and, thus, that portion of the plan which the Agency suggests would not be satisfactory would not have provided them with any information which they did not already possess. The Respondent pointed out that in 1982, employees of the Complainant came to their premises and tested the quality of the water in the wells used by them and found them to be perfectly acceptable and not violative of any of the Agency's drinking water standards. The Regional Administrator even noted this fact in a press release which he

issued, apparently with some satisfaction. In any event, the Complainant in its evaluation of this deficiency stated that although it was a Class I violation, as to the damage and conduct aspects of it they considered them to be "minor". Applying that rationale to the amended penalty matrix one sees a suggested range of penalties from $100.00 to $400.00. Although the Respondent's failure to file the report with the proper agency is admitted, the evidence also suggests that such failure was not based on recalcitrance or an intentional flaunting of the law, rather an honest misunderstanding of the Agency's regulations in this regard, and that under those circumstances I feel that a penalty of $200.00 would be appropriate.

The situation surrounding the groundwater monitoring violations are a little more complicated and need to be addressed in some detail. One of the problems with this aspect of the case is that the Complainant takes the position that the failure to have the wells located downgradient from the disposal facility and the inability of those wells to be able to monitor groundwater elevations constitutes two separate offenses whereas the Respondent argues that only one violation is appropriate since the deficiencies all arise from the same basic factual situation. Although not addressed in Mr. Brossman's testimony, the Agency, in its post-hearing brief and in its complaint also seeks a separate penalty for the failure of the Respondent to have its monitoring wells on the boundary of its disposal waste management area as required by 40 CFR §265.91(a)(2). As previously noted, the Agency has been aware of the location and nature of the Respondent's monitoring wells for some period of time prior to the bringing of this complaint. Its 1982 inspection of the Respondent's facilities did not note this violation and, in fact, indicated on its inspection report that the nature and location of the monitoring wells was

consistent with the requirements of the regulations. Although, as the Complainant points out, the government is not estopped from bringing a complaint based on matters found at subsequent inspections, and its previous approval should not be taken as condoning such wells. Certainly the Agency's failure to previously identify this problem cannot be disregarded by the fact finder in assessing a penalty in this matter. The Complainant attempts to excuse its prior oversights on the theory that at the time of the first inspection, the Agency was sort of "feeling its way" around the new regulations and were attempting to identify serious violations on their first inspection and did not have the time to examine facilities such as the Respondent's in great detail on this first series of inspections and, therefore, they should be excused for not noting such deficiencies earlier. Although I have no reason to doubt the truth of this observation, I do not feel that it constitutes a viable excuse for the Agency's lackness in enforcing the statutes and regulations, which responsibility the statutes clearly place on it.

In any event, let me first address the failure of the Respondent to have its wells located on the boundary of its management facility. As pointed out by the Respondent, the definition of what constitutes the boundary of a management facility is not addressed in any great detail in the regulations, but is rather a broad definition to the effect that where a facility consists of only one landfill or land treatment area, the waste management area is described by the waste boundary (perimeter). See 40 CFR §265.91(a)(1)(A)(2)(b). Just where a waste boundary is, is not clear, but the Complainant apparently takes the position that the outline of the waste treatment area described in its Part A application will be determinative of this location. Although I have no

quarrel with this evaluation, the situation in the present case is complicated by the fact that the Respondent's present disposal facility is located inside an existing landfill which had been used by it and others in previous years to accept all kinds of domestic and industrial wastes, some of which would now be characterized as hazardous wastes under the Act. Given that situation, the Respondent argues that, based on advice from its consultants, it would not be sensible, reasonable, or good engineering practice to place monitoring wells in an old waste disposal area since one would not be able to determine the genesis of any contamination which the wells might identify as it is quite likely that any such contamination would have been caused by the previously deposited hazardous wastes, unrelated to materials currently being disposed of under the RCRA permit. The Respondent's arguments are persuasive. Additionally, since it now turns out to be the case that the wells were not located in a direction downgradient from the waste treatment facility, the fact that they may not have been as close to the boundary of the Respondent's facility as the Agency would have liked appears to me to be almost a moot question. Since the location of the wells is the subject of another count in the case, I am of the opinion that, under the circumstances in this case, the assessment of a civil penalty for the failure of the Respondent to have located its groundwater monitoring wells on the "boundary" of its facility would not be appropriate.

As to the other portions of the case arising from the inadequacies of the groundwater monitoring system, i.e., the failure to have the wells located downgradient from the facility and the inability of such wells to measure groundwater elevations, I agree with the Complainant that these failures do, in fact, constitute two separate and distinct violations of

the regulations for which individual penalty assessments are appropriate. In making this determination, I rely on the case of Blockburger v. United States, 284 U.S. 299 (1932), which was cited to me by both counsel and previously utilized by myself in a decision. The test set forth in that case states that:

> "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

In this case, it is obvious that the failure to have the wells located downgradient from the facility is one offense, and the inability of such wells to detect or measure the groundwater elevations is a separate offense for which proof of another fact is necessary. For example, one can easily envision a situation where wells are not located downgradient at a facility, but are capable of accurately measuring the elevation of the groundwater. In that case, only one violation would exist. Of course the opposite situation could occur where the wells were located downgradient from the facility, but, for one reason or another, were not able to measure the elevation of the groundwater. So, in this case, it seems to me that the assessment of two separate penalties in regard to the groundwater monitoring system is authorized.

Having said that, I will first address the failure of the Respondent to have its wells located in a downgradient position from the disposal facility. Mr. Brossman in his testimony characterized this violation as a Class I violation under the penalty policy. I have no problem with this assessment inasmuch as it appears to be consistent with the plain language of the penalty policy document. Mr. Brossman then went on to characterize the violation in regard to the conduct and the potential damage to be in the

major category in both instances. Given the circumstances of this case, I am not satisfied that this is a proper characterization of the Respondent's failure. It is true that assuming the fact that the monitoring wells used by the Respondent were not located downgradient from the disposal facility, their ability to detect any migration of hazardous pollutants would be nil. Although I agree that the wells utilized by the Respondent for detecting the migration of hazardous wastes from its facility were unable to fulfill that purpose, to suggest that this Respondent be treated in the same fashion as a facility operator who had made no effort to install any form of a groundwater monitoring system would not be appropriate. As evidenced by the testimony of all the witnesses in this case, everyone involved assumed that the monitoring wells used by the Respondent were, in fact, located downgradient from its disposal facility. This fact coupled with the failure of the Agency to note this deficiency in its prior inspections of the Respondent's facility causes me to place the conduct aspect of Respondent's failure in the "substantial" rather than "major" category. It was testified to by the Respondent's consultants and accepted by Complainant's witnesses that the basic location of the disposal facility operated by the Respondent, aswell as its appropriateness for such purpose, given the extremely low permeability of the soil, make the likelihood of any migration of hazardous materials from the site extremely remote. In addition, it was testified to by the Respondent's consultants that a sump had been installed at the bottom of the disposal pit prior to its use as a hazardous waste disposal site and that a system of drains exist which flow into the sump from which all leachate is pumped, treated and properly disposed of. The expert testimony of Respondent's witnesses also reveals that given the high

saturation of the ground immediately surrounding the disposal pit, principles of hydrology and ground hydraulics would dictate that any flow of water in the ground would be toward the pit rather than away from it, thus additionally reducing the likelihood of migration of hazardous materials from the site. Since the potential for damage or threat to the environment or humans in this case is extremely low, I am of the opinion that the appropriate category of that aspect of the violation would be in the moderate category. Assuming then a "substantial" characterization of the Respondent's noncompliance with regulatory standards, and a "moderate" classification of the actual or threatened damage, reference to the modified penalty matrix for Class I violations indicates a range of penalties from $500.00 to $1,000.00. In making this determination, I have also taken into consideration the fact that although the Agency in its assessment of this violation assumes that all of the waste indicated on the Respondent's Part A application could be placed in the facility, many of which are extremely hazardous, I am inclined to take the position that since the Respondent is governed, in the final analysis, by the constraints placed upon it by the OEPA in its permit, the toxic or hazardous nature of the materials actually placed in the facility by the Respondent are not of a high level. I am, therefore, of the opinion that the appropriate penalty to be assessed in this case for the failure to have the wells located downgradient from the disposal facility should be $1,000.00.

As to the violation concerning the inability of the wells to measure groundwater elevation, I am not sure, given the testimony of the witnesses, exactly how serious this violation is. I say that for the reason that my

understanding of the testimony suggests that the wells are located on a perpendicular plain from the location of the disposal site and it is quite likely that even if groundwater elevation could have been measured at those wells, they will probably all show the same elevation and, therefore, not provide any particularly useful information as to whether or not the wells were, in fact, downgradient from the facility. However since that point was not made clear in the record, I will consider the Respondent's deviation from the requirements of the regulations to be of a "major" category in this circumstance. The wells could not just measure groundwater elevations accurately, but were, in fact, not able to provide any measurements at all.

As to the threat of actual or potential damage to the environment or to human health resulting from this failure, it occurs to me that given the discussion above concerning the excellent characteristics of the Respondent's site and the remote likelihood of materials escaping from the disposal pit to groundwaters, wells or springs in the immediate location, I am of the opinion that on that classification, the violation constitutes a "moderate" deviation. Given a major deviation and a moderate threat reference to the penalty matrix reveals a range of suggested penalties from $1,500.00 to $2,500.00. Considering all the circumstances of this case as it applies to this particular situation, I am of the opinion that a penalty of $2,000.00 would be appropriate for this violation.

Having determined the base penalties for these groundwater monitoring violations, one must see whether or not circumstances exist which would cause one to adjust these figures either upward or downward considering other aspects of the Respondent's conduct. I find no evidence of intent

or recalcitrance on the part of the Respondent in this case and the record further reveals that when the true facts surrounding the direction of the groundwater flow was discovered by the Respondent, they exhibited extraordinary efforts to remedy the problem. They advised their consultant to initiate an expedited program utilizing several drilling rigs rather than one. According to the testimony of the Respondent's consultants, the cost associated with this expedited program was over twice what it would have been had the system been installed in the normal course of business. Mr. Edwards, a senior engineer with the firm of Dames & Moore, testified on this issue on behalf of the Respondent and stated that the cost of installing the new system was approximately $166,000.00, and, had the program been done in the normal course of events, it would have cost somewhere between $50,000.00 to $70,000.00. Therefore, given this fact I am of the opinion that no upward adjustment of the figure is appropriate for failure to take corrective action and that on the contrary some downward adjustment of the base penalty might be appropriate under these circumstances. Additionally, any financial or competitive advantage which the Respondent could have arguably enjoyed because of its failure to have installed a proper system are clearly offset by the additional cost it occurred in putting in an acceptable system in an expedited manner. Balancing these factors one against the other, I am of the opinion that, taken in its totality, no adjustment of the base penalty either upward or downward would be appropriate in this case.

There is another complicating factor in this case. The violation which received the most attention in the hearing, that is, the failure to have the monitoring wells located downgradient from the facility, was not

cited in the complaint. Technically, therefore, no penalty should be assessed for this violation. However, since the Respondent did not raise that defense and actively joined issue on that point throughout the hearing, I will allow the Complainant to amend its complaint to conform to the evidence relative to that violation.

All contentions of the parties presented for the record have been considered, and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this initial decision are rejected.

Conclusion

It is concluded, on the basis of the entire record, that the Respondent violated 40 CFR §265.94(a)(ii) by failing to file its annual report with the Agency; violated 40 CFR §265.52(a) by not specifying actions to be taken in the event of an emergency; violated 40 CFR 265.92(e) for failing to obtain groundwater elevations when sampling its monitoring wells; violated 40 CFR §265.91(a)(2) by not locating its monitoring wells downgradient from their waste management area. It is further concluded, for the reasons stated, that $3,300.00 is an appropriate penalty for said violations and that a compliance order in the form hereinafter set forth should be issued.

ORDER[1]

Pursuant to the Solid Waste Disposal Act, §3008, as amended, 42 USC 6928, the following order is entered against Respondent, Ohio Waste Systems of Toledo, Inc.:

1. (a) A civil penalty of $3,300.00 is assessed against the Respondent for violations against the Solid Waste Disposal Act found herein.

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

2. The Respondent shall:

(a) Within 30 days include in the facility contingency plan the specific actions to be taken by personnel in the event of an emergency.

(b) Within 30 days submit a groundwater monitoring report for 1982.

(c) Immediately operate its groundwater monitoring system in conformance with 40 CFR §§265.91 and 265.92.

Thomas B. Yost
Administrative Law Judge

DATED: July 2, 1984

1/ Unless appealed in accordance with 40 CFR §22.30, or unless the Administrator elects, sua sponte, to review the same as therein provided, this decision shall become the Final Order of the Administrator in accordance with 40 CFR §22.27(c).