UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
A.Y. McDonald Industries, Inc. (formerly A.Y. McDonald Manufacturing Co.),	)	Docket No. 85-H-0002
	)	
Respondent	)	

1. RCRA - Economic Benefit Component of Penalty - burden is on EPA to establish the facts justifying the addition of an economic benefit to the initially determined penalty.

2. RCRA - Economic Benefit Component of Penalty - estimated costs in penalty policy are accepted as prima facie evidence of actual costs to meet minimum groundwater monitoring system requirements.

3. RCRA - Economic Benefit Component of Penalty - In computing economic benefit, allowance must be made for increases in costs occurring between the time the act should have been done and the time when it was done.

4. RCRA - Economic Benefit Component of Penalty - economic benefit component not added to penalty where the EPA has not shown that Respondent has, in fact, benefitted by its delay in installing a goundwater monitoring system and penalty assessed is found to be sufficient to deter further violations.

5. RCRA - Liability of former owner of a site to close facility - former owner of a site ordered to close facility where it appeared that property remained in essentially same condition as when it was sold. Order, however, was conditioned upon present owner giving its permission to close the facility in accordance with an approved closure plan.

Appearances for Complainant: David L. Kopp, Esquire
Margaret Lindeberg, Esquire
U.S. Environmental Protection Agency
Region VII
726 Minnesota Avenue
Kansas City, KS 66101

Appearance for Respondent: Louis M. Rundio, Jr., Esquire
Stephen P. Krchma, Esquire
McDermott, Will & Emery
111 W. Monroe Street
Chicago, IL 60603

INITIAL DECISION

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (hereafter "RCRA"), Section 3008, 42 U.S.C. 6928, on a complaint against Respondent A.Y. McDonald Industries, Inc., assessing civil penalties for alleged violations of the Act and containing an order requiring compliance with certain regulatory requirements. 1/

The complaint, issued by the United States Environmental Protection Agency, Region VII ("EPA"), charged Respondent with failing to file a Notification of Hazardous Waste Activity Waste, with disposing of hazardous waste without a permit or without achieving interim status and with not complying with the groundwater monitoring requirements. A penalty of $55,928 was requested. The compliance order included in the complaint directed Respondent to submit a closure and a post-closure plan (if applicable), and a groundwater assessment plan, and to close the facility in accordance with the closure plans.

1/ Pertinent provisions of Section 3008 are:

Section 3008(a)(1): "[W]henever on the basis of any information the Administrator determines that any person 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, requiring compliance immediately or within a specified time period or both . . . ."

Section 3008(g): "Any person who violated any requirement of this subchapter 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."

Respondent answered and admitted that it had not filed a Notification of Hazardous Waste Activity nor had it qualified for interim status or been issued a hazardous waste treatment, storage or disposal permit, but denied that it had stored, treated or disposed of any hazardous waste after November 19, 1980, the effective date of the regulations. Respondent denied also that it was required to comply with the groundwater monitoring requirements. Respondent opposed the assessment of a penalty. With respect to the compliance order, Respondent contended that the property had been sold on or around September 1, 1983, to the Iowa Department of Transportation and that an order against it therefore, was neither warranted nor necessary.

A hearing was held in Dubuque, Iowa, on November 5, 6 and 7, 1985, and a supplemental hearing was held in Kansas City, Kansas on January 6, 1986. Both sides, thereafter, submitted post-hearing briefs. The EPA in its brief contended that the penalty of $55,928, proposed in the complaint, which with respect to the groundwater monitoring violation included $14,428, for the alleged economic benefit accruing to Respondent of noncompliance, should be increased to $61,583, based on data in the record relating to Respondent's actual monitoring costs. The following decision is entered on consideration of the entire record and the parties' submissions:

Findings of Fact

1. Respondent A.Y. McDonald Industries, Inc., formerly A.Y. McDonald Mfg. Co., is an Iowa Corporation, which presently operates a foundry at Chavenelle Road in Dubuque, Iowa. Prior to November 19, 1980, and up until the fall of 1983, Respondent operated a foundry at 12th and Pine Streets in Dubuque, Iowa ("facility"). Respondent was the owner of the site on which the facility

was located until it was sold to the Iowa Department of Transportation in 1982. Complaint and answer; Tr. 369, 730. 2/

2. The foundry operation consisted essentially of melting brass in electric furnaces, pouring it into molds and changing its shape through grinding or machining. The brass alloy used contained lead. Tr. 374-75.

3. From November 19, 1980 through sometime in 1983, Respondent generated waste from its foundry operations at 12th and Pine Streets, some of which was disposed of by dumping it on the site east of the fenced area where the buildings were located. Tr. 384-387, 389, 568, 570, 575-72, 585; Complainant's Exh. 1, 42, 46.

4. One type of waste that was generated and dumped at the site was dust from a "Pangborn" machine used to clean the surface of brass castings. The dust emitted from the process was collected in a hopper, and prior to the fall of 1983 was dumped on the site. This dust was tested in January 1983 for the hazardous waste characteristic of EP toxicity (see 40 C.F.R. 26.24), and found to contain 20 miligrams per liter (mg/l) of lead. Tr. 380-83, 569-70, 591-92; Complainant's Exh. 12, p. 10. Waste that shows a concentration greater than 5 mg/l of lead on an EP toxicity analysis is a hazardous waste under the EPA regulations, with the hazardous waste No. D008. 40 C.F.R. 261.24.

5. Another type of waste generated at the site was "Grind Baghouse" (also referred to as "Grinding Baghouse") material. In 1982 it was sold but in the prior years it was dumped on the site. The material was tested for EP toxicity in June 1982 and found to contain 360 mg/l of lead. Tr. 484, 561, 573-577; Respondent's Exh. 9, p. 4.

2/ "Tr." refers to the transcript of proceedings. The date of sale to the Iowa Department of Transportation is taken from Respondent's Proposed Finding No. 5. See also Tr. 495.

6. A third waste generated was material from the "sand system". The sand system conveys sand to the moulding machines. This material was tested for EP toxicity in January 1983 and found to contain 13 mg/l of lead. While this material was hazardous waste, none of it appears to have been dumped on the site. Tr. 479, 545; Complainant's Exh. 12, p. 4.

7. A fourth waste generated was known as "core" sand. This waste came from sand which was used to make moldings from the castings, but was no longer fit for such use. While this waste was dumped on the site, there is no evidence that it exhibited the characteristic of EP toxicity which is the hazardous waste characteristic of concern in this proceeding. Tr. 183, 47677, 493; Complainant's Exh. 12, p. 15.

8. A fifth waste generated was sand waste from the "German Machine", a machine used to separate the metal from the sand used in the casting process. This sand was also dumped on the site, but the weight of the evidence is that it was not D008 waste. Tr. 389, 567-68; Respondent's Exh. 7, p. 5.

9. D008 waste was first identified as a hazardous waste in the EPA's regulations published on May 19, 1980, 45 Fed. Reg. 33122. A facility generating, treating, storing or disposing of such waste was required to file a notification of its hazardous waste activity within 90 days thereafter or by August 17, 1980, and it became subject to the hazardous waste permitting and management requirements six months after May 19, 1980, or on November 19, 1980. RCRA Section 3010(a) and (b), 42 U.S.C. 6930(a) and (b).

10. Respondent filed a notification of its hazardous waste activities on April 21, 1983, disclosing as D008 waste generated by it, sand system waste and Pangborn waste. Said notice pertained to its operations at Chavenelle Road. Respondent neither achieved interim status (which is obtained by timely filing a notification of hazardous waste activity,

and a Part A permit application) nor did it obtain a permit to carry on hazardous waste activities during the period of its operations at 12th and Pine Streets. Complainant's Exh. 39.

11. William Oberle, working under a contract with the EPA to investigate potential or confirmed hazardous waste sites, investigated Respondent's facility in October 1984. Mr. Oberle collected samples from 10 sample locations on the site at a depth of 0-6 inches. The samples were not selected pursuant to a systematic sampling plan but where Mr. Oberle estimated hazardous waste was likely to be found from information he had about the site and Respondent's operations, and from his own observation of the site. Tr. 31, 40, 86, 107, 119-20.

12. Seven samples were taken from four of the sampling locations (Sample AEJ01003 from location 2, Samples AEJ01011 and 012 from location 6, Samples AEJ01013 and 014 from location 7, and Samples AEJ01019 and 020 from location 10) and analyzed for the presence of D008 waste. Except for location 2, the locations were those where the highest lead content had been found. Location 2 was selected because it was adjacent to a run-off point next to a play area. The test results for EP toxicity for lead were as follows:

Sample No.	Concentration (mg/l)
AEJ01003 (Location 2)	< 0.05
AEJ01011 (Location 6)	13.1
AEJ01012	18.6
AEJ01013 (Location 7)	10.5
AEJ01014	4.0
AEJ01019 (Location 10)	12.6
AEJ01020	11.4

Thus five of the samples (AEJ01011, 012, 013, 019 and 020) exceeded the allowable maximum concentration for lead of 5 mg/l and disclosed the

presence of D008 hazardous waste. Tr. 131, 133-34, 240; Complainant's Exh. 54.

13. In March 1985, Mr. William P. Liljestrom, a consultant with TDJ Company, in conjunction with Carmi Neal Spicer of the Center for Industrial Research and Service of the Iowa State University ("CIRAS"), made an investigation of Respondent's site to determine whether there was foundry sand present containing metals that could be economically recovered. Tr. 349.

14. Samples were taken by Mr. Spicer from five locations in the eastern part of the property at depths ranging from 31" to 40" for testing as to the metallic content of the dirt at these locations. An EP toxicity test was also run on a composite sample mixed from the five individual samples. These samples were tested by the Iowa State University Hygienic Laboratory. The tests disclosed an average metallic content for the five individual samples of 8.86%, and for the EPA toxicity test run on a composite sample a concentration of lead of 28 mg/l. Tr. 296-99, 349; Complainant's Exh. 18, pp. 6-9.

15. In June 1985, Mr. Liljestrom took additional samples at a depth of 10" from the northeast location previously sampled by Mr. Spicer. Some of this material was then run through a quarter inch screen. The material as taken from the site and also the material which had passed through the quarter inch screen were then submitted to CIRAS for EP toxicity analysis. The analysis this time was made by the Analytical Services Laboratory of the Engineering Research Institute of Iowa State University. The results reported were that the material taken from the ground had a concentration of 92.4 mg/l lead, while the finer material that passed through the quarter

inch sieve had a concentration of 102 mg/l lead. Tr. 301-02, 327-28; Complainant's Exh. 18, pp. 10-11.

16. In April of 1985, Respondent employed ATEC Associates, Inc. to do a site assessment of the 12th and Pine Streets site. The ATEC employee in charge of the assessment was John William Weaver III, who has had training and experience in geotechnical engineering, a branch of civil engineering that deals with soil and groundwater. Tr. 596, 605.

17. In connection with its site assessment, ATEC set up a grid of 20 evenly spaced boring locations so as to cover the entire area east of the fence. The area was broader than that which the EPA had sampled because it also included the parking lot on the northeast corner. The borings ranged in depth from 5 to 15 feet. Tr. 607-08; Respondent's Exh. 1.

18. Samples were taken from every other boring (10 locations in all) at depths between 1 and 10 feet to be analyzed for EP toxicity for lead. In order to get a representative vertical profile of possible contamination of the site, the depth of each sample was randomly selected. All of the samples tested below the regulatory threshold of 5 mg/l. Tr. 607-611; Respondent's Exh. 1.

19. In addition, ATEC had a surveyor find the locations sampled by the EPA and by Mr. Spicer of CIRAS for the presence of D008 waste. Samples were then taken from these locations at the same depths as the EPA's and Spicer's samples and tested again for D008 waste. D008 waste was found at the following sample locations:

Sample Location	Concentration (mg/l)
EPA location 2	80
EPA location 6	25
CIRAS Location SW	28
CIRAS location Ctr	9.8

Mr. Weaver attributed the variability between his test results and those obtained by the EPA and by Mr. Spicer to the heterogenous nature of the fill which could result in getting different results even when samples are taken side by side. Tr. 619, 623-24, 626, 685; Respondent's Exhs. 15, 18. The EPA's chemist in testing the material also came to the conclusion that the heterogeneity of the sample could cause variations in the test results. Tr. 267.

Discussion, Conclusions and Penalty

The EPA's tests disclosed the presence of D008 waste on Respondent's property east of the fence. Since the sampling was unsystematic and the waste heterogenous in nature, the EPA's tests in themselves do not show whether this hazardous waste lay only in isolated spots or was uniformly spread over the area. 3/ Nor do the tests indicate when the waste was

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3/ There is no inconsistency between the EP toxicity results obtained in the EPA's tests and those obtained in Respondent's tests of samples taken from the same area (Finding of Fact No. 18), since Respondent's tests were done on samples taken from a lower depth. Assuming Respondent's test results are accurate, and no bias was introduced by Respondent having included the parking lot, Respondent's sampling, because of the systematic fashion in which it was done, would indicate that D008 waste is probably to be found only in the top 12 inches or so of soil in the area. The EPA's contention in its reply brief that Respondent sampled at depths from which it knew the lead would have long leached out is purely speculative. The test run by Mr. Spicer of CIRAS disclosing the presence of D008 waste (Finding of Fact No. 14) does not appear to be indicative of the character of the waste at any specific interval in the depth drilled, and does not rule out the possibility that sand at the top could have been mixed with sand at the lower depths. The record also indicates that any hazardous waste that might be found inside the fenced area was probably put there prior to November 19, 1980. Tr. 522-24.

generated or dumped. Respondent admits to the dumping of some D008 waste in the form of grinding baghouse sand east of the fence after November 19, 1980, but contends that it was a small amount. 4/ The argument assumes that the test on the Pangborn sand run in January 1983, disclosing lead to be present in a concentration of 20 mg/l on an EP toxicity analysis, is unrepresentative of the Pangborn sand. Nevertheless, it was this analysis that was sent in with Respondent's notification of hazardous waste activity listing the hazardous waste generated by Respondent, and not the test in June 1982, showing a lead concentration of less than 5 mg/l, which presumably Respondent also had available at the time. 5/ Under these circumstances, Respondent's claim that the sample tested in January 1983 is not representative of the Pangborn waste is found to be unpersuasive. 6/

The record thus identifies at least two kinds of D008 waste that were dumped on the site after November 19, 1980, namely grinding baghouse sand and Pangborn sand. While the record does not disclose the precise quantities of

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4/ Respondent's post-hearing memorandum at 9.

5/ See Tr. 563; Respondent's Exh. 8, p. 7.

6/ Respondent claims that it is not known who took the sample for the January 1983 test. Kaesbauer's testimony, however, was that he could not remember whether he or another employee working with him took the sample. Even if the sample was not taken by Kaesbauer, there is no evidence that it was tampered with or that it was other than waste that would have come from the Pangborn machine as it was operated at the 12th and Pine Street site. See Tr. 555, 569-70, 583-85. Respondent's test of a mixture claimed to be comprised of one-third molding sand, one-third core sand, and one-third Pangborn sand (Respondent's Exh. 10), contrary to what Respondent contends, is the least credible test of the three tests so far as showing the EP lead content of Pangborn waste, because it was a mixture. See Tr. 501.

D008 waste dumped, it is sufficient to demonstrate that it was considerably more than an insignificant amount in absolute terms. 7/ Respondent also contends that the contamination was limited to the specific waste piles sampled by the EPA. The evidence does not show, however, that the dumping was so carefully controlled as to support such a finding.

Finally, I find that the area east of the fence where Respondent dumped its waste was a "landfill" within the meaning of the regulations, for which groundwater monitoring was required. 8/

The Penalty

The EPA has proposed the following penalties:

For failure to timely file a notification of hazardous waste activity.	$ 9,500.00
For disposing of hazardous waste without a permit or having achieved interim status.	9,500.00
For failure to comply with groundwater monitoring requirements.	42,853.00

7/ Over 800,000 lbs. of Pangborn sand could have been dumped in the years 1981-82, and over 200,000 lbs. of grinding baghouse waste in 1981, as reported to the Iowa Department of Environmental Quality in July 11, 1983. Complainant's Exh. 1. Respondent says it recomputed these figures and found them incorrect because the total exceeded the toal sand purchased for those years. While Mr. Winne was ready to estimate how much higher his estimates were than they really should be, he was unwilling to give any estimate as to how much baghouse waste was sold in 1981 rather than dumped. See Tr. 485, 576-77. In short, his testimony does not really preclude the inference that virtually all of it could have been dumped.

8/ See 40 C.F.R. 260.10 where a "landfill" is defined as "a disposal facility or part of a facility where hazardous waste is placed in or on land and which is not a land treatment facility, a surface impoundment, or an injection well." The definition is broad enough to include waste that is dumped in piles. Respondent's contention that landfilling applies only to waste that is evenly spread over a site gives too narrow a reading to the definition. Certainly, there is nothing in 40 C.F.R. 265.90 to support Respondent's claim that landfill must be read to exclude waste piles.

The penalty for failure to comply with groundwater monitoring requirements includes an amount of $20,353, said to represent the economic benefit to Respondent of its delay in carrying out a groundwater monitoring program.

RCRA provides that in assessing a penalty there shall be taken into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements. 9/ The EPA has also developed an internal policy for the guidance of its staff in assessing civil penalties. 10/ It contends that its proposed penalties are consistent with this policy. 11/

The seriousness of the violations found here must be judged by their adverse effect on the statutory or regulatory purposes for carrying out the RCRA program and the potential for lead to leach from the waste and contaminate the environment, particularly the groundwater. There is no evidence that physical contact with the waste itself, consisting as it does of brass fragments or particles, is potentially dangerous to humans.

The notification and permitting requirements are crucial to the effective enforcement of RCRA. The law is not designed to allow hazardous waste facilities to operate until they are discovered by the EPA. Instead, the burden is placed on the facility owners and operators to analyze and report their operations to the EPA (or the state if there is

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9/ Section 3008(a), 42 U.S.C. 6928(a).

10/ RCRA Civil Penalty Policy dated May 8, 1984. Official notice is taken of the EPA's issuance of the penalty policy. Tr. 26-27.

11/ See testimony of Donald E. Sandifer. Tr. 412-60.

an approved state program in effect). The permit, or in lieu thereof qualifying for interim status by filing a notification and Part A permit application, sets the conditions for continued operation of the facility in a manner that will be environmentally safe. The failure to file the notification and to apply for a permit or qualify for interim status had the effect of concealing from the EPA Respondent's existence and the nature of its hazardous waste operations. 12/ This situation could have continued indefinitely had it not been for the fortuitous circumstance that Respondent became involved in planning for its new foundry. Accordingly, the EPA's classification of these two violations as having a "moderate" potential for harm (i.e., a significant adverse effect) on the administration of the RCRA program is not only in accord with the RCRA guidelines but also is reasonable. At the same time it cannot be overlooked that it was apparently through Respondent's efforts to have its new foundry comply that the violations at the old site were discovered. Accordingly, I find that the proposed penalty of $9,500 for each of these violations should be reduced 25% and that a penalty of $7,125 should be assessed for each violation.

Respondent contends that it made reasonable efforts to comply with the law. The reasonable effort to comply consisted of an inquiry in 1978 to an officer of the American Foundry Society as to whether there was a hazardous waste problem with Respondent's waste because of the lead in it. 13/

12/ The Part A permit application provides more detailed information about the hazaradous waste managed by the facility than does the notification of hazardous waste activity. See 40 C.F.R. § 270.13, which reads substantially the same as former § 122.24. See 45 C.F.R. 33434 (May 19, 1980).

13/ Tr. 469-65, 497-98.

It seems clear enough from the specifications of EP toxicity, which Respondent should have recognized if it had taken the trouble to read the regulation after it was promulgated, that a chemical analysis of the waste would have given a much more reliable answer. Contrary to what Respondent contends, a responsible effort to comply with the law does not consist of doing only a superficial investigation of one's waste and waiting until a violation is discovered before making a serious study of it. In short, while Respondent now appears to have acted responsibly in having its new foundry comply with RCRA, it has not shown that it did so with respect to its operation at 12th and Pine Streets.

Respondent would also minimize the seriousness of its violations by claiming that they had no adverse effect on the environment, and the likelihood that they would was mere speculation. The argument assumes the small quantity of waste assertedly involved, which as already noted is not supported by the record, and ignores the very nature and purpose of the EP toxicity testing. The EP toxicity procedure was intended to identify those wastes from which a toxic constituent, in this case lead, is likely to leach into the environment at levels hazardous to humans. Its purpose is to insure that the waste is managed so as prevent any contamination from occurring. If, for example, the groundwater should become contaminated, the harm may well be irreversible. The fact that no contamination of the groundwater has yet been discovered, accordingly, is irrelevant. The test itself establishes with sufficient certainty the probability that this will occur in time if the waste or its disposal is not properly managed. The levels of EP toxicity lead found, however, were in general relatively low and the quantities of D008 waste dumped do not appear to be as great as the EPA seems to assume they were. Accordingly, I believe

that the potential for harm is more properly evaluated as moderate. I find, therefore, that a penalty of $9,500 is the appropriate penalty for this violation.

The EPA has also calculated the economic benefit it contends Respondent realized by not having its groundwater monitoring system installed by November 19, 1981, which economic benefit it would add to the penalty. If Respondent had complied in a timely manner with the groundwater monitoring requirements, it would have installed by November 19, 1981, necessary monitoring wells, developed a groundwater sampling and analysis plan, and prepared an outline of a groundwater quality assessment program. Starting in November 1981, the wells had to be sampled and analyzed once each year for parameters establishing groundwater quality and semiannually for parmeters used as indicators of groundwater contamination. 14/ Following the example in the RCRA guidelines, and using the proposed costs given there except as modified by what the EPA contends are actual costs disclosed at the hearing, the EPA calculated that for installing monitoring wells, developing a groundwater sampling and analysis plan, preparing an outline of a groundwater quality assessment program, and preparing what the penalty policy describes as a "report for determining the system needs", Respondent's costs would have been $27,402. To compute the economic benefit said to be realized by Respondent from its delay in expending this sum, the EPA used the interest rates charged by the Internal Revenue Service and calculated that Respondent had realized a benefit of $11,714 between November 19, 1981 and November 19, 1984. 15/ In addition

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14/ 40 C.F.R. § 265.90 - .94

15/ The EPA considers the first year expenses as capital costs which eventually would have to be made.

the EPA claims that Respondent had avoided sampling and analysis costs of $8,000 per year during the period between November 1982 and November 1984, which, allowing for the fact that money not spent for sampling and analysis would be subject to an income tax (computed at a rate of 46%), resulted in a savings of $4,320 per year or a total savings of $8,640. The full economic benefit to Respondent thus computed comes to $20,353 (allowing for rounding of figures). The method, in general, seems to be a reasonable way of calculating economic savings. In this case, however, the EPA's application of the method is open to question.

The EPA contends that Respondent "terribly misunderstood" the EPA's economic analysis. 16/ In fairness to Respondent, it is not at all clear that Respondent had adequate notice of what the EPA's burden and its burden were on this issue. So far as I am aware, this is the first administrative litigated case where the economic benefit has been an issue. The EPA in its civil penalty policy states that the goals to be achieved in determining the appropriate penalty are deterrence, fair and equitable treatment of the regulated community and swift resolution of environmental problems. These are reasonable goals, consistent with the statute, and the EPA's policies for determining an appropriate penalty as stated in its penalty policy should be given deferrence. The actual costs avoided or postponed, however, are factual not policy determinations, which the EPA has the burden of establishing. Notwithstanding this, the estimated costs in the example in the penalty policy, which are for installing four wells (one upgradient and three downgradient), the minimum required by the EPA, can probably be taken as prima facie correct so as to put upon Respondent the burden of

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16/ Complainant's memorandum in support of proposed findings, etc. at 25.

coming forward with evidence that they do not reflect actual costs. Here, Respondent has shown that the $9,000 estimated for the cost of installing wells should really be $4,202. The EPA correctly used this figure in its computations. The EPA, however, was not justified in raising the costs of sampling and analysis based on the testimony of Mr. Weaver. The costs are so much greater than the estimated costs in the example as to suggest that the costs have increased since 1981, in which case some allowance presumably should be made for this fact. 17/ I find, therefore, that the penalty should be computed according to the estimated costs given in the EPA's penalty policy of $13,000 for sampling and analysis in the first year and the $1,900 for sampling and analysis in the following years, rather than the $18,000 and $9,000, respectively, used by the EPA. This would reduce the economic benefit part of the penalty to $11,328, computed as follows:

Costs for groundwater quality assessment plan outline, groundwater sampling and analysis plan, installation of wells, analysis for first year and report for determining systems needs =	$ 22,402.00
Cost of sampling and analysis after the first year =	1,900.00
Economic benefit for period November 19, 1981 - November 19, 1982. $22,402 x .18 =	4,032.00

17/ The EPA has belatedly suggested in a reply brief that any increase in costs would be more than compensated for by the inflation rate. The record, however, is barren of any evidence to show this and I decline to take official note of the fact. The EPA contended at the hearing that Respondent's groundwater monitoring system was incapable of determining the facility's impact on the groundwater. The evidence on this at the hearing was conflicting. See testimony of Richard Young. Tr. 816-91, and testimony of John William Weaver, 894-921. The EPA now attempts to press this claim belatedly in its reply brief, but the evidence does not support a finding that Respondent's efforts have so far been inadequate.

Economic benefit for November 19, 1982 - November 1983. $1,900 x (1-.46) + $22,402 x .145 =	4,274.00
Economic benefit for November 19, 1983 - November 19, 1984. $1,900 x (1-.46) + $22,402 x .1025 =	3,322.00
Total benefit	$ 11,628.00

There are, however, reasons why an economic benefit component should not be added at all to the penalty. To be sure taking the economic benefit into account in assessing a penalty reinforces the deterrent purpose served by insuring that a Respondent does not profit by its noncompliance. In this case, however, it is simplistic to say that Respondent will, in fact, reap any economic benefit from its noncompliance. In fact, as Respondent argues, its violations may have compounded its closing costs. 18/ Further, Respondent is now proceeding in good faith to develop a groundwater monitoring plan and prepare a closure plan. Accordingly, I find that the addition of an economic benefit component to the $9,500 penalty assessed herein is not warranted. I further find that a total penalty of $23,750 should be assessed for the violations found herein.
There is no evidence that Respondent would be unable to pay a penalty in this amount.

The Compliance Order

The compliance order issued by the EPA would require Respondent to submit a groundwater assessment plan. Such a plan is required only if the results of the goundwater monitoring disclose that there has been a

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18/ Respondent's post-hearing memorandum at 26-27.

significant increase (or pH decrease) in the downgradient wells in the parameters used as indicators of groundwater contamination. 19/ There is no evidence that there have as yet been such results. Respondent, accordingly, should not be required to submit such a plan at this time.

The order would also require Respondent to prepare a closure plan, and if applicable a post-closure plan, which Respondent does not object to. Respondent, however, does object to having to carry out those plans, since it has not owned the site since 1982. It is true that Respondent is the one responsible for the hazardous waste contamination at the site. The Iowa Department of Transportation, however, should not necessarily be relieved of all responsibility for remedying the condition at the site. There is no evidence that Respondent concealed or withheld information about its waste from the Iowa Department of Transportation. If, as appears, hazardous waste is generated in the operation of a brass foundry, then the Iowa Department of Transportation could have made their own investigation of the site at the time they purchased it to insure that there were no hazardous waste problems connected with it. Nevertheless, the primary blame must rest with Respondent, and unless it appears inequitable to do so, the primary responsibility for closing the site should also be placed upon Respondent.

It appears from the record here that the area where the hazardous waste lies has been relatively undisturbed by the Iowa Department of Transportation so far, and the property remains in essentially the same condition as when Respondent sold it. In other words, closure has not been made more

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19/ 40 C.F.R. § 265.93(d).

expensive or more difficult by reason of anything done by the Iowa Department of Transportation. Under these circumstances, Respondent will be ordered to close the site in accordance with the closure plan, provided that the Iowa Department of Transportation gives Respondent the necessary permission to do so. If it does not, the EPA will then have to seek its remedy from the Iowa Department of Transportation.

ORDER 20/

Pursuant to the Solid Waste Disposal Act, as amended, Section 3008, 42 U.S.C. 6928, the following order is entered against Respondent, A.Y. McDonald Industries, Inc. (formerly A.Y. McDonald Mfg. Co.):

1(a). A civil penalty of $23,750 is assessed against Respondent for violations of the Solid Waste Disposal Act found herein.

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

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

20/ Unless an appeal is taken pursuant to the Rules of Practice, 40 C.F.R. 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. See 40 C.F.R. 22.27(c).

2. The following compliance order is entered against Respondent:

(a) Respondent shall within thirty (30) days of receipt of this Order submit to EPA a complete closure plan for the disposal site, and, if applicable, a post-closure plan, both developed in accordance with 40 C.F.R. 265, Subpart G.

(b) Upon approval by EPA and the Iowa Department of Water, Air and Waste Management, Respondent shall proceed to fully implement the closure and post-closure (if applicable) plans for the hazardous waste disposal site in accordance with the schedules contained therein, provided the necessary permission to undertake such action is granted by the owner of the site.

Gerald Harwood
Gerald Harwood
Administrative Law Judge

DATED: April 23, 1986
Washington, D.C.