UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Ashland Chemical Co.,	)	Docket No. RCRA-V-W-86-R-13
Division of Ashland Oil Inc.,	)	
	)	
Respondent	)	

Resource Conservation and Recovery Act - Listed Hazardous Waste - Spent Solvents

Where mixed solvents stored in underground tanks were not shown to have served their original intended use and were valuable and saleable solvents, solvents were not spent and accordingly, were not listed hazardous wastes as specified in 40 CFR § 261.31.

Resource Conservation and Recovery Act - Solid and Hazardous Waste - Burden of Proof - Abandonment

In order to be a hazardous waste, material must first be shown to be a solid waste and burden was on Complainant to show that mixed solvents stored in underground tanks and materials remaining in other product tanks at time of closure of facility had been abandoned so as to be discarded within the meaning of 40 CFR § 261.2(c) and thus solid waste.

Resource Conservation and Recovery Act - Recycling Exemption - Burden of Proof

Where Respondent acknowledged that materials in underground tanks were hazardous wastes after the materials were determined to be contaminated with water, but contended wastes were not subject to RCRA regulation,

because of exemption for recycling or beneficial use in accordance with 40 CFR § 261.6, burden was on Respondent to establish entitlement to the exemption.

Resource Conservation and Recovery Act - Solid and Hazardous Wastes - "Disposal of" - Leaks

Circumstantial evidence held insufficient to establish that underground tanks leaked so as to constitute disposition of hazardous waste prior to the time tanks were removed from the site.

Resource Conservation and Recovery Act - Rules of Practice - Penalty Policy - Determination of Penalty

ALJ has substantial discretion in application of penalty policy in light of evidence in the record and adjustments were made in penalty proposed by Complainant.

Appearance for Complainant: Roger Grimes, Esq.
Office of Regional Counsel
U.S. EPA Region V
Chicago, Illinois

Appearance for Respondent: William S. Hood, Jr., Esq.
Ashland Chemical Company
Dublin, Ohio

INITIAL DECISION

This proceeding under § 3008 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6928) was commenced on February 19, 1986, by the issuance of a complaint and compliance order charging Respondent, Ashland Chemical Company, Division of Ashland Oil, Inc., with violations of the Act[1/] and applicable regulations, 40 CFR Parts 262, 265 and 270, and

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1/ Section 3008 of the Act provides in pertinent part:

Sec. 3008(a) Compliance Orders.

(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subtitle, the Administrator may issue an order requiring compliance immediately or within a specified time period or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

* * * *

(3) Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator or a State under this subtitle and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subtitle. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

* * * *

(g) Civil Penalty -- Any person who violates any requirement of this subtitle shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

corresponding provisions of the Ohio Administrative Code. Specifically, Ashland was charged with storing hazardous wastes in underground tanks on November 13, 1984, without having achieved interim status as required by § 3005 of the Act; failure to submit a closure plan for approval prior to commencing closure as required by OAC § 3745-66-97;[2/] failure to prevent releases of hazardous waste to the environment as required by 40 CFR § 265.31 and OAC § 3745-65-31, and with shipping hazardous wastes with an incorrect EPA identification number in violation of 40 CFR §§ 262.12 and 265.11 and OAC §§ 3745-52-21 and 3745-65-72(c). For these alleged violations, it was proposed to assess Ashland a penalty of $85,000.

Ashland answered, denying the principal violations alleged in the complaint, asserting that it had initiated comprehensive remedial action at the site under the direction of, and with the approval of, the Ohio EPA and that initiation of the complaint could not be construed as remedial, but instead was punitive, misdirected, exaggerated and unfair.

A hearing on this matter was held in Cincinnati, Ohio on September 23 and 24, 1986.

Based on the entire record including the proposed findings and briefs of the parties, I make the following:

2/ This is a miscitation, the correct citation being § 3745-66-15 (Tr. 200).

FINDINGS OF FACT

1. Ashland Chemical Company, Division of Ashland Oil, Inc., a Kentucky corporation, operated, for a period in excess of 20 years, a chemical distribution facility at 1953 Losantiville Avenue, Cincinnati, Ohio (Tr. 338-39). The facility included approximately 50 underground tanks.

2. Ashland qualified the mentioned facility for interim status by filing a Notice of Hazardous Waste Activity on August 8, 1980 and a Part A permit application on November 12, 1980 (Tr. 93, 95; Complainant's Exhs 4 and 5). The former of these documents identified three F wastes (F002, F003 and F005), four P wastes (P022, P029, P053 and P090) and 49 U wastes. The Part A permit application indicated that Ashland had SO-1 (container) and SO-2 (tank) storage of hazardous waste in the amounts of 2,500 and 20,000 gallons, respectively. The only hazardous waste identified on the Part A application was D001 (ignitable), estimated to be generated at a rate of 75,000 gallons per annum. A plot plan attached to the application contained a notation identifying Tank No. 20 as a waste solvent tank.

3. Ashland closed the Losantiville Avenue property as an active facility in December 1980. By letter addressed to the Ohio EPA, dated August 14, 1981, Ashland stated it was withdrawing its hazardous waste permit application for the Losantiville Road plant.3/ The letter explained

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3/ Complainant's Exh 12. This exhibit is Ashland's response, dated May 17, 1985, to an EPA information request under § 3007. The August 14 letter to Ohio EPA was an attachment to that response and all attachments are considered part of the record.

that the Losantiville Road plant was used to store solvents from line flushes and drumming operations. These solvents were assertedly collected from underground waste solvent tanks at Ashland's Cincinnati plant in Evendale and when a sufficient quantity was accumulated, the solvents were sold to a reclaimer, who was able to treat and sell them. As none of the solvent mixtures was "spent," Ashland stated it believed that a permit was not required, because the solvents qualified for the RCRA reclamation exemption.

4. In a letter to the U.S. EPA, dated January 20, 1982, Ashland stated that material stored in the 20,000-gallon tank at its Losantiville Road plant as indicated on its Part A permit application was not a waste, but a virgin solvent mixture from drumming and transfer operations (Complainant's Exh 6). The letter further stated that the solvent mixture was sold for beneficial use and requested that the Part A application be withdrawn. EPA acknowledged this letter under date of August 20, 1982, pointing out that the letter was not signed by an individual authorized to do so under the regulations (Complainant's Exh 11). A letter, identical to the January 20 letter, but signed by Mr. Rodney G. Parsons, Vice President and General Manager, was sent to EPA on November 17, 1982 (Complainant's Exh 7). EPA granted Ashland's request by letter, dated January 26, 1983 (Complainant's Exh 3), which stated in part "[a]ccording to the information which you have submitted, the wastes which are treated, stored or disposed at your facility are not defined as hazardous waste

in 40 CFR 261.3" Ashland was informed that it was not required to have a hazardous waste permit under RCRA § 3005 at this time. According to Mr. Robert C. Sterrett, Manager of Environmental Affairs for Ashland, Losantiville was one of a number of "protective filings" made by Ashland, which were withdrawn as their understanding of the regulations increased (Tr. 288-89, 326-27).

5. Ashland's response to EPA's information request (note 3, supra), states in pertinent part that "[p]rior to the closing of the [Losantiville] facility in early December 1980, the filling and transferring of solvents had resulted in the collection of mixed solvents which were stored in drums. This accumulation came from various products that were never sold or were returned to the facility as off-specification for a customer's intended use" (Id. at 2). The products assertedly had potential commercial value and were transferred to two of the underground product tanks which had been emptied when the facility was closed and operations transferred to a new facility. It was further stated that products stored in the mentioned underground tanks were intended for resale and, in fact, occasional withdrawals of varying amounts of material were made and sold.

6. Mr. Sterrett testified that the principal source of material in the tanks at Losantiville was material left over as a result of each transfer (overfill) and "line flushings," i.e., accumulated mixed solvents resulting from the flushing of common lines to assure that a particular customer receives a product uncontaminated by other solvents (Tr. 273-75, 295). He testified that overfill was placed

in a bucket or other container and then transferred to a drum or other vessel to hold in a secure manner. He stated that "line flushings" were held until the material could either be used as a blend in the plant or sold (Tr. 276). Although he acknowledged that the primary market was for pure or technical grade chemicals, he explained that a number of businesses prefer or have use for blended material and that Ashland stored such material in tanks prior to sale (Tr. 384). He explained that, depending on the market, Ashland also packaged such blends in 55-gallon drums and sold them.

7. According to Mr. Sterrett, the original intended use of "line flushings" was as a product for varied uses (Tr. 277, 386). He testified that this material can be used for an original intended purpose and explained that frequently Ashland would be selling a proprietary blend to one customer and another customer would have a particular application and blends of materials would be sold (Tr. 391-92). He stated that there were many instances in which the materials in "line flushings" were compatible and that, in any event, such a use would not constitute a solvent related use of the material. He asserted that use of one solvent to flush common lines of another solvent did not create a "spent" solvent or mixture thereof, because the material had not served its intended purpose and was usable (Tr. 293-96). He explained that material was handled in this fashion for economic reasons as it was usable and saleable (Tr. 274-75). It was standard practice to "stick" a tank and take a sample as the material had to be tested prior to making a sale (Tr. 344, 410). He referred in particular to a sale to a paint manufacturer, who was going to

use the material for a solvent related use (Tr. 279). Ms. McCord, an employee in the RCRA Enforcement Section of U.S. EPA, Region V, testified that documents submitted by Ashland in its prehearing exchange indicated the sale of 21 drums of scrap solvent in November and December 1982.4/

8. Chromatograms in the record (Complainant's Exh 12) reflect that in addition to water, the tanks contained quantities of flammable materials with low flash points such as toluene, xylene, methyl ethyl ketone (MEK), butane, heptane, mineral spirits (naptha), ethyl acetate and ethylene oxide. The tanks also contained quantities of nonflammable or relatively nonflammable materials such as 1,1,1-trichloroethane, methylene chloride and ethylene glycol.

9. In May of 1984, the underground tanks at Losantiville were sampled by Solvents Resource Recovery (SRR), a unit or division of Chemical Waste Management, Inc., and an environmental contractor for Ashland. The tanks were found to be contaminated with water (Tr. 402; Ashland response, note 3, supra).

10. At this point, Ashland determined that the potentially saleable mixed and/or off-specification products were unsaleable and should be handled as hazardous wastes (Ashland response at 2). The mentioned products were contained in Tank No. 20 5/ and one other

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4/ Tr. 249-50. The documents referred to were not offered in evidence and are not in the record. According to Mr. Sterrett, the last such sale was in August 1983 (Tr. 279).

5/ Tank No. 20 was specifically identified as a waste solvent tank on Ashland's Part A permit application (finding 2) and correspondence, leading to the correction of this alleged error (finding 4), indicated this tank holds a virgin solvent mixture from drumming and transfer operations.

tank, alleged by Complainant to be No. 19.6/ Chromatograms of the May 1984 tests performed by SRR indicate that contents of Tank No. 19 included water, hexane and mineral spirits (naptha) and that contents of Tank No. 20 included water, toluene, mineral spirits, butyl acetate, methylene chloride, 1,1,1-trichloroethane and MEK (Complainant's Exh 12). An inventory, apparently taken in June 1984, reflects that these tanks are both of 20,000-gallon capacity, that Tank No. 19 originally contained mineral spirits and that Tank No. 20 originally contained toluene. The inventory further reflects that Tank No. 19 contained a total of 9,878 gallons of liquids, including 95 gallons of water and that a partial analysis reflects that a sample tested 95% water. Tank No. 20 contained 5,205 gallons, including 4,839 gallons of water and a partial analysis shows a sample tested 7% 1,1,1-tri[chloroethane] and 60% toluol. Many other tanks contained comparable high proportions of water and several, including Nos. 19 and 20, contained a notation "2 phase rust" under description. Tank No. 17 is listed as originally containing MEK recycled and as presently containing 1,256 gallons

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6/ Ms. McCord identified Tank Nos. 19 and 20 as containing line flushings, off-specification commercial products returned from customers and what she characterized as "spillage." She did not visit the site, however, until September of 1986 and the apparent sources of her information are EPA and OEPA files and conversations with OEPA inspectors (Tr. 110). OEPA does not appear to have prepared any written inspection reports and there is no indication OEPA personnel were familiar with events at the site prior to November of 1984. Although acknowledging that two tanks at Losantiville contained the mixed solvents at issue here (Brief at 1), Ashland has disputed the allegation that Tank Nos. 19 and 20 contained line flushings. Mr. Sterrett denied knowledge in this regard (Tr. 325, 405-06, 418). The record establishes that Tank No. 20 was one of the two tanks containing mixed solvents (note 4, supra), but it is not clear Tank No. 19 was the other.

and no water. A partial analysis indicated it contained 67% MEK and 3% methylene chloride. Mr. Sterrett stated that if the zero water content was accurate, the contents of this tank would be a valuable and saleable solvent (Tr. 411-12).

11. Mr. Jeffrey Hines, an environmental engineer with the Ohio EPA, received an anonymous telephone call in November 1984 to the effect that underground tanks at Ashland's Losantiville facility were being pumped by Chemical Waste Management, that some of the tanks were immediately refilling with water and that a mixture obtained from a pit resulting from the removal of a tank had ignited (Tr. 17, 18; notes of telephone call, Complainant's Exh 19). The caller related that 100,000 gallons had already been removed and that there were 40 to 50 tanks at the site.

12. The following day (November 13, 1984), Mr. Hines, accompanied by his supervisor, Don Marshall, visited the site and collected samples (Tr. 19, 20). Representatives of a contractor, Spade Pipeline, Inc., employed by Ashland to remove the tanks, associated piping, all structures, and to perform restoration work, were on the site. Samples were taken from a pit resulting from the removal of Tank Nos. 36 and 37, from the return line of a separator or coalescer, which was discharging water into the pit, and from surface ponding on the western side of the site near a storm drain (Tr. 22-24). Mr. Hines testified that there was discoloration in the area near the storm drain and that they were concerned contamination might get into the drain.

13. The samples referred to in finding 12 were delivered to and tested by the Ohio Department of Health Laboratory in Columbus. The sample taken from the discharge from the coalescer had a flash point of 85°F (top layer) and a benzene content of 13 ppm (Tr. 27, 28; Environmental Sample Submission Reports, Complainant's Exh 15A). The sample taken from surface ponding at the site had a flash point of 81°F (top layer) and a xylene content of 27.9% or 279,000 ppm (Tr. 29, 30). The sample taken from the pit had a flash point of less than 76°F (top layer) and a benzene content of 13,000 ppm (Tr. 31).

14. Hazardous waste manifests were used to ship the material from Ashland's Losantiville facility to SRR's facility in West Carrollton, Ohio (Complainant's Exh 12). According to Mr. Sterrett, this was because SRR procedures required it and not because the material was considered to be hazardous (Tr. 282-83). These shipments were made during the period October 22 through December 12, 1984. The material was identified as waste flammable liquid, N.O.S. and also as numbers F003 and F005. Mr. Sterrett testified that, based on his interpretation of the regulations, i.e., apparently because the solvents should not be considered spent, the designation of material as F003 and F005 on the manifests was erroneous (Tr. 372, 421). The address and ID numbers shown on the manifests were for Ashland's Glendale-Milford Road facility, sometimes referred to as Evendale, rather than Losantiville. The manifests indicate that 30 shipments were made totaling approximately 157,000 gallons. Ms. McCord stated that there was a discrepancy in the number of manifests supplied by Ashland in response to the § 3007 information request

and in its prehearing exchange (Tr. 247). She placed the quantity removed at approximately 180,000 gallons. Mr. Sterrett confirmed that 180,000 gallons of fluids were removed from the site, of which 100,000 gallons consisted of water (Tr. 350). An Ashland memorandum, dated December 7, 1984 (Complainant's Exh 12), places the quantity removed at 178,000 gallons.

15. Although acknowledging that there was no way to make the distinction, Mr. Sterrett attributed most of the contamination at the site to operations over 20 years rather than leaking tanks (Tr. 342). Based on data from the American Petroleum Institute, he stated that the average life of carbon-steel underground tanks such as those at Losantiville was 25 years (Tr. 393). He testified that records will show that 95% of leaks in tanks are in associated piping, because of the dissimilarities in metals and the piping was at a point with a high potential for corrosion (Tr. 394). He indicated that water probably leaked into the tanks through the piping (Tr. 405). He denied having personal knowledge of whether the tanks at Losantiville leaked, but answered a question in that regard: "I suspect they did, yes" (Tr. 395).

16. Mr. Sterrett further testified that much of liquid (water) removed from the site did not come from the tanks and that this water would not have a flash point (Tr. 284). Nevertheless, he indicated that SRR reclaimed or blended the material removed from the tanks for use as fuel at three cement mills in Ohio. He stated Ashland's belief that use as fuel was the most appropriate disposition or use of the material (Tr. 281). He acknowledged that he had not been on the SRR site, but claimed to have knowledge of its operation and

asserted that use of the material as fuel was verified by flash points below 140° and BTU content of 18,000 to 20,000 per pound shown on chromatograms accompanying the manifests (Tr. 282, 286-87; Complainant's Exh 12). All of the chromatograms do not contain such information. Handwritten notations on those that do, however, show flash points ranging from 70° to 160°. Of the four chromatograms showing BTU content one is at 18,500, one at 19,000 and two are at 20,000. Presumably these figures are per pound. On cross-examination, Mr. Sterrett acknowledged that he could not state with certainty that all materials removed from Losantiville were used either as fuels or reclaimed solvents (Tr. 386). An Ashland memorandum, dated July 23, 1984, refers to the SRR estimate for removing the material and describes the material as consisting of contaminated water containing flammables, chlorinated waste, nonchlorinated waste and contaminated water (Complainant's Exh 12). The memorandum states that the material will be transported by SRR to its West Carrollton, Ohio facility for decanting and that eventual disposal will be either by incineration or deep well injection. Mr. Sterrett discounted this memorandum, attributing it to speculation prior to entering into a contract with SRR (Tr. 400-01).

17. Mr. Sterrett explained Ashland's reasons for proceeding with removal of the tanks and materials therein at the Losantiville site without a closure plan. He said that the tanks were considered product tanks and that there was no indication that anyone [regulatory body or agency] had authority over the tanks (Tr. 352, 360). He said it was unclear whether the Part 265 Interim Status Standards applied to underground hazardous waste tanks, but opined that they did not

(Tr. 344). He pointed out that § 264.190 provides that the regulations in that Subpart were not applicable to hazardous wastes in underground tanks[7/] and that it wasn't until the Hazardous and Solid Waste Amendments of 1984 that EPA's authority over such tanks was made clear (Tr. 343-44). According to Mr. Sterrett, removal of the tanks and materials was conducted in a reasonable manner with due attention to all [environmental] factors (Tr. 352). He testified that Ashland had been removing underground tanks at other facilities for several years and that he was unaware of any other action Ashland could have taken to remedy the situation with respect to material removal (Tr. 351). He said that the object of Ashland's activities was to remove problem materials as soon as possible and pointed out that Ashland's Part B application for its Evendale facility had been on file for two years without a permit being issued (Tr. 361, 367).

18. On November 29, 1984, a meeting was held at the district offices of Ohio EPA in Dayton with representatives of Ashland (Tr. 33, 34). Concerns as to contamination at the Losantiville site were expressed and Ashland was directed to prevent surface runoff from entering the stormwater sewer and requested to submit a plan for the assessment of soil and groundwater contamination. Ashland constructed an earthen dike to prevent surface flow into the storm drain (Tr. 36). Ashland employed the consulting firm of T.M. Gates, Inc. to develop a plan for

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7/ This is accurate with the qualification that the tanks cannot be entered for underground inspection. Subpart J, applicable to tanks, was added to the Part 264 standards in 1981 (46 FR 2867, January 12, 1981). The preamble made it clear that the reason for the exemption as to underground tanks that could not be entered for inspection was that EPA was considering a complete ban on the storage or treatment of hazardous waste in such tanks (Id. at 2831).

the assessment of site contamination, which under date of December 11, 1984, submitted a Hydrologic Investigation Plan to Ohio EPA (Respondent's Exh 16). The stated purposes of the plan were to "1) [d]elineate the nature, magnitude, horizontal and vertical extent and geometry of groundwater contamination, if it exists" and "2) [i]f necessary, develop an environmentally sound, technically feasible, and cost effective remedial approach to mitigate potential adverse impacts to the surrounding environs." The plan assumed that there would be six, 15 to 25 foot test borings and one well cluster consisting of borings approximately 25', 75' and 190' deep, to the top of the water table, bottom of clay aquitard and the potentiometric surface of deep sand and gravel aquifer, respectively. Soil and water samples were to be tested for, inter alia, volatile organic compounds and oil and grease. By letter, dated January 7, 1985, OEPA commented on the plan and included a stipulation that all site work was to be accomplished with a representative of OEPA present (Respondent's Exh 2).

19. On August 15, 1985, T.M. Gates, Inc. (TMG) submitted to OEPA a draft "Summary of Hydrologic Investigation and Recommendation of Remedial Plan, Losantiville Avenue Plant, Ashland Chemical Company," (Respondent's Exh 16). OEPA acknowledged receipt of the report under date of November 1, 1985 (Respondent's Exh 2), stating that on-site disposal of contaminated soil was not acceptable and that other alternatives must be presented. OEPA stated the belief that data gaps exist in information necessary to accurately characterize the underlying geology and potential for off-site contaminant migration

and that additional characterization by continued site evaluation was needed. After a meeting at the OEPA district office with representatives of Ashland and its consultant, Dr. Todd Gates, on November 14, 1985, wherein it appeared that remedial activities at the site were restricted by saturated conditions, it was agreed that an interceptor trench/sump system would be installed on at least two sides of the site (OEPA letter, dated November 25, 1985, Respondent's Exh 2). Collected liquids were to be treated on site and discharged to the sanitary sewer with the approval of the Metropolitan Sewer District. OEPA also requested installation of an off-site monitoring well to the southwest of the Ashland property. TMG submitted revisions to its remedial plan on February 20 and March 10, 1986 (Respondent's Exh 16).

20. A total of eight monitoring wells were drilled on the property and one (MW-7) was drilled to the southwest of the property line (Tr. 42; Plot Plan, Respondent's Exh 7). Mr. Hines testified that samplings from these wells revealed some level of contamination from each well on the site (Tr. 35, 36). He characterized contamination in the majority of the shallow wells as significant and that in the deeper wells as of low levels. Contaminants referred to included some of the solvents found in surface sampling. The off-site well (MW-7) had low levels of similar contaminants (Tr. 46). Mr. Hines opined that the contamination came from material that was in the tanks (Tr. 41). He acknowledged, however, that most of the wells were to the north of the area where the underground tanks had been located (Tr. 44, 45). Ashland's consultant, Dr. Todd Gates, distinguished water table and

perched water groundwater flows, asserting that the former were most likely to the west of the site while the latter were to the northwest (Tr. 470-71).

21. Cross-sections of the Losantiville Road area, referred to as Mill Creek Valley, indicate that the Ashland site is underlain by approximately 90 feet of silty clay and clayey silt (Respondent's Exh's 8, 9 & 10). The cross-sections, apparently based on soil borings from drilling monitoring wells, show limited areas of silty/clayey sand. Beneath these materials is a shale bedrock. According to Dr. Gates, the layers other than silty clay are of a discontinuous nature and relatively limited in extent (Tr. 434). He testified that contaminants from the site are confined within this silty-clay, clay silt layer with very little potential for migration either horizontally or vertically (Tr. 437). He described the shale bedrock underlying the mentioned materials as having appreciable thickness and low permeability. He was therefore of the opinion that there was little likelihood contamination from the site would have any significant impact on the surrounding environs, particularly groundwater. The TMG report concludes that the site should be regarded as consisting of entrapped perched water lenses and layers in which negligible contaminant movement occurs and conditions are virtually stagnant (Id. at 42).
A generalized cross-section of Mill Creek Valley (Respondent's Exh 11) indicates the uppermost layer at the Losantiville site consists of clay. Dr. Gates referred to this material as "till," consisting of a heterogenous mixture of clay having scattered stringers of sand and gravel (Tr. 439). The water bearing characteristics of

till are described as "meager supplies from the drift in upland areas." (Tr. 456; Respondent's Exh 12). Under cross-examination, Dr. Gates explained that the overall composition of till was heterogeneous, but that the vast bulk of the material consisted of fine grains, so that the permeability of the material was low (Tr. 459-60). He acknowledged that he had used literature values for permeability rather than measurements or tests at the site (Tr. 461-62). He defended this practice upon the ground that there was no need to "reinvent the wheel" and insisted that permeability coefficients shown in the TMG report (Respondent's Exh 16 at 25, 26) were very conservative (Tr. 462, 465-66).

22. A summary of analytical results of samples from the monitoring wells is in evidence (Respondent's Exh 14). The samples were taken on March 20, 1985, April 2, 1986 and September 16, 1986, except for the off-site well (MW-7), which was sampled on only the latter two dates. Dr. Gates characterized the results from MW-1, in the southwest corner of the site and the area where above-ground chemical storage tanks had been located, as showing elevated concentrations of a variety of contaminants [VOC's] (Tr. 441). Although he pointed out that the concentrations declined along the western portion of the property, particularly at MW-3 in the northwest corner, he acknowledged that these contaminant levels would be considered significant under almost anybody's definition of the term. Referring to MW-5 and 6 in the southeastern and northeastern portions of the site, respectively, he stated that contaminant concentrations had dropped, but might be considered significant at MW-5 even though VOC's were

less than one ppm (Tr. 442). He emphasized that contaminant levels decreased significantly with depth (Tr. 446). As to MW-7, the off-site well, Dr. Gates characterized the contamination as very low, ranging from a few parts per billion (ppb) to below the detection limit of .01 ppb (Tr. 443). He questioned whether such low analytical results were repeatable, because of the ubiquitous nature of many of the chemicals and the possibility of contamination of the samples. In any event, he was of the opinion that it was unlikely such low concentrations would have any environmental significance (Tr. 445). He pointed out that some of the VOC's shown on Exhibit 14 would not have occurred in Ashland's product line, but could be degradation products therefrom (Tr. 448). He emphasized that degradation products are indicative of a relatively long-past history (Tr. 449).

23. Respondent's Exhibit 13 shows the results of soil analyses for Monitoring Wells Nos. 1, 2C, 3, 4 and 5 at the Losantiville site. The exhibit shows the results of samples taken at the surface and at depths of from 3.5' to 5.0' at the mentioned wells. All samples showed oil and grease concentrations ranging from a surface concentration low of 425 mg/kg at MW-5 to a surface concentration high of 3230 mg/kg at MW-1 and from a low of 365 mg/kg at MW-2C to a high of 1370 mg/k at MW-3 at the 3.5' to 5.0' depth. The vast majority of VOC's were reported as "not detected." Alkylbenzenes (13000 ug/kg), methyl ethyl propyl benzene (5800 ug/kg) and xylene (1800 ug/kg) were reported at the 3.5' to 5.0' depth at MW-2C. Substantially smaller quantities of these chemicals were reported at both the surface and subsurface

of MW-4 and minute quantities of the former two chemicals (182 ug/k and 125 ug/k, respectively) were reported on the surface at MW-5.

24. According to Dr. Gates, the most significant aspect of the results shown on Exhibit 13 is that no detectable VOC's were found in the southwest corner of the property (MW-1), where because of topographical and hydraulic gradients most of these contaminants would likely have flowed (Tr. 450-51). Although he noted the variations in oil and grease concentrations, he attributed the variations at least partially to drive-through truck traffic and opined that the concentrations did not have much to do with the site in general. Based on the geologic environment at Losantiville, he concluded that the likelihood of exposure to hazardous waste was extremely limited (Tr. 452-53).

25. Mr. James Brossman, Chief of the Ohio-Minnesota RCRA Enforcement Unit for EPA Region V, who qualified as an expert in geology, questioned whether several of the conclusions in the T.M. Gates Remedial Plan (Respondent's Exh 16) were supported by data presented (Tr. 495-97). Specifically, he contended that the sampling interval of one-and-a-half feet for every five feet of depth was too sparse and that there should have been direct measurement of soil permeability (Tr. 498-99). He asserted that without such data, he would not be comfortable with the conclusion the site was underlain by materials having essentially uniform permeability (499). He further contended that a grain size analysis should have been performed in order to adequately characterize the soils and pointed out that water levels

in the monitoring wells appeared to rise or fall in concert, indicating the likelihood of hydraulic continuity. Referring to the cluster of wells at the west central area of the site (MW-2A, -2B and -2C), he stated that the water level in the shallower well was considerably higher than in the deeper wells, indicating the potential for a downward gradient or movement (Tr. 502-03).

26. Mr. Brossman alluded to the well log for MW-2A (Appendix A, Respondent's Exh 16) as indicating chemical odors from 13.5 feet to 23.5 feet and was critical of the fact soil sampling ended at five feet (Tr. 503). He also referred to studies to the effect that many organic solvents cause a shrinkage in clay particles, creating what he referred as "secondary permeability" and allowing an increase in contaminant migration (Tr. 504). In Mr. Brossman's opinion, there was evidence of groundwater contamination and of migration of that contamination (Tr. 506-07). He criticized the location of MW-7, which was drilled to the west of the southwest corner of the Ashland property, for the reason groundwater flow was to the northwest and contamination migrating off-site would not show in this well.8/ He testified that based on data presented he didn't know whether there was sand and gravel under the site, because only one boring, MW-2C, went down to shale bedrock and that had a 60' gap where there was no sample recovery (Tr. 509). Based on comparisons of soil and water analyses at MW-1, MW-2 and MW-4 as indicated in Respondent's Exhibits 13 and 14, Mr. Brossman opined that there was no demonstrated correlation between site contamination and surface

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8/ Tr. 508. The record reflects that this well was installed in the specified location at the instance of OEPA (finding 19).

spillage (Tr. 513-16). To him, this meant that contaminated groundwater was migrating. On cross-examination, he acknowledged that he had never visited the Losantiville site or done any [geologic] work in the immediate Cincinnati area (Tr. 516-18). He further acknowledged that he had not studied the Gate's remedial plan in any detail.

27. An affidavit, dated July 31, 1986, by Mr. William R. Gruber, District Manager for Ashland, attributes the error as to the address and ID number on the manifests used to ship materials from Losantiville to SRR (Respondent's Exh 1). The affidavit explains that SRR has done extensive business with Ashland at the Glendale-Milford Road facility and that Ashland personnel overlooked this error when signing the manifests prepared by SRR. This is at least understandable as Ashland has not had any employees stationed at Losantiville since the site was closed. Mr. Sterrett testified that purchase orders to SRR called for services at the Losantiville facility (Tr. 319). Although the purchase orders are not in the record, this is confirmed by correspondence from SRR prior and subsequent to removal of the material (letters, dated August 27 and November 21, 1984, Complainant's Exh 12).

28. Ms. Catherine McCord explained Complainant's reasons for considering the materials at Losantiville to be hazardous wastes. She testified that based on information furnished U.S. EPA, source or sources not identified, some materials were left in the product tanks at the time the facility was closed in late 1980 (Tr. 101). She described these

materials as not easily pumpable and as including "heels," i.e., solids that drop out of liquids or chemical products over the years. She stated that Ashland indicated, to whom not stated, that an attempt was made to pump all of the tanks, but that only easily pumpable materials were removed (Tr. 102). Regarding Tank Nos. 19 and 20, Ms. McCord asserted that these tanks contained materials which had been accumulated in drums at the time of the closing and that the sources of these materials were overfill and spillage from drum filling operations and solvents used for flushing common pumping lines. In her opinion, material that remained in the underground tanks, material that was spilled during drumming operations and line flush were all hazardous wastes. She described the material remaining in the underground tanks, other than Nos. 19 and 20, as "U" wastes, the line flushing material as spent solvents or an "F" waste and the collected overfill and spillage from drumming operations as a "U" waste, i.e., a discarded or off-specification commercial chemical product (Tr. 103). According to Ms. McCord, material remaining in the balance of the tanks became a regulated hazardous waste 90 days after the plant closed, the line flushing material became a waste as it exited the common lines and the spillage or overfill became a waste at the time it was spilled (Tr. 104-05). She justified her contention that material remaining in tanks, other than Nos. 19 & 20, were abandoned when Losantiville was closed by reference to the ultimate disposition of the materials (Tr. 126, 225). She further contended that the materials were disposed of when the tanks leaked and supported this allegation by reference to the age of the tanks,

the amounts of water in the tanks, making it logical to assume materials could also leak out, OEPA analyses of surface and monitoring well samples and the sheens on surface ponding observed by OEPA inspectors at the time of the November 13 inspection (Tr. 225-27).

29. Although Ms. McCord did not calculate the proposed penalties in this case, she testified that she was familiar with the basis of the calculation (Tr. 69). For this purpose, the Final RCRA Civil Penalty Policy was utilized (Complainant's Exh 18). The policy employs a matrix having a horizontal axis, extent of deviation from requirement, and a vertical axis, potential for harm. Each axis is subdivided into major, moderate and minor categories resulting in cells containing penalty amounts up to the statutory maximum of $25,000 per day. In this instance, the potential for harm resulting from the incorrect identification number and address on the hazardous waste manifests was regarded as moderate and the extent of deviation as major, leading to a penalty range of from $15,000 to $19,999. The midpoint was selected resulting in a proposed penalty of $17,500 (Penalty Computation Worksheet, Complainant's Exh 17). The potential for harm and the extent of deviation were all regarded as major for the other three violations, operating without a permit, failure to submit a closure plan prior to commencing closure and failure to prevent releases of hazardous wastes to the environment. This resulted in a penalty range of $20,000 to $25,000 and, again the midpoint was chosen, resulting in a penalty of $22,500 for each of the mentioned violations. The policy states that the potential for harm is to be determined by

"(t)he likelihood of exposure to hazardous waste posed by noncompliance, or the adverse effect noncompliance has on the statutory or regulatory purposes or procedures for implementing the RCRA program" (Id. at 6). According to Ms. McCord, penalties for operating without a permit, using an incorrect identification number and address on the manifests and failure to submit a closure plan prior to commencing closure were more heavily weighted towards impact on the regulatory framework than on the likelihood of exposure to hazardous waste (Tr. 159). The penalty justification for operating without a permit refers under potential for harm, however, to illegal underground tank storage where tanks have leaked (Complainant's Exh 17). Under extent of deviation, the justification states that operating without a permit is a statutory as well as a regulatory violation. The justification for the major extent of deviation for the manifest violation states that the identity of the generator was hidden. The justification describes the potential for harm for the closure standard violation thusly: "[l]eaky underground storage tanks have been illegally removed and the removal process exposed the environment to solvents. In addition, an extensive cleanup is necessary to try to meet the closure performance standard." It is clear that the penalty for the fourth violation, failure to minimize releases to the environment was based on exposure, or the likelihood thereof, both as to potential for harm and extent of deviation from the requirements, because the penalty justification refers to contamination of the site under both categories.

CONCLUSIONS

1. Mixed solvents consisting of line flushings, off-specification materials and overfill stored in two tanks at Losantiville have not been shown to be solid or hazardous wastes prior to May of 1984.
2. The mixed solvents in the two tanks were contaminated with substantial quantities of water, contained an undetermined amount of low energy materials such as chlorinated solvents and Ashland has not carried its burden of demonstrating that after May 1984 the solvents were being accumulated or stored prior to beneficial use or re-use, i.e., use as fuel, in accordance with 40 CFR § 261.6 (1984).
3. Complainant hasn't shown that materials remaining in the tanks other than the two containing mixed solvents were abandoned prior to May 1984. Ashland concedes that the materials in these tanks were hazardous wastes after the materials were determined to be contaminated with water and as noted in Conclusion 2, Ashland has not carried its burden of demonstrating that after May 1984, the materials were being accumulated or stored for beneficial use as fuel.
4. Complainant hasn't shown by a preponderance of the evidence that leaks or discharges from the tanks occurred prior to the removal of the tanks from the site in November 1984.

5. The violations alleged in the complaint, that is, storing hazardous waste without having a permit,[9/] commencing closure without having submitted a closure plan, failure to prevent releases of hazardous wastes and shipping hazardous wastes with an incorrect address and identification number have been established.

6. In imposing an $85,000 penalty, Complainant failed to consider certain mitigating and other factors. An appropriate penalty is the sum of $48,375.

DISCUSSION

Complainant contends that the mixed solvents resulting from line flushings stored at Losantiville are solid wastes, because the solvents were discarded, or being accumulated, stored or treated prior to being discarded within the meaning of 40 CFR § 261.2(b) (1984).[10/] Complainant

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9/ Although the charge is storing hazardous waste without having achieved interim status, it does not appear that Ashland was accumulating or storing hazardous waste on November 19, 1980, and accordingly, it could not thereafter qualify for interim status once it began storing such wastes for periods in excess of 90 days. This is because the hazardous waste facility was not in existence on November 19, 1980, and a permit for hazardous waste storage was required. See Regulation Interpretation Memorandum, November 3, 1981 (46 FR 60446, December 10, 1981). Because the basic charge is illegal storage of hazardous waste, the defense of which does not concern the distinction between interim status and a permit, Ashland is not prejudiced by this fact and an amendment of the complaint is not required.

10/ Brief at 8-10. Section 261.2 provides:

Definition of solid waste.

(a) A solid waste is any garbage, refuse, sludge or any other waste material which is not excluded under § 261.4(a).

(b) An "other waste material" is any solid, liquid, semi-solid or contained gaseous material, resulting from industrial, commercial, mining or agricultural operations, or from community activities which:

further contends that the line flushings were discarded in three different ways by being burned or incinerated by SRR, disposed of by SRR by being discharged, deposited, injected, dumped or placed into or on land or water and disposed of by Ashland through leaks from the underground tanks. According to Complainant, the line flushings are spent materials from nonspecific sources and thus listed "F" wastes as set forth in 40 CFR § 261.31, because the solvents could no longer be used for their original intended purpose (Brief at 11, 12). Complainant alleges that line flushings were combined with off-specification material and what is referred to as "spillage" from drumming operations and that because

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Footnote 10/ continued

(1) Is discarded or is being accumulated, stored or physically, chemically or biologically treated prior to being discarded; or

(2) Has served its original intended use and sometimes is discarded; or

(3) Is a manufacturing or mining byproduct and sometimes is discarded.

(c) A material is "discarded" if it is abandoned (and not used, re-used, reclaimed or recycled) by being:

(1) Disposed of; or

(2) Burned or incinerated, except where the material is being burned as a fuel for the purpose of recovering usable energy; or

(3) Physically, chemically, or biologically treated (other than burned or incinerated) in lieu of or prior to being disposed of.

(d) A material is "disposed of" if it is discharged, deposited, injected, dumped, spilled, leaked or placed into or on any land or water so that such material or any constituent thereof may enter the environment or be emitted into the air or discharged into ground or surface waters.

of the "mixture rule,"[11/] the entire contents of Tank Nos. 19 and 20 were listed hazardous wastes.

According to Ashland, proper analysis requires that the storage of mixed solvents at Losantiville be separated into the period prior to the time (May 1984) the tanks were determined to be contaminated with water, and thereafter. Ashland contends that the material was product prior to May 1984, and although thereafter regarded as hazardous waste, it was beneficially used or reused as fuel and accordingly, exempt from RCRA regulation (Brief at 2, 15-17). As to the classification of the material prior to May of 1984, Ashland relies on the testimony of Mr. Sterrett that the intended use of line flushings was as a product, that the material had economic value, was held for sale and that sales of the material were, in fact, made.[12/] For this reason, Ashland disputes Complainant's contention that the material was discarded or intended to be discarded and thus a

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11/ The provision cited, § 261.3(b), provides in pertinent part:

> (b) A solid waste which is not excluded from regulation under paragraph (a)(1) of this section becomes a hazardous waste when any of the following events occur:
>
> (1) In the case of a waste listed in Subpart D, when the waste first meets the listing description set forth in Subpart D.
>
> (2) In the case of a mixture of solid waste and one or more listed hazardous wastes, when a hazardous waste listed in Subpart D is first added to the solid waste.
>
> (3) In the case of any other waste (including a waste mixture), when the waste exhibits any of the characteristics identified in Subpart C.

12/ Finding 7. Although Mr. Sterrett's testimony appears limited to line flushings, it is undisputed that off-specification material returned by Ashland's customers and what has been referred to herein as "overfill" were combined in two underground tanks at Losantiville (Ashland Brief at 1). Accordingly, these materials (mixed solvents) will be treated together.

solid waste, much less a hazardous waste (Brief at 4-9). Ashland also relies on Mr. Sterrett's testimony that use of one solvent to flush another solvent from common lines was not a solvent related use of the material, thus the material was not "spent" and could not be a listed "F" waste (Brief at 9-12).

In order for a material to be a hazardous waste, it must first be a solid waste and the initial question is whether the mixed solvents (note 12, supra) were discarded or being accumulated, stored or physically, chemically or biologically treated prior to being discarded in accordance with 40 CFR § 261.2(b)(1). Because discarded is defined by reference to "abandoned" (§ 261.2(c)) and "abandon" or "abandonment," at least with respect to property, normally requires an intent to abandon together with an external act fulfilling that intent,13/ it is concluded that as long as Ashland was selling or intending to sell the mixed solvents at issue here, the solvents may not be considered to have been discarded within the meaning of § 261.2(b)(1).14/ The argument that the mixed solvents were being accumulated or stored--there is no evidence that the solvents were being physically, chemically or biologically treated--prior to being discarded fails for the same reason.

13/ Jackson Brewery Development Corp., et al., TSCA-VI-83C (Initial Decision, December 16, 1985) affirmed, TSCA Appeal 86-1 (Final Order, July 28, 1986). Accord: Chemical Sales, Inc. v. Diamond Chemical Co., 766 F.2d 364 (8th Cir. 1985).

14/ Although Complainant asserts that the sales shown by Ashland are so limited and inconsequential as to demonstrate that Ashland had no real intent to sell the material (Reply Brief at 5, 6), the rule that certain materials accumulated speculatively, including spent materials, are solid wastes (40 CFR § 261.2(c)(4), 1985) was not in effect. Moreover, the speculative accumulation rules are not applicable to commercial chemical products listed in § 261.33. Furthermore, it is not self-evident that the sales of approximately 1,150 gallons (21 55-gallon drums) of mixed solvents shown here are inconsequential in comparison to the total quantity of mixed solvents accumulated or generated.

This brings us to § 261.2(b)(2) "[the material] [h]as served its original intended use and sometimes is discarded." It is at this point that the argument over whether use of one solvent to flush the lines of the remains of another solvent is a solvent-related use becomes relevant. Because the very essence of a solvent includes the capability of dissolving another substance,15/ it is concluded that Ashland has the better of this argument and that use of a solvent for flushing purposes as described herein is not evidence that the solvent has served its original intended use.

The foregoing conclusion would seem to require the further conclusion that the solvents here concerned are not solid wastes and to end the inquiry, because we have already found that prior to May 1984 the solvents were not discarded or being accumulated or stored prior to being discarded.16/ If a material is not a solid waste, it clearly cannot be a hazardous waste, least of all a listed hazardous waste. Nevertheless, Complainant contends that line flushings were spent solvents and thus listed "F" wastes in accordance with § 261.31 and this issue will be briefly addressed. Although the regulations did not contain a definition of "spent" prior to the 1985 amendments (50 FR 614, January 4, 1985), it is noted that the preamble to the referenced amendments characterizes materials referred to in § 261.2(b)(2), quoted above, as "spent" (Id. at 615, note 2). This lends support to the view that the

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15/ A solvent is defined as "[a] substance capable of dissolving another substance (solute) to form a uniformly dispersed mixture (solution) at the molecular or ionic level." The Condensed Chemical Dictionary, 8th Ed. (1971). "The chief uses of organic solvents are in paints, varnishes, lacquers, printing inks, rubber processing and pharmaceuticals." (Id.)

16/ River Cement Company, RCRA (3008) 83-9 (Final Order, February 4, 1985) is not controlling, because in that case it was clear that the still bottoms which Respondent intended to use as fuel had served their original intended use.

"original intended use" of the material was an integral part of the concept of "spent" prior to the 1985 amendments to the regulation.17/

Complainant apparently recognizes the weakness of its case in characterizing the mixed solvents at issue here as "spent" and thus listed "F" wastes for it now emphasizes the alleged "spillage" component of the mixed solvents.18/ Relying on the definition of "disposed of" in § 261.2(d), which includes spills, Complainant argues that the "spillage" constituted disposal which in turn is included in the definition of "discarded," § 261.2(c)(1). Complainant says that the material became a solid waste when spilled, because it was discarded, and a listed hazardous waste as a discarded chemical product, including off-specification species and spill

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17/ This view is also supported by the common definition of spent which includes "exhausted of active or required components or qualities often for a particular purpose." Webster's New International Dictionary, 3rd Ed. (1967). The amended regulation, 40 CFR § 261.1(c)(1) (1985), defines spent as follows: "[a] 'spent material' is any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." The focus of this definition is not on the purpose for which the material was used, but rather, whether after use of any kind, the material is contaminated and can no longer serve the purpose for which it was produced without processing. Accordingly, use of this definition in conjunction with § 261.2(b)(2) (1984) could produce anomalous results in that a material might be spent as defined above and still not have served its intended use. For this reason, any suggestion that the definition in the amended regulation should control here is rejected.

18/ Reply brief at 3-5. Complainant alleges that Tank Nos. 19 and 20, containing mixed solvents, also contained residuals or heels (Brief at 3). Mr. Sterrett stated that "[a] heel could be rust, a small amount of water or a small amount of the original product" (Tr. 383). Although he answered affirmatively a question as to whether any of the tanks at Losantiville contained heels after its closure as an active facility in 1980, there is no indication this answer related to the tanks Complainant alleges contained mixed solvents. We have found above, however, that the inventory taken in June 1984 indicated the presence of rust in Tank Nos. 19 and 20 (finding 9) and this would appear to fit within Mr. Sterrett's definition of a heel. Only Tank No. 20 has definitely been established as one of two Losantiville tanks containing mixed solvents (note 6, supra).

residues thereof in accordance with § 261.33. Materials in § 261.33 become listed wastes only when discarded or intended to be discarded and we have previously found that as long as Ashland was selling or intending to sell the materials, the materials could not properly be considered to have been discarded. Complainant, however, relies on the testimony of Ms. McCord to support its contention the mixed solvents included so-called "spillage." As pointed out above (note 6, supra), the sources of her information, however, are secondhand and have not been identified with any specificity. Moreover, it does not seem reasonable to regard solvents, which have been "discharged, spilled, leaked, pumped, poured, emitted or dumped into or on any land or water" within the contemplation of § 261.2(d)[19/] as collectible or retrievable in the normal sense so as to be combined with other solvents. Accordingly, it is concluded that the so-called "spillage" at issue is what has been characterized herein as "overfill," i.e., material left over in lines, hoses, etc., as a result of transfer and drumming operations, which cannot properly be characterized as spills or the result thereof. For this reason, the so-called "spillage" component of the mixed solvents at issue provides no support for the contention the mixed solvents were either a solid or a hazardous waste prior to May 1984. "Discarding" or the "intent to discard" is an essential element of an off-specification commercial chemical product which is a listed hazardous waste under § 261.33 and Complainant fares no better with this component of the mixed solvents in question.

19/ Although the 1983 and subsequent versions of the regulation do not contain a definition of spill, spill was defined in 40 CFR § 260.10 (1982) as follows: "Spill means the accidental spilling, leaking, pumping, pouring, emitting, or dumping of hazardous wastes or materials, which when spilled, become hazardous wastes[,] into or on any land or water."

There is no evidence of leaks from the two tanks holding mixed solvents and we now turn to Ashland's contention these particular solvents, although hazardous wastes because they were ignitable, were not subject to RCRA regulation, because the solvents were being stored or accumulated prior to beneficial use or re-use, i.e., as fuel, in accordance with § 261.6(a).20/ Evidence that the materials were used as fuel consists of Mr. Sterrett's testimony as to Ashland's belief that use as a fuel was the most appropriate use of the material, Mr. Sterrett's understanding that the material was reclaimed or blended by SRR for use as fuel in three cement plants in Ohio and the low flash points and high BTU

20/ Section 261.6(a) & (b) (1984) provide in pertinent part:

Special requirements for hazardous waste which is used, re-used, recycled or reclaimed.

(a) Except as otherwise provided in paragraph (b) of this section, a hazardous waste which meets any of the following criteria is not subject to regulation under Parts 262 through 265 or Parts 270, 271, and 124 of this Chapter and is not subject to the notification requirements of Section 3010 of RCRA until such time as the Administrator promulgates regulations to the contrary:

(1) It is being beneficially used or re-used or legitimately recycled or reclaimed.

(2) It is being accumulated, stored or physically, chemically or biologically treated prior to beneficial use or re-use or legitimate recycling or reclamation.

* * * *

(b) Except for those wastes listed in paragraph (a)(3) of this section, a hazardous waste that is a sludge, or that is listed in § 261.31 or § 261.32, or that contains one or more hazardous wastes listed in § 261.31 or § 261.32; and that is transported or stored prior to being used, re-used, recycled, or reclaimed is subject to the following requirements with respect to such transportation or storage:

* * * *.

content of the material.21/ Mr. Sterrett acknowledged, however, that he had not been on the SRR site and that he could not state with certainty that all of the materials removed from Losantiville were used as fuels or reclaimed solvents.22/ The material contained a high percentage of water and an Ashland memorandum, dated July 23, 1984 (finding 15), describes the material as consisting in part of chlorinated waste. It appears to be established that chlorinated wastes do not have high energy value and that burning such materials or other materials with a high percentage of chlorinated wastes under the guise of energy recovery will not be regarded as legitimate recycling.23/ It is recognized that

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21/ Complainant argues that even if the materials were intended for beneficial use or re-use as fuel, storage of such materials was nevertheless subject to RCRA regulation as listed hazardous waste (Reply Brief at 4, 5). This, of course, is true only if the materials are listed in §§ 261.31 or 261.32. See § 261.6(b). It has already been concluded that the materials may not properly be regarded as spent solvents so as to be listed in § 261.31.

22/ Finding 15. It is of interest that Ms. McCord, who based her knowledge on conversations with an Ohio EPA inspector involved in compliance monitoring for the SRR facility, indicated that wastes treated or handled by SRR included blended fuels (Tr. 234). She stated that she had no knowledge of on-site disposal activities by SRR, but expressed the belief SRR did not engage in such activity.

23/ AN EPA Enforcement Guidance Memorandum, dated March 8, 1983, indicates that the energy value of wastes being burned is the primary factor distinguishing legitimate from sham recycling (48 FR 11157, March 16, 1983). The memorandum uses as a benchmark values of wood, ranging from 5,000 to 8,000 BTU's per pound and of subbituminous coal having a value of approximately 8,300 BTU's per pound. Materials with BTU values at or above the high of these values would be regarded prima facie as being burned for energy recovery, while burning of wastes with lesser values would be presumed to have been burned for the purpose of destroying or disposing of the materials. The memorandum points out that chlorinated solvents or wastes containing high concentrations of such solvents have low fuel value and specifically lists, among others, carbon tetrachloride, methylene chloride and trichloroethylene as low energy materials.

removed from the tanks is logical, her source for this information is a nonspecific "indication from Ashland" (finding 28). Such generalized secondhand information cannot be regarded as an admission against interest by Ashland and is entitled to little, if any, weight. There is no evidence of sales or withdrawals from these tanks after the closure and prior to removal of the materials by SRR and this period of approximately three-and-a-half years of inactivity is seemingly sufficient to distinguish these materials from the mixed solvents in two of the tanks.26/ If the act or acts of abandonment be deemed to have been demonstrated, it is still necessary to establish the requisite intent. Intent to abandon may, of course, be inferred, but requires strong and convincing evidence. Diamond Chemical Co. (note 13, supra). It is concluded that the evidence is not sufficient to demonstrate Ashland intended to abandon materials in tanks, other than the two containing mixed solvents, and that Complainant hasn't shown these materials were abandoned or discarded prior to May of 1984.27/

Ms. McCord's other reasons for considering materials remaining in tanks, other than Nos. 19 and 20, were abandoned are the ultimate disposition of the materials by SRR and that the tanks were leaking. The only evidence as to the ultimate disposition of the materials is an Ashland memorandum, dated July 23, 1984 (finding 16), which indicated eventual disposal of the

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26/ In accordance with § 261.4(c) hazardous waste generated in product or raw material storage tanks, transport vehicles, vessels and pipelines is not subject to RCRA regulation, until it exits the unit in which it was generated or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for the storage or transportation of product or raw materials. This provision, of course, does not establish when a material becomes a hazardous waste.

27/ It is highly unlikely that a stranger claiming title to the materials upon the ground they had been abandoned by Ashland would receive favorable consideration of his claim.

without material in the tanks leaking out. This would seem to be especially true in saturated conditions which apparently prevailed at Losantiville. Accordingly, the fact the tanks contained substantial quantities of water does not establish that the tanks leaked. Although contamination at the site is an established fact, it is probable and, indeed, highly likely that contamination occurred during the 20 or more years of operations. Support for this finding is derived from Dr. Gates' testimony concerning the presence of degradation products at the site (finding 22). It is therefore concluded that Complainant has not demonstrated that the tanks leaked prior to the time they were removed from the site in November 1984. Nevertheless, releases or discharges to the environment during the removal process are deemed to be established by samples taken at the time of the inspection on November 13, 1984 (finding 12).

Ashland apparently acknowledges that the materials were hazardous wastes after the materials were determined to be contaminated with water in May of 1984. It contends, however, that the materials were stored or reclaimed for use as fuel and that it is entitled to the exemption from RCRA regulation in § 261.6. The burden of proof in this respect is on Ashland and for the reasons set forth previously in regard to the mixed solvents, it is concluded that Ashland has not demonstrated entitlement to a recycling exemption in accordance with § 261.6.

PENALTY

As we have seen, the Final RCRA Civil Penalty Policy was utilized in calculating the proposed penalties (finding 29). The penalty for the incorrect address and identification number on the manifests was determined to be $17,500, the potential for harm being regarded as moderate and the extent of deviation from the requirement as major. Potential for harm is measured by the likelihood of exposure to hazardous waste posed by noncompliance or the adverse effect noncompliance has on the statutory or regulatory procedures for implementing RCRA (Penalty Policy at 6). It is difficult to envisage how the fact the manifests bore the identification number and address of Ashland's Evendale facility rather than of the closed Losantiville facility in any way increased the risk of exposure to hazardous waste. Failure to have the correct identification number could, however, make tracing the origin and disposal of hazardous waste, which is one of the means by which RCRA's goals are to be accomplished, more difficult and for this reason, considering the violation as having a moderate potential for harm as measured by adverse effects on the RCRA program is accepted. It is worthy of emphasis that it is potential for harm rather than actual harm that is significant here. The deviation from the requirement may not, however, be considered major. The wastes were identified as such in a manner considered proper by Complainant and manifested to a permitted facility. Thus, one of the major purposes of RCRA was served and it is

product tanks and it was unclear whether the Part 265 standards applied to underground tanks (finding 17). While we have determined that Ashland hasn't carried its burden of demonstrating that the materials were being stored for recycling or re-use as fuel, Ashland's reasons for considering it was entitled to the § 261.6 exemption are far from groundless. Moreover, although Ashland is mistaken in its apparent belief that the Part 265 standards are not applicable to hazardous waste in underground tanks, some of the Part 265, Subpart J provisions applicable to tanks, e.g., requirements for inspecting the level of waste in the tank and construction materials of the tank (§ 265.194(a)(3) and (4)), leave their applicability to underground tanks in doubt. This, coupled with the exclusion of underground tanks which cannot be entered for inspection from the presumably more stringent Part 264 standards and the Agency's reasons for doing so (note 7, supra), makes understandable Ashland's beliefs in this respect. For these reasons a 25% reduction in the gravity based penalty for commencing closure without a closure plan is appropriate, making the penalty for this violation $16,875.

No further adjustments are considered to be warranted, and a total penalty of $48,375 will be assessed against Ashland for the violations herein found.

O R D E R

The violations charged in the complaint having been established, a penalty of $48,375 is assessed against Ashland Chemical Company in accordance with § 3008 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6928). Payment of the penalty shall be made by sending a cashier's or

certified check payable to the Treasurer of the United States to the following address within 60 days of receipt of this order:

Regional Hearing Clerk
U.S. EPA, Region V
P. O. Box 70753
Chicago, Illinois 60673

The tanks, having been removed from the site, the terms of the compliance order have been mooted, save for those dealing with closure, which are affirmed.34/

Dated this 22nd day of June 1987.

Spencer T. Nissen
Administrative Law Judge

34/ Unless appealed in accordance with Rule 22.30 (40 CFR Part 22) or unless the Administrator elects, sua sponte, to review the same as therein provided, this decision will become the final order of the Administrator in accordance with Rule 22.27(c).