UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Federal-Hoffman, Inc.,	)	Docket No. V-W-87-R-001
	)	
Respondent	)	

1. A State permitted sanitary landfill listed in a Part A permit application in which waste had been placed prior to filing the application did not have to be retrofitted to meet the revised standards issued on July 1982, but was exempt as an "existing portion."

2. State ban against placing waste containing free liquids found not to be void for vagueness.

3. Respondent whose violations were not corrected on its own initiative but only after the violations had been specifically brought to its attention by the regulatory authorities held not to be entitled to any reduction in penalty.

4. Where Respondent for a three-month period during which a State ban against landfilling of liquid sludge was in effect continued to place its sludge in the landfill and then stopped when the Federal ban against landfilling its liquid sludge became effective and installed a filter press to meet the Federal ban, the cost of the filter press was properly used to determine under the BEN program Respondent's economic benefit for not complying with the State ban.

5. The EPA's estimate of operating and maintenance costs was properly used in determining under the BEN program Respondent's economic benefit since Respondent made no attempt to rebut or impeach these estimates.

6. In computing under the BEN program the economic benefit of Respondent's noncompliance, it was proper to include in the calculations the monetary return earned by the violator on the benefit prior to payment of the penalty.

APPEARANCES:

For Complainant:

Elizabeth Maxwell, Esquire
Nola Hicks, Esquire
Office of Regional Counsel
U.S. EPA, Region V
230 South Dearborn Street
Chicago, IL 60604

For Respondent:

Patricia J. Leonard-Mayer, Esquire
Douglas R. Rainbow, Esquire
1036 Norwest Midland Building
Minneapolis, MN 55401

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"), § 3008, 42 U.S.C. 6928, for assessment of a civil penalty for alleged violations of the Act. 1/

The complaint issued by the United States Environmental Protection Agency ("EPA"), Region V, charged that Respondent Federal-Hoffman, Inc. (hereafter "FHI"), during the period from January 26, 1983 until February 11, 1985, when the Federal hazardous waste management program was in effect in Minnesota, had placed bulk or noncontainerized liquid waste or waste containing free liquids in a landfill that did not meet the requirements of the Federal standards (40 C.F.R. § 265.314(a)). The complaint further charged that during the period between February 11, 1985 and May 8, 1985, when the State of Minnesota was authorized to administer a hazardous waste program in lieu of the Federal program, FHI had violated the State standards (Minnesota Rules Part 7045.0638, Subpart 7) by placing bulk or non-containerized liquid waste or waste containing free liquids into its landfill. A penalty of $77,150 was proposed for the violations. 2/

1/ Section 3008 in pertinent part provides as follows:

Section 3008(g): "Any person who violates 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."

2/ The complaint also contained a compliance order in accordance with RCRA, § 3008(a), directing Respondent to cease placing bulk or non-containerized liquid waste or waste containing free liquids in its landfill.

(Footnote continued)

Respondent filed an answer denying that it violated the law or regulations. Specifically, Respondent asserted that its landfill came under the "existing portion" exception to the Federal requirements while the Federal program was in effect, that the State requirements under the State program were vague, arbitrary and capricious when applied to sludge, that the government should be estopped from bringing this action and that the proposed penalty was inappropriate for the violation found.

A hearing was held in Minneapolis, Minnesota on March 24 and 25, 1987. Each party submitted post hearing briefs. On June 16, 1987, I issued a preliminary decision finding that FHI had not violated the Federal regulations but had violated the State requirements, and directing that supplemental briefs be submitted with respect to the appropriate penalty for the violation of the State requirements. Those briefs have now been submitted and this intial decision is accordingly rendered. My preliminary decision of June 16, 1987, with such changes as have been deemed necessary on further consideration of the record and arguments is incorporated in this decision in the text below beginning with the heading "Factual Background" and continuing up to the heading "The Penalty" on page 16.

(Footnote 2 continued)

The EPA in its post hearing brief asks only for a penalty, presumably because FHI discontinued placing such hazardous waste in its landfill after the enactment of the Hazardous and Solid Waste Amendments of 1984, which amended RCRA § 3004(c), to impose an absolute ban on the landfilling of such hazardous waste after May 8, 1985.

Factual Background 3/

The issues in this case center around the operation of a landfill by FHI at its facility in Anoka, Minnesota. The landfill has been used since 1976 to store a sludge generated by a waste water treatment plant. It was constructed according to plans and specifications approved by the Minnesota Pollution Control Agency (hereafter "MPCA") and has the following:

a. Twelve inch thick recompacted clay liner.

b. Subsurface monitoring system.

c. Clay sides.

d. Leachate collection system.

e. Groundwater monitoring wells.

A permit to operate the landfill was granted by the MPCA in May 1977, pursuant to the Minnesota Solid Waste Rules, and a second permit was granted in June 1979. The original permitted landfill space at the FHI landfill was 12 acres in area. A cell of about 1.75 acres was put into operation in 1977, and this is the only cell which has been put into operation since that time.

The sludge is a listed hazardous waste sludge under the Federal RCRA regulations and is identified by the following waste code numbers: K044, F006, K046 and F012. FHI on August 17, 1980, accordingly, filed a notification of hazardous waste activity and on November 18, 1980, filed a Part A permit application, thereby obtaining interim status to continue operating the sludge disposal landfill.

3/ Except where otherwise noted the facts are taken from the parties' stipulation of facts, transcript (hereafter "Tr.") Vol. I, 5-12.

On May 19, 1980, the EPA published standards for permitted facilities and interim status standards for owners and operators of hazardous waste treatment, storage and disposal facilities pending issuance of a permit. The only standards issued for landfills were interim status standards, of which 40 C.F.R. § 265.314, read in pertinent part as follows:

> § 265.314 Special requirements for liquid waste.
>
> (a) Bulk or non-containerized liquid waste or waste containing free liquids must not be placed in a landfill, unless:
> (1) The landfill has a liner which is chemically and physically resistant to the added liquid, and a functioning leachate collection and removal system with a capacity sufficient to remove all leachate produced 4/

It is not disputed that FHI's landfill satisfied these requirements.

On July 26, 1982, the EPA issued standards for permitted landfills and amended the interim status standards accordingly, to become effective January 26, 1983. The standard for permitted facilities, 40 C.F.R. § 264.301, read in pertinent part as follows:

> § 264.301 Design and operating requirements.
>
> (a) A landfill (except for an existing portion of a landfill) must have:
>
> (1) A liner that is designed, constructed, and installed to prevent any migration of wastes out of the landfill to the adjacent subsurface soil or ground water or surface water at anytime during the active life (including the closure period) of the landfill. The liner must be constructed of materials

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4/ 45 Fed. Reg. 33249 (May 19, 1980).

> that prevent wastes from passing into the liner during the active life of the facility. . . . 5/

The amended interim status standard, § 265.314 read in pertinent part as follows:

> § 265.314 Special requirements for liquid waste.
>
> (a) Bulk or non-containerized liquid waste or waste containing free liquids must not be placed in a landfill unless:
> (1) The landfill has a liner and leachate collection and removal system that meets the requirements of § 264.301(a) of this chapter 6/

While the clay liner in FHI's landfill has a low permeability, it is not as impermeable as required by § 264.301(a). 7/ Consequently, the landfill did not conform to the amended standard unless the exception for an existing portion applies, a question which will be considered further below.

5/ 47 Fed. Reg. 32365 (July 26, 1982). The standard also contained more specific requirements for the leachate collection and removal system but they are not an issue in this proceeding. FHI questions the EPA's reference to § 264.301, as a "permitting" regulation. Reply brief at 8. The wording, however, has been understood as simply a shorthand way of describing the actual difference between the Part 264 and Part 265 standards.

6/ 47 Fed. Reg. 32369.

7/ The record indicates that the clay liner has a permeability no greater than 10^{-7} cm. per second. Respondent's Exh. (hereafter "RX") 59. The standard, however, requires a liner that would prevent any migration of waste out of the landfill, and the preamble to the July 26, 1982, amendments makes clear that a clay liner would not be acceptable. 47 Fed. Reg. 32314.

On November 8, 1984, the Hazardous and Solid Waste Amendments of 1984 ("HSWA") amending RCRA, were enacted (Pub. L. 98-616, 98 Stat. 3221). Under these amendments, the placement of any bulk or non-containerized liquid hazardous waste or free liquids in hazardous waste was banned after May 8, 1985. 8/ This ban was codified into the EPA regulations published on July 15, 1985. 9/

On February 11, 1985, the Minnesota Pollution Control Agency ("MPCA") received final authorization from the EPA to administer the State hazardous waste program in lieu of the Federal program. After that date, FHI was required to operate in accordance with the State regulations (except with respect to HSWA-related requirements). 10/ Minnesota Rules Part 7045.0638, Subpart 7, read in pertinent part as follows:

> Special requirements for liquid waste.
>
> Bulk or noncontainerized liquid waste or waste containing free liquids must not be placed in a landfill.

FHI continued to use the landfill to dispose of its sludge until May 8, 1985, when, in obedience to the Federal ban, it suspended the landfilling of its waste water treatment sludge and began to store the sludge until dewatering equipment could be obtained.

8/ RCRA, § 3004(c)(1), 42 U.S.C. 6924(c)(1).

9/ See 50 Fed. Reg. 28748 (amendment to § 264.314(b)), 28750 (amendment to § 265.314(b)).

10/ 50 Fed. Reg. 3757 (January 28, 1985). See also Complainant's Exh. (hereafter "CX") 8.

Discussion

The complaint charges a violation of the Federal regulations for the period from January 26, 1983 until February 11, 1985, and of the State regulations from February 11, 1985 until May 8, 1985.

1. FHI was not in violation of the Federal regulations.

The Federal requirement for permits in Part 264, added by the July 26, 1982 amendments, contained an exception for an "existing portion of a landfill." The term "existing portion" was also added by the amendments and was defined as meaning "that land surface area of an existing waste management unit, included in the original Part A permit application, on which wastes have been placed prior to the issuance of a permit." 11/ It is not disputed either that the landfill was included in FHI's Part A permit application filed on November 18, 1980, or that waste had been placed in it at the time.

The EPA in the preamble to the July 26, 1982, explained why existing portions were exempt from the requirements to install more impermeable liners. 12/ Essentially, it was concerned with the hazards of requiring owners or operators to remove waste in order to meet the new requirements. It described these hazards as follows:

11/ 47 Fed. Reg. 32349, codified at 40 C.F.R. § 260.10.

12/ 47 Fed. 32315.

> Some facilities may lack space in which to store the waste temporarily while retrofitting. Even worse, in some cases, the ongoing waste disposal operation is integral to production operations. For example, some facilities use large volumes of water as part of their manufacturing processes and use surface impoundments to treat wastewater or to store or dispose of sludge. Unless additional space is available to construct a new impoundment to receive the wastes being removed from the existing impoundment, it may be impossible to retrofit the old impoundment without shutting down production facilities.
>
> A second problem is safety. Exhuming wastes from a landfill, for example, may create significant hazards for workers and others who are nearby and may be exposed to the wastes. 13/

The EPA went on to point out the limited nature of the exemption:

> The limited exemption for existing portions in these rules implements the legislative intent. The exemption applies only to those requirements which would require dangerous or impracticable retrofitting at existing units (i.e., bottom liners and leachate collection and removal systems). Moreover, it applies only to existing portions of existing units. New portions of existing units (e.g., lateral extensions of existing landfills such as new cells or trenches) are not entitled to the exemption since they would not experience the retrofitting problems pertaining to existing portions. 14/

The EPA also spoke about the limited scope of the exemption in commenting on its definition of "existing portion", saying as follows:

> 4. Existing portion. A new term, "existing portion," has been added to § 260.10 to describe the portion of a waste management unit that is exempt from those requirements in Subparts K, L, and N of Part 264 which would involve impractical

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13/ Id.

14/ Id.

> retrofitting for existing operations . . . . [T]odays regulations do not exempt all existing waste management units from liner requirements but do exempt the land surface included in the original Part A permit application on which wastes have been placed prior to permit issuance. . . . 15/

The EPA reads § 265.312, as prohibiting FHI from placing any liquid hazardous waste or hazardous waste containing free liquids in its landfill after January 26, 1983, because the landfill did not contain a proper liner. It really does not address the concern expressed in the preamble to the July 26, 1982 regulations about retrofitting existing portions of landfills but relies instead upon the explanation in the preamble that special requirements for liquid waste were being established because of the EPA's fear that the requirements for liners originally set out in § 265.314 would allow a substantial portion of the added liquids to pass through the liner and escape. The explanation concluded with the following statement:

> According to EPA's information, only a relative few existing landfills are equipped with appropriate liners and leachate collection units. Therefore, bulk disposal of liquids in many existing landfills may be curtailed upon the effective date of these requirements, at least until new, appropriately designed cells can be built at those landfills. 16/

If the existing portion exception were read literally to exempt from from the design and operating requirements all landfills included in the Part A application on which waste had been placed prior to the time a

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15/ 47 Fed. Reg. 32290.

16/ 47 Fed. Reg. at 32333.

permit was issued, which is the way the EPA appears to read it, the EPA's argument would have merit. But FHI does not press for such a construction. It seeks a construction that would exclude only the portion of the landfill included in the original Part A application on which waste had been placed prior to the time the application was filed. If, thereafter, a new trench or another cell was added to the landfill, the addition would not be entitled to the exclusion. While the construction contended for by FHI seems somewhat at variance with the literal wording, it is in accord with the reasons for the exclusion and is to be preferred over the EPA's reading that would virtually wipe out the exclusion. United States v. American Trucking Assn's., 310 U.S. 534 (1940).

The EPA contends that excluding FHI's landfill would run counter to the EPA's reasons for establishing requirements for landfills used to dispose of liquid waste. The preamble shows, however, that the EPA made a policy choice to exclude existing portions because it believed that the hazards created by requiring them to be retrofitted outweighed the reasons for requiring more impermeable liners. 17/

I find accordingly, that FHI has not violated 40 C.F.R. § 265.314.

17/ That § 265.314(a) is an interim status standard and not the standard that applies in the case of a permit should make no difference in the conclusion reached here. The amended § 265.314 was identical in wording with § 264.314. Compare § 264.314 as set out at 47 Fed. Reg. 32366, with § 265.314, 45 Fed. Reg. 33232 (May 19, 1980), as amended, 47 Fed. Reg. 12318 (Mar. 22, 1982), 47 Fed. Reg. 32369 (July 26, 1982). It is reasonable to assume that both should be construed the same with respect to the operation of the exclusion.

2. FHI Violated the State Requirements.

The State regulation, Minnesota Rules Part 7045.0638, Subpart 7 in effect from February 11, 1985, until May 8, 1985, banned the placement of any liquid waste (except containerized liquid waste) or waste contain-free liquids in a landfill. "Free liquids" are defined in Minnesota Rules Part 7045.0020, Subpart 29 as "liquids which readily separate from solid portion of the waste under ambient temperature and pressure." The evidence as to the nature of the sludge placed into FHI's landfill consists of a visual observation of the sludge during an inspection on March 21, 1985. An FHI employee took a sample of the sludge as it came out of a discharge pipe from which it was loaded on a tank truck that hauled the waste to the landfill. In his words, the waste "was extremely liquid". 18/ In addition, FHI stated in its Part B permit application that prior to the utilization of the plate filter press at the waste water treatment plant, which was installed after May 8, 1985, sludge dewatering capabilities were limited to a gravity thickener, that the sludges from the thickener, designated for landfilling, were typically only 3-7% solids and contained free liquids, and that during these operations the landfill was essentially utilized as a drying bed for the sludges and free liquids readily passed through the sludges to the leachate collection system. 19/ I find that this evidence is sufficient to establish that FHI was placing waste

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18/ Tr. (Vol. I) 42-44, 85.

19/ CX 15E; Tr. (Vol. I) 11.

containing free liquids in the landfill during the period from February 11, 1985 to May 8, 1985. The testimony of Respondent's expert witness, Dr. Malouf, that sludge coming from FHI's clarifier is capable of having a solid content high enough to pass the paint filter test and satisfy the Federal standard for waste that does not contain free liquids is too inconclusive to rebut the inference that the normal condition of the the sludge was that its solids content was so low that the presence of free liquids could be readily observed. 20/

FHI contends that the Minnesota Rule is unconstitutionally vague because of the asserted failure to adequately define free liquids. "Free liquids" are defined in Minnesota Rules Part 7045.0020, Subpart 29:

> "Free liquids" means liquids which readily separate from solid portion of waste under ambient temperature and pressure.

The definition is identical to that which has been in the Federal regulations since May 19, 1980. 21/ True the adoption of the paint filter test in April 1985 under the Federal standard gives a more precise standard for determining when the waste contains free liquids. But the absence of the paint filter test does not make the term too vague. FHI found no ambiguity in the term as used in the Federal program prior to

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20/ See Tr. (Vol. II) 35, 39-40. The paint filter test for determining the presence or absence of free liquids in waste was promulgated by the EPA as an amendment to §§ 265.314 and 264.314 on April 30, 1985. 50 Fed. Reg. 18370. It has not yet been adopted by Minnesota. According to Dr. Malouf, sludge with 12% to 20% solids will pass the paint filter test. Tr. (Vol. II) 35.

21/ See 45 Fed. Reg. 33074, codified at 40 C.F.R. § 260.10.

the adoption of the paint filter test. According to it, the term was used as a generic term for sludge. 22/

FHI's real quarrel with the State requirements is that there was no exemption for existing facilities. This simply meant that the State program was more stringent in that it prohibited the landfilling of sludges which would have been permitted under the Federal program. RCRA specifically allows this. 23/

FHI argues that the State was acting outside its authority in banning the landfilling of liquid waste and waste containing free liquids because the State had not yet been authorized to enforce the HWSA amendments. The HWSA ban, however, did not go into effect until May 8, 1985. 24/ Prior thereto the requirements under the State program continued to apply. The language from the preamble to the July 1985 regulations cited by FHI, is most logically read as relating to the State's authority to enforce the ban on landfilling of liquid waste after May 8, 1985. 25/

22/ Respondent's post-hearing brief at 11-12. While this is how FHI construed the term, it is to be noted that prior to the adoption of the paint filter test, the EPA suggested the use of an inclined plane test for sludges which are not obviously liquids. 45 Fed. Reg. 33214 (May 19, 1980). The indication is that if the sludge passed the incline plane test it would not constitute waste containing free liquids. There is no evidence that FHI ever subjected its sludge to such a test.

23/ See RCRA, § 3009, 42 U.S.C. 6929.

24/ This was true with respect to both the Federal program, RCRA, § 3004(c), 42 U.S.C. 6924C, and the authorized State programs, RCRA, § 3006(g), 42 U.S.C. 6926(g).

25/ See Respondent's post-hearing brief at 45-46, quoting from 50 Fed. Reg. 28731. If the State was divested by HWSA of jurisdiction to regulate landfills prior to May 8, 1985, as FHI contends, the pre-HWSA Federal requirements would have continued to remain in effect notwithstanding that the State

(Footnote continued)

Finally, FHI argues that it has been misled by the government into believing that its sludge disposal was lawful and that the government should be estopped from bringing this action. Since a violation is found only of the State regulations during the period from February 11 to May 8, 1985, the argument will be considered only with reference to that violation.

The government, of course, cannot be estopped by conduct of its employees from enforcing the law. 26/ FHI's argument, however, does have relevance in determining FHI's good faith compliance with the law and, hence, the appropriate penalty. Contrary to what FHI argues, it was FHI's duty to comply with the regulation banning the landfilling of liquid waste and FHI cannot rest upon the government's failure to act sooner than it did as exonerating FHI from liability for the violation. 27/ Nor is good faith shown by the fact that FHI, because it may have thought the regulation too vague to determine whether it applied to FHI's sludge, believed it was justified in construing the government's silence or inaction as approval of what FHI was doing. The argument assumes that the government

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(Footnote 25 continued)

had more stringent requirements with respect to the landfilling of waste containing free liquids. See 50 Fed. Reg. 28705 (until the ban against placing free liquids in landfills takes effect, the July 26, 1982 regulations remain in effect). Such a result seems totally inconsistent with the purpose of RCRA which was to permit States to adopt more stringent requirements than those imposed under the Federal program.

26/ Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984).

27/ See Emery Mining Corp., supra, 744 F.2d at 1416; Precious Metals Ass'n. v. Commodity Future Trading Comm'n., 620 F.2d 900, 910 (1st Cir. 1980).

was fully aware that the sludge being placed in the landfill contained free liquids. The record, however, does not bear out this assumption. 28/ In fact, what it does indicate is that the State's Hazardous Waste Enforcement Division first learned that FHI was placing waste liquids in the landfill when an investigation of the facility was made on April 11, 1985, in connection with reviewing a petition by FHI to delist its sludge as a hazardous waste. 29/ The matter was then brought to the attention of FHI and resulted eventually in a notice of violation being issued by the State. 30/

28/ When the State investigated FHI's facility in March 1985, the investigator noted on the report that the waste placed in the landfill was dewatered (RX 117 at N-2). The investigator testified that this was based on information given to him by an FHI representative. (Tr. (Vol. I) 39-40). Mr. Davich, the FHI representative who was present at the inspection testified that he did not recall telling the investigator that bulk liquids were not placed in the landfill (Tr. (Vol. II) 151-52). The investigator's testimony, however, is the more credible explanation.

29/ Tr. (Vol. I) 43-44, CX 10. FHI argues that the government had been regularly provided with reports showing that the sludge was being transported by tank truck to the landfill. See e.g., RX 92. The implication is that the waste could not be transported in a tank truck if it were not a liquid (Tr. (Vol. II) 98-99. These reports were furnished to the State Solid Waste Division in accordance with the solid waste permit issued to FHI to operate the landfill. The testimony of the State investigator indicates, either that reports were not seen by the Hazardous Waste Enforcement Division, or if they were, that their significance as evidence of dumping of liquid waste into the landfill was not understood.

30/ CX 10, RX 116, Tr. (Vol. I) 45-48. It is not material that the Notice of Violation cited a violation of the State's permitting standards, Minnesota Rules Part 7045.0538, Subpart 10.A, rather than the interim status standard with which it is charged the complaint. See RX 135. The notice still called to FHI's attention that the landfilling of its sludge was being questioned.

In sum, FHI insofar as it seeks to estop the government from charging a violation of the State program is really asserting that the government by its conduct waived the regulatory prohibition against dumping waste liquids into the landfill. The record here does not show that the government by its silence or inaction was clearly and unequivocally endorsing what FHI was doing. Without such a showing, the defense of estopel is without merit and must be rejected.

The Penalty

The EPA in accordance with my direction, but reserving its right to challenge on appeal my finding that FHI has not violated the Federal regulations, has proposed the following penalty for the violation of the State requirements found herein:

Seriousness of violation penalty	$ 9,500
Economic benefit of noncompliance	7,054
Total penalty	$ 16,554 31/

The seriousness of violation penalty of $9,500 is based upon a moderate potential for harm and a major deviation from regulatory requirements, and is the midpoint for the penalty range in that cell in the RCRA Civil Penalty Policy.

Although the period of noncompliance is three months and not 28 months, I find the violation correctly appraised as a major deviation from regulatory requirements with a moderate potential for harm.

31/ CX 17 and 17-A. CX 17-A submitted with Complainant's recalculation and supplemental brief is admitted into evidence.

The EPA's reasons for assessing a moderate potential for harm is that placing the liquid waste in the landfill increases the rate of migration of the leachate through the clay liner and the underlying aquifer in the area is of usable drinking water quality. 32/ FHI argues that the potential for the liquid waste to leach through the liner is low. 33/ The argument misses the point insofar as it is addressed to the rate at which the liquid may move through the liner, since there is still the likelihood that a drinking water source in time can become contaminated. As to whether the liquid reaches the liner, FHI's own expert witness, Dr. Malouf, conceded that the leachate could reach the clay liner and be asborbed into it. 34/

Finally, it should be noted that finding the violation to have a moderate potential for harm is not in any way inconsistent with the fact that FHI had been permitted to dump its sludge in the landfill under the Federal program. That was done pursuant to an exception, and the exception

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32/ Tr. (Vol. I) 156.

33/ See Respondent's post-hearing brief at 52-53.

34/ Tr. (Vol. I) 54-55. Dr. Malouf also testified that the leachate did not contain any hazardous waste constitutents but his statement was limited to the presence of metals exhibiting the characteristic of EP Toxicity. Tr. (Vol. II) 52-53. This was inconclusive insofar as showing that the waste presented no risk of harm to the environment, for it did not present the total story with respect to the sludge. The record shows that the EPA had notified FHI that information presented to the EPA by FHI in support of its petition to delist its waste indicated that there were organic hazardous constitutents in the waste. CX 23. Yet Dr. Malouf was unable to express any opinion as to whether the waste did contain organic hazardous constitutents. Tr. (Vo. II) 53. If the waste was hazardous under the Federal regulations it was also hazardous under the State regulations, for the State program at a minimum had to be equivalent to and consistent with the Federal program. 50 Fed. Reg. 3757 (January 28, 1985).

should not be construed to nullify or mitigate the potential for harm created by the violation of the State requirements when that violation standing by itself would meet the test of a moderate potential for harm. 35/

The major deviation from regulatory requirements was selected because, as Mr. Helmers testified, "[the] requirement had not been met. It was kind of cut and dried -- either free liquids went in or it didn't. It appeared that it wasn't an isolated incident. . . ." 36/ The reference was to the violations charged in the complaint of both the Federal and State regulations. The observation is still true even though the penalty is now for the State violation. This violation also cannot be dismissed as an isolated incident unlikely to happen again. FHI's own efforts to place the blame for the violation upon the failure of the government officials to tell FHI that it was doing wrong show why this is so. In this instance, FHI was not warned by the State inspector during his inspection on March 1985, because the inspector relied in turn on what

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35/ Although the record does not contain the precise quantities of sludge dumped into the landfill between February 11 and May 5, 1985, there is sufficient evidence to indicate that it was substantial. In 1984, FHI hauled an average of 1360 cubic yards per quarter to the landfill. (RX 102, 103, 105, 106, 110, 111, 113, 114). On the average two tank truck loads per day were hauled to the landfill. (Tr. (Vol. I) 43, (Vol. II) 154). There is no showing that there was any decrease in the amount of sludge dumped in 1985. Indeed, the reason for FHI embarking on a "crash program" to meet the Federal ban on landfilling was because of the limited storage it had for the sludge. See RX 123 (p. 2), 124, 125.

36/ Tr. (Vol. I) 55.

he had been incorrectly told by FHI. 37/ In short, the violation seems to have occurred because of FHI's failure to take upon itself the duty of learning about and carrying out the regulatory requirements. It cannot excuse a lack of diligence on the grounds that it faithfully corrected any violations specifically brought to its attention. 38/

FHI argues that the penalty in any event should be reduced because of its successful efforts in complying with the Federal ban on landfilling waste liquids effective May 8, 1985, citing Sandoz, Inc., (RCRA 3008) Appeal No. 85-7 (March 11, 1987). 39/ There are two answers to this argument. First, FHI continued to landfill its sludge up until May 8, 1985, in total disregard of State requirements. Second, it appears that FHI's efforts were not so much self-motivated as spurred on by the fact that it knew that the State was examining its hazardous waste activities in connection with reviewing its petition for delisting. 40/

37/ See supra 16-17.

38/ That there were State requirements as well as Federal requirements under RCRA was brought to FHI's attention as early as August 1984, but FHI seems to have paid little attention to them. See RX 108, Tr. (Vol. II) 144-45.

39/ See also A.Y. McDonald Industries, Inc., RCRA Appeal No. 86-2 (July 23, 1987) at 28-29.

40/ FHI apparently first learned of the Federal ban on landfilling when one of its employees attended an EPA seminar on April 17, 1985 (RX 120). The "crash program" to insure that it would be in compliance, however, was not really undertaken until after Ms. Weber of MPCA told FHI on May 3d, that it could not landfill its sludge after May 8, 1985. (Tr. (Vol. II) 109, 179-180; RX 123, 124, 125, 127, 128, 129, 130, 131, 132, 133, 135, 136, 137, 139).

FHI argues that using the cost of installing the filter press to determine the economic benefit realized by its noncompliance is arbitrary since the filter press was installed to meet the Federal requirements. As of February 11, 1985, however, there was only one course of action open to FHI under both State and Federal programs and that was to stop the landfilling of its sludge in its present liquid form. Using some method other than installing a filter press as a short term expedient for complying with the State ban is offered only as a theoretical possibility and is accompanied by no cost data showing how it would have been advantageous to FHI to proceed in this fashion. 41/ It is true that FHI knew that the paint filter test was being considered under the Federal program, and that this was a factor in its decision to use a filter press. But FHI had no reason to assume that the State would have rejected the test for compliance with its requirements, given the similarity between the two programs. One thing is clear, FHI never explored this with the State. 42/ In short, what FHI really gained by its noncompliance was a

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41/ See Respondent's Reply to Complainant's Recalculation and Supplemental Brief at 7.

42/ FHI itself recognizes that Minnesota Rule 7045.0638 and the Federal ban on landfilling liquid waste are substantially equivalent. Respondent's Reply Brief at 15. See also the "Statement of Need and Reasonableness" issued by MPCA on October 16, 1986, to amend its rules, Attachment B to Complainant's Reply Brief. The amendments were issued to maintain as much consistency as possible between the State's rules and the Federal program and included adoption of the paint filter test. Statement of Need & Reasonableness at 5, 22, 29. It is true that the paint filter test, although it had been under consideration since February 1982, was not

(Footnote continued)

delay in ending the landfilling of its liquid sludge, and it was reasonable for the EPA to take the cost of installing the filter press as the measure of the economic benefit conferred by that delay.

FHI also argues that it was arbitrary to assume an annual operating and maintenance expense of $20,000. This cost includes labor, power, water, raw materials and supplies and any annual increase in property tax. 43/ The EPA's figure was Mr. Helmer's estimate made on the assumption that annual maintenance will constitute about 10% of the cost of the equipment plus additional manpower and utilities cost associated with operating the filter press. 44/ The estimates seem reasonable enough to be prima-facie correct. Since FHI made no attempt to rebut these estimates, the reasonable inference is that they are not out of line with actual expenses. 45/

(Footnote 42 continued)

adopted as the official test for determining the presence or absence of free liquids in waste until April 30, 1985. See 50 Fed. Reg. 18370. Possibly, if it had faced the question of how to lawfully dispose of its sludge on February 11, 1985, FHI would have selected some method other than dewatering it with a filter press, but the most logical solution would have been one that satisfied both the State and Federal requirements given the similarity of the two programs. There is no reason to assume that some other long term solution would have been less costly than the installation of the filter press.

43/ CX 5, p. II-5.

44/ Tr. (Vol. I) 16.

45/ Cf., Int'l Union (UAW) v. N.L.R.B., 459 F.2d 1329, 1336 (D.C. Cir. 1972) (when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable).

Finally, FHI argues that the EPA's use of an estimated penalty payment date of August 1986, to calculate the penalty was arbitrary. The benefit calculated is the monetary return earned by the violator during the noncompliance period on the cash expended to bring itself into compliance. BEN assumes that the violator earns a return on this benefit until it is paid. 46/ I find that this was a reasonable method to determine the economic benefit.

It is concluded accordingly, that a penalty of $16,554 (which includes an economic benefit of $7,054) should be assessed against FHI.

ORDER 47/

Pursuant to the Solid Waste Disposal Act, as amended, Section 3008, 42 U.S.C. 6928, and for the reasons stated above, a civil penalty of $16,554 is hereby assessed against Federal-Hoffman, Inc.

46/ CX 5, pp. I-6, II-7. Put in overly simple terms, if a violator by deferring compliance is able to realize a cash benefit of $100 by its delay in bringing itself into compliance, the violator has the benefit of that $100 up until the time it is paid in satisfaction of the penalty.

47/ Unless an appeal is taken pursuant to the Rules of Practice, 40 C.F.R. § 22.20, 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).

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 V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, IL 60673

Gerald Harwood

Gerald Harwood
Chief Administrative Law Judge

DATED: August 12, 1987

Washington, D.C.