UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
INLAND METALS REFINING CO.,	)	Docket No. V-W-85-R-59
	)	
Respondent	)	

Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq. (RCRA). Respondent found in violation of Section 3004 of RCRA, 42 U.S.C. § 6924, and pertinent provisions of Illinois Administrative Code.

INITIAL DECISION

By: Frank W. Vanderheyden
Administrative Law Judge

Dated: September 27, 1988

APPEARANCES:

For Complainant:

Timothy M. Conway, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, Illinois 60604

For Respondent:

Louis M. Rundio, Esquire
McDermott, Will & Emery
111 West Monroe Street
Chicago, Illinois 60603

Mary Ellen Hogan, Esquire
McDermott, Will & Emery
2049 Century Park East
Los Angeles, California 90067

INTRODUCTION

This civil administrative proceeding is the result of a complaint issued by the U.S. Environmental Protection Agency (sometimes EPA or complainant), on September 30, 1985 and an amended complaint on April 23, 1987. They were brought pursuant to Sections 3006 and 3008 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6926, 6928. Respondent is charged with violation of Section 3004 of RCRA, 42 U.S.C. § 6924, and pertinent provisions of the Illinois Administrative Code (sometimes Ill. Adm. Code).

On October 18, 1982, respondent executed a consent agreement and final order in settlement of a complaint issued August 18, 1982. That document stipulated that respondent would comply fully with the consolidated permit regulations as if respondent had filed a timely Notification of Hazardous Waste Activity pursuant to Section 3010(a) of RCRA. As a result, EPA determined that respondent could operate the facility on an interim basis pursuant to Section 3005(e) of RCRA and 40 C.F.R. § 270.70. (Complaint, pars. 9, 10; Answer at 2). Also in 1982, the State of Illinois (State) was granted interim

authorization under Section 3006 of RCRA[1/] to administer its own program in place of that of the federal government. 47 Fed. Reg. 21043 (May 17, 1982). It followed that facilities in the State that qualified for interim status under 40 C.F.R. Part 270, Subpart G, were subject to regulation by the comparable State provisions found in 35 Ill. Adm. Code, Part 720, et seq., instead of the regulations set out in 40 C.F.R. Part 265, pertaining to Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities (TSD facility). Section 3008(a)(2) of RCRA authorizes EPA to bring an enforcement action in those states,

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1/In significant part, Section 3006 provides:

(c) Interim authorization.-(1) Any State which has in existence a hazardous waste program pursuant to State law before the date of ninety days after the promulgation of regulations under section . . . , may submit to the Administrator evidence of such existing program and may request temporary authorization to carry out such program under this subchapter. The Administrator shall, if the evidence submitted above shows the existing State program to be substantially equivalent to the Federal program . . . grant an interim authorization to the State to carry out such program in lieu of the Federal program . . . for a period ending no later than January 31, 1986.

as here, which are authorized to administer their own programs.2/ This was confirmed in a prehearing order issued November 5, 1987. The State received final authorization in January 1986 to administer its own hazardous waste program. 51 Fed. Reg. 3778 (January 30, 1986).

The complaints charged respondent with numerous violations of the Ill. Adm. Code. Stated broadly, whether or not respondent is in violation of the many provisions of the Ill. Adm. Code hinges essentially upon whether or not respondent has a surface impoundment, subject to regulation, and whether or not its waste piles of dross and slag are subject to regulation as hazardous waste. The penalty sought is $67,000, plus a compliance order. Some of the evidence, with particular reference to respondent's financial structure, is subject to a protective

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2/Section 3008(a) provides:

(a) Compliance orders.-(1) Except as provided by paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated . . . any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty . . . requiring compliance immediately or within a specified time period, or both, ...

(2) In the case of a violation of any requirement of this subchapter where a violation occurs in a State which is authorized to carry out a hazardous waste program under Section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing civil action under this section.

order and filed under seal. The concern here is solely with whether or not respondent has violated Section 3004 of RCRA and pertinent sections of the Ill. Adm. Code., and the penalty, if any, to be assessed. A separate initial decision concerning the penalty question, which necessarily addresses respondent's financial data, is of a confidential nature, and is issued under seal the same date as this decision.

To be determined initially is whether or not the alleged violations are supported by the preponderance of the evidence.3/ "Preponderance of the evidence" is that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely true than not true. All issues have been considered by the Administrative Law Judge (ALJ). Those questions not addressed are either rejected or viewed as not being of sufficient import for the resolution of the principal issues presented.

FINDINGS OF FACT

This matter reaches back some years and has had a long and agonizing journey. There were numerous inspections of respondent's facility, and many communications to and from respondent

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

involving the alleged violations. In an attempt at clarity, the format of these findings shall, insofar as possible, be topical, rather than chronological.

Respondent's facility is located at 651 East 119th Street, Chicago, Illinois. Operations began about 1947 and it has operated continuously since then. It is approximately seven acres in size. Respondent has had as high as 30 or 32 employees, but at the time of the hearing this was down to 12, because it is no longer operating reverberating furnaces mentioned below. (Tr. 219, 228, 229). Its business is that of a secondary smelter of solder residue. Part of respondent's activities is on custom or contract basis where it does work for other businesses and returns the metal to them. The other segment of its business is buying, selling and processing for its own account. The principal type of metal involved in respondent's operation is a solder dross, composed primarily of tin and lead. This dross was received by respondent from third parties and was processed for itself and others. Dross forms at the top of molten metal and is then skimmed off. Depending upon the quality of the dross, it may contain metal in varying degrees from 30 or 40 percent to 90 or 95 percent. Dross can be described as respondent's raw material, and the piles of dross on respondent's property belong to respondent. It has not taken any dross in for about 10 years. The piles

of dross contain about four percent tin and 30 percent lead. The piles have been on respondent's property for about 21 years. (Tr. 220-224, 303-305).

After the metal is taken out of the dross, there yet remains another dross and this can go through a reduction process where the reverbatory furnace was used. More dross, and an additional material slag, are produced by this method. When that process is complete, the metal is topped out of the furnace, refined and returned to the customer or sold. Slag resembles a large chunk of broken black-green glass, with the biggest single ingredient being sand. It is typically not powdery. The slag contains on the average of about four percent tin. It can be reprocessed to recover whatever metal remains. However, the process requires a blast-furnace that respondent does not have. The slag, which is saleable, reusable material, was sold to parties that had blast furnace equipment, who stripped out the small amount of metal that remained. (Tr. 224-228). The slag material that was produced in the reverberatory furnaces would be placed on cement to cool which was located at the east end of the plant. The slag was then moved to the southwestern part of the plant "until it was sold or whatever." (Tr. 252-253).

When the reverberatory furnace was functioning it had a baghouse associated with it. It was designed to collect fugitive pollution emissions from the air. (In many cases it actually consisted of bags, hence the name "baghouse.") Respondent ceased to use the reverberatory furnaces because it was found difficult to comply with the ambient lead standards established by the U.S. Occupational, Safety and Health Administration (OSHA). (Tr. 111, 229). When baghouse dust was being produced it was sold routinely to a buyer in Germany, where additional metals were recovered from it consisting of about 10 percent tin or more, and lead. (Tr. 234).

Surface Impoundment

In addition to respondent's operations, the history and geography of its facility is pertinent to the issue of "surface impoundment" (hereinafter sometimes without quotation marks), a core consideration in this proceeding. Early in the century, buildings occupied by respondent were originally a brick factory. Plats indicate that 119th Street was at one time a sluice that emptied into Lake Calumet, which is about three miles directly east of respondent's facility. This sluice was used by a mud scow which took clay from the bottom of Lake Calumet and brought it to the brick manufacturing plant. General refuse, mostly coal ash was used to fill in the sluice on 119th Street. Bottles were observed in the fill on 119th Street, but not tin cans. (Tr. 234-238, 240-241).

Respondent's facility is located in an industrial area. It is immediately south of 119th Street. Directly to the north of respondent's facility is the Sherwin Williams paint manufacturing plant, which at one time, was the largest plant factory in the world. This company disposed of materials associated with paint manufacture on its property just across the other side of 119th Street, in what might be described as an old landfill. Some of the waste material was removed and disposed of elsewhere. To the east of respondent's facility is a salvage yard, which in the past had all types of old machinery. South of the facility is an abandoned asphalt mix plant, and to the west is Champlain Avenue and the Illinois Central Railroad. (Ex. R8 at 59; Tr. 239-241).

In the extreme northeast corner of respondent's property, south of 119th Street, was a depression in the land which formed a low, marshy area, or swale, where run-off rainwater from respondent's facility would tend to collect. Up until about 1980, the accumulated water would go into a culvert that ran under 119th Street. It discharged into the north side of 119th Street then worked its way eastward and eventually flowed into Lake Calumet. Respondent did not use water in its processes and did not discharge any water from its operations into the swale, which only gathered rainwater. Around 1980, the Chicago Metropolitan Sanitary District (CMSD) determined

that the water was an intermittent stream, without giving reasons for such an opinion. The CMSD directed respondent to remove the culvert that went under 119th Street. When it requested respondent to change the drainage, the CMSD had in mind controlling the flooding of 119th Street, and avoiding lead contamination of Lake Calumet. Respondent complied, and as a result water accumulated on the southside of 119th Street, which resulted in the flooding of railroad tracks that ran parallel to 119th Street on its south side, for the entire length of respondent's property. From north to south, the arrangement was first 119th Street, then the swale, then the railroad tracks,[4/] and then respondent's off loading facility, which is right next to the tracks. To keep the tracks dry respondent raised the tracks and placed new ballast under them consisting only of limestone. No dross, no slag or any other product was used. The result of respondent's actions was to enlarge the swale and change its configuration into a ditch-like depression which was about 100 feet long, approximately two and one-half feet wide and about two feet at its deepest

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4/The railroad tracks were used as a siding into its property, but rail service was discontinued sometime ago.

point. The ditch 5/ was enlarged and the only material respondent put into it was limestone gravel. Following this enlargement, there were no further complaints from CMSD, though it did visit the area periodically, and put dye into the water to be reassured that it was not migrating to the north side of 119th Street. (Tr. 240-251, 319).

Section 3010 of RCRA, 42 U.S.C. § 6930, requires the notification of hazardous waste activity. On September 30, 1980 respondent submitted such notification. (Complaint, par. 6; Answer at 2). On November 19, 1980, respondent filed its original Part A permit application with EPA. The application referred to storage in containers and waste piles. (Process Codes "S01" and "S03".) The application did not mention anything concerning storage in a "surface impoundment." (Ex. C21). The Illinois Environmental Protection Agency (IEPA)

5/Respondent's evidence also referred to the purported ditch as a "drainage swale." (Ex. R8 at 9, 10). "What's in a name? That which we call a rose/by any other name would smell as sweet." Romeo and Juliet, Act II, Sc. 2, Line 43. The parties appear not to concur in this. In an apparent attempt to create a mental picture most favorable to its cause, respondent, at the hearing and on brief, uses the phrase "drainage ditch" or the word "ditch." Complainant with like regularity employs the expression "settling pond." Considering the shape of the land depression and what results when liquid flows into it, hereinafter, in the interest of objectivity and consistency, the phrase "settling ditch" shall be used by the undersigned until a conclusion is reached concerning whether or not it is a surface impoundment.

inspected respondent's facility on January 25, 1984. In the Remarks Section of that inspection report reference is made to respondent's surface impoundment, and to an earlier inspection of March 18, 1981. During this latter inspection apparent violations were observed in such areas as the waste analysis plan, facility inspections, personnel training, contingency plan, and exporting hazardous waste, but no reference was made to any surface impoundment violation. (Ex. C19 at 314, 314A).

Clifford Gould (Gould), in the employ of the IEPA, conducted the January 25, 1984 inspection. As a field inspector he had performed more than 200 inspections. At the time of the hearing he was an IEPA Regional Manager and in that capacity had reviewed at least 150 inspection reports. The purpose of Gould's inspection was to determine the compliance and regulatory status of respondent's facility. He determined that the settling ditch was a surface impoundment, conceding that he could have been the first IEPA inspector to reach such a conclusion. (Ex. C19 at 310, 314, 314A; Tr. 75-79, 109).

Craig Liska (Liska), also of IEPA, inspected respondent's facility on March 8, 1984. He also had much experience, having conducted approximately 130 inspections. He concluded that respondent's settling ditch was a surface impoundment. (Ex. C1 at 003, 010, 027; Tr. 30, 39, 44, 58, 59). Liska observed that the settling ditch was located at the low point on the

facility; that runoff of rainwater would flow to it and that it was located near uncovered waste piles that were being stored on the ground at the facility. (Tr. 66, 68). Richard Mulcahy (Mulcahy), a managerial employee of respondent, told Liska during the aforementioned inspection that storm or rainwater, and not some type of waste used in the facility's operation, ended up in the settling ditch. (Tr. 65, 66). Mulcahy confirmed that the settling ditch was excavated to comply with the CMSD directive to prevent runoff from the respondent's property, and that the sludges on the bottom of it were the same materials mentioned in the IEPA Special Waste Stream Applications (SWSA). (Exs. C3, 4; Tr. 59, 60). The SWSAs, dated June 6 and December 14, 1982, were applications submitted to IEPA concerning the disposal of waste. Tests on the samples were done by Chemical Waste Management (CWM) of Riverdale, Illinois. The site for disposal is listed as CID Corp. I, Calumet City, Illinois. In the Waste Generator Information Section of the SWSA it lists respondent as the waste generator, the generator contact name as David Rice, the process or operation is designated as "rain-water runoff," and the Generic Waste Name as "settling pond sludge," with the physical appearance of "brown, moist soil, sludge, negligible odor." The CWM laboratory conducted the tests on the sludge with disclosed hazardous wastes, classified by hazardous waste numbers D006 (cadmium), D007 (chromium),

and D008 (lead). With both samples, the laboratory report shows a lead component of seven percent, and a water component of 18.3 percent. The Special Waste Analysis report attached to the SWSA contained the following attempted disclaimer language: "This report has been prepared for the exclusive use and benefit of Chemical Waste Management. No representation concerning sample validity or analytical accuracy or completeness is hereby made to any other person receiving this report." (Exs. C3, 4 at 049-054; Tr. 38, 40, 42). This language implies that the report on the samples validity and analytical accuracy is sound and correct with regard to respondent only but not to others. The attempted disclaimer is not persuasive. If it is valid for respondent, it is valid for others.

Respondent did not call Mulcahy as a witness during the proceeding. There is some conflict between his statement that the settling pond sludge was the same material on the SWSA, and the testimony of David Rice (Rice), president of the respondent. Upon direct examination, Rice was shown Exhibits C3 and C4. He testified that respondent never sent any rainwater runoff or settling pond sludge from the settling ditch to CWM; that respondent did not have in the files any manifests of hazardous waste for material going to the CID landfill; and that the only thing respondent removed from the settling ditch was material

"that was almost all limestone" and whatever else was taken out was put into the reverberatory furnace as part of the recycling process. (Tr. 268-272, 322). On cross-examination, however, Rice was again shown complainant's Exhibits 3 and 4. Concerning contacts with CWM, Rice conceded that: "We sent samples over there. We did apply. Never sent anything." (Emphasis supplied.) Rice's attention was directed to page 050 of complainant's Exhibit 3 and was asked "is that the result of the sample sent over there?" His reply was that: "I believe so. It looks consistent." (Tr. 306, 307). Respondent argues that "[t]he fact that [respondent] sent a sample to CWM for analysis and possible disposal does not conclusively prove that the material was hazardous waste." (Resp. Rep. Br. at 7). This is an admission that samples of the sludge were sent. Complainant does not have to "conclusively prove" the samples were hazardous waste. The standard of proof is "preponderance of the evidence." Complainant's Exhibits 3 and 4 are test results done on the settling ditch sludge from the respondent's facility, samples of which were sent by respondent to CWM. With reference to removal of the material from the settling ditch, Rice stated: "Well, I think we removed at the suggestion of the Sanitary District" (CMSD). (Tr. 271). He did not know if it was removed a second time. No reason is given why the limestone was removed when it was put in the ditch initially to help with the drainage and into which lead would settle and accumulate as sludge.

By letter dated April 4, 1984, IEPA advised respondent of the list of deficiencies noted during the March 8, 1984 inspection concerned with groundwater monitoring requirements. (Ex. C1 at 001, 002). On May 14, 1984 a response was had. Referring to the water in northeast part of its property and the settling ditch question, respondent stated that "[w]e did not include a Surface Impoundment in our original Part A application because we did not consider those areas as such." Respondent further stated that "[s]ince these areas appear to meet the general definition of a Surface Impoundment, and we do not need or want such an area as part of our current operations" it intended to submit a correction to its Part A application, and also submit a closure plan for these areas. (Ex. C2 at 045). Respondent at that time did not challenge but deferred to the opinion of IEPA that the settling ditch was a surface impoundment. (Tr. 260, 261). The revised Part A permit application was submitted on June 8, 1984. In this document respondent used the process code S04 for surface impoundment stating it contained 22,000 gallons, more or less. The document also described the facility's hazardous waste as code number D008 (lead), with the estimated annual quantity of this waste as 1,000-10,000 "P" or pounds, with the process code S04 next to it. (Ex. C23 at 323, 325; Tr. 179-180).

On January 29, 1985 another inspection of respondent was conducted by IEPA. In significant part, the "Remarks" section of the inspection report spoke of contaminated runoff from waste piles; and that such contamination water is in a surface impoundment which was formed in a settling ditch along 119th Street. In a letter from IEPA to respondent of February 14, 1985, the latter was advised, in part, that facilities that use surface impoundments to treat, store or dispose of hazardous waste must maintain at least two feet of freeboard,[6/] that all earthen dikes must have a protective cover; and that the owner/operator must inspect the freeboard level at least once each operating day, and the dikes and surrounding area at least once weekly. The person who conducted the inspection for IEPA, Bonnie Eleder, did not testify. (Ex. C12 at 160, 166, 175, 179). By letter of March 7, 1985, counsel for respondent answered to the IEPA communication of February 14, 1985. With regard to the surface impoundment issue, it was respondent's position that the settling ditch was not a surface impoundment within the meaning of 35 Ill. Adm. Code § 720.110 for the reasons that it does not place any hazardous waste into the drainage ditch. (Ex. C12 at 162, 163, 164). Since

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6/"Freeboard" means "the vertical distance between top of the tank or surface impoundment dike and the surface of the waste contained therein." 35 Ill. Adm. Code § 720.110.

March 1985, respondent has not considered the settling ditch to be a surface impoundment and for this reason it has not complied with IEPA regulations. (Res. Op. Br. at 6). Respondent expressed a like opinion during the IEPA inspection of November 21, 1986, and admits that it failed to file a Part B permit application for a surface impoundment by November 8, 1986. (C12 at 162; Amended Answer, par. 23 at 2).

Respondent's facility was reinspected on March 19, 1985. During this inspection, concerned with groundwater monitoring, IEPA remained of the view that respondent maintained a hazardous waste surface impoundment. (Ex. C7 at 82; Tr. 50, 51). On April 1, 1985, respondent filed a second revised Part A permit application in which it stated that its storage consisted of containers and waste piles, omitting the surface impoundment classification. (Ex. R10 at 98).

Some further background is needed here concerning respondent's position that the settling ditch is not a surface impoundment. On April 7, 1986, Atec Associates, Inc., (Atec), prepared a Drainage Improvement and Drum Storage Area Closure Plan (Plan) for respondent. (Ex. R8) The Plan was prepared by John W. Weaver (Weaver) of Atec, who was a witness for respondent. It contained a summary of Atec's characterizations of the site conditions, an assessment of soil properties and migration concerns of respondent's facility, plus Atec's recommendations to respondent concerning the drum storage area

and the controlling of surface water runoff. The Plan was intended to improve the site drainage as it relates to lead migration. Weaver conducted an investigation which disclosed lead in the settling ditch. In his view, one of the sources of lead in the settling ditch was from the Sherwin Williams landfill. He was also of a mind, however, surface water runoff from respondent's facility was an obvious source of lead. Samples of run-off water were taken by Atec and examined for lead content. The test results showed the lead content in the settling ditch water to be generally less than that on other parts of respondent's property. The test results show that the lead concentration attenuates relatively quickly as it enters the settling ditch. (Ex. R8 at 65, 75; Tr. 334, 337, 341, 342). Where liquid enters the settling ditch the lead particles settle out and elevated lead levels are to be found in the residue at the bottom. The potential for vertical lead migration is virtually nil, but there is a potential for horizontal migration through the upper superficial fill layer of the drainage ditch. However, lead tends to tie up quickly in soils and precipitate out. It is common for settling ditches to accumulate sediment. There is nothing unique about the sediment gathering mechanism in the respondent's settling ditch. (Tr. 349).

Waste Piles

In the revised or corrected Part A application of April 1, 1985 respondent estimated that it currently had 100 cubic yards, with the estimated annual quantity of the waste piles being 100,000 pounds, with the hazardous waste code D008. (Ex. R10 at 98-102).

About 90 days prior to collapse of the tin market in 1985, respondent exported about a fifth of its slag and about half of its dross production for a total of about 500,000 pounds which was sold to a buyer in Germany. Following the drop in prices, respondent's inventory depreciated and it had a negative value. That is, it would cost more to extract the metal from the slag than the metal extracted was worth. Following the price collapse respondent shipped some of the dross overseas for recycling. In 1986 a 20,000 pound sample of dross was sent to Europe. In that year 20,000 pound samples of tin were shipped off-site. (Tr. 231-234, 304). As of the time of the hearing, respondent had about 2,000 tons of solder dross at the facility. Piles of solder dross have been at the facility since Rice got there about 21 years prior to the hearing. The piles have stayed basically the same since the drop in tin prices. (Tr. 233, 301, 304-305).

In respondent's original Part A application of November 19, 1980 it used the code "S03" which represented "waste piles" with the amount being about 1,400 cubic yards. In a subsequent conversation of December 17, 1981, Rice stated that approximately 5,000 tons were in piles; and that the waste code was D008. (Ex. C22)

In the report of January 25, 1981, IEPA inspector Gould concluded that the material stored in the piles at that time was not subject to regulation because it was being stored prior to reclaiming/recycling and it is not listed as a hazardous waste or a sludge. (Ex. C19 at 314). Liska in his March 8, 1984 inspection observed on a map of the facility that there were "waste piles for recycling" on the facility. (Ex. C1 at 027). In the remarks section of the inspection report of January 29, 1985, it was observed that the waste pile was comprised of solder drosses and slag; that it was characteristically hazardous for metals, but that it was exempt from regulation because the waste was being accumulated prior to shipment off-site for reclamation, or reclamation on-site. It was further noted that shipments have been recently sent off-site and that respondent's plans were for "all the waste in the pile to be gone this summer." (Ex. C12 at 179).

On November 21, 1986, Gino Bruni (Bruni) of IEPA inspected respondent's facility. He noted that the waste piles of slag and dross were on the ground, not on a cement pad, that they were not inside a building, and there was no protective roof over the pile. There was no protection from the wind where any release from the piles could enter the air. Stormwater that came in contact with the waste piles would pass through the waste piles and end up in the settling ditch. Weaver admitted that the slag and dross piles should be placed on concrete slabs, and that the piles should be covered "to reduce leachate generated from precipitation, and to reduce wind-generated dust." (Exs. R8 at 068, C13 at 243, 244; Tr. 67, 69, 100, 123-124). Bruni relied upon the respondent's Part A application for his determination that the piles were hazardous waste. (Tr. 128, 129). He also observed, for example, with regard to certain record keeping requirements that some of the slag and dross was sent to Germany or England for reclamation. (Ex. C13 at 185, 187, 199). Bruni agreed that if the composition of the waste piles were not hazardous waste then many of the alleged violations in his inspection report were not violations. (Tr. 127-133). Respondent admitted that it did not file a permit application for the waste piles by January 5, 1987; it also acknowledged that it failed to certify compliance

with groundwater monitoring and financial responsibility requirements for the waste piles by January 5, 1987; that such certification was not required because the waste piles were not land disposal facilities; and that it failed to submit a closure plan for the waste piles by January 20, 1987 because such submission was not required. (Am. Answer at 3). In the November 21, 1986 inspection report Bruni stated the facility was not a "disposal site" or a "disposal facility." (Ex. C13 at 233, 234). In his testimony he repeated this, but he was of the firm view that while the respondent's facility at the time of inspection was not a land disposal facility, it was regulated as a disposal unit because it contained land disposal units in the forms of waste piles and a surface impoundment. (Tr. 136-138).

Groundwater Monitoring

In April 1983, following discussions with IEPA, respondent installed monitoring wells to monitor the general site. At first, IEPA wanted shallow wells and then it wanted respondent to install deeper wells. During the time when the wells were installed and samples were taken from them, IEPA did not communicate with respondent concerning its belief that the settling ditch was a surface impoundment. Prior to completing the fourth sampling of the deep wells, IEPA inspected the site

and was of the opinion that the settling ditch was a surface impoundment and that it was not properly monitored for groundwater contamination. The original program was halted and a new one begun about the settling ditch. Under this, IEPA wanted the "perched" water monitored instead of the limestone aquifer. Respondent had two more shallow wells dug and a new first year program was started in September 1984 following approval by IEPA in August 1984. (Ex. C5 at 55; Tr. 261-263).

In its brief, complainant states that the March 19, 1985 inspection report disclosed that respondent was in violation concerning the starting and completion dates for groundwater sampling and monitoring. (Comp. Op. Br. at 5, par. 23). However, the record reference for the alleged violation groundwater sampling analysis merely states that: "The first year background should be completed with June '85 samples." (Ex. C7 at 85). With regard to this inspection Liska stated, regarding groundwater monitoring, "[t]hat the facility was in general compliance with groundwater monitoring requirements." (Tr. 50-51). In a communication of March 19, 1985, respondent informed IEPA of groundwater annual sampling results and advised that certain wells were being tested quarterly for arsenic and lead. (Ex. C6). On February 26, 1986, IEPA conducted a compliance

inspection of respondent's groundwater monitoring program. This inspection disclosed numerous violations including, but not limited to, those involving background sampling and sampling and analysis at prescribed periods. More specifically, the inspection revealed the following: It was unknown whether respondent followed a groundwater sampling and analysis plan; that the groundwater sampling plan did not include procedures and techniques for sample collection, sample preservation and chain of custody control; and that the required parameters in groundwater samples were not being tested quarterly the first year, with the facility completing only two quarters of background sampling. As a consequence, samples were not analyzed for the parameters characterizing the suitability of the groundwater as a drinking water supply, or establishing parameters for groundwater quality, or parameters to be used as indicators of groundwater contamination. An additional result of respondent's lack of action resulted in the failure to obtain for each indicator parameter at least four replicate measurements obtained at each upgradient well for each sample during the first year of monitoring. This also resulted in respondent not making provisions to calculate the initial background arithmetic mean and variance of the respective parameter concentrations or values obtained from upgradient wells during

the first year. Further, samples were not obtained and analyzed for groundwater quality parameters annually or semi-annually. Groundwater surface elevations were not determined at each monitoring well each time a sample was taken; and it was not determined that modification of the number, location or depth of monitoring wells was necessary to assure a system capable of yielding appropriate groundwater samples. (Ex. C9). In the January 13, 1987 inspection, similar violations were detected. (Ex. C10 at 134, 135).

Weaver was qualified as an expert regarding groundwater qualities of lead. In his opinion, the limestone gravel in the settling ditch would help to precipitate lead from the water, and lead tends to accumulate. After a rainfall there was seepage from the Sherwin Williams plant which was blue in color, the source of which was pigment paint. (Ex. R8; Tr. 344-346). With regard to groundwater associated in the perched aquifer, Weaver was of the opinion, in part, that there is groundwater seep into the settling ditch; that the groundwater in the perched aquifer did not impose an environmental hazard; and that based upon the area and facilities the environmental hazard to other living receptors or species, would be close to insignificant. (Tr. 351, 380).

Container Storage Area

The baghouse dust was stored in the container area. Respondent listed the container capacity of the dust on its original and revised Part A application. Its second revised Part A application also listed the containers and included the hazardous waste code number of K069, which represents emission control dust from secondary lead smelting. (Ex. R10; 35 Ill. Adm. Code § 721.132). The baghouse dust was typically stored in drums with a plastic bag over the top to prevent it from getting wet. (Tr. 273). During the January 29, 1985 inspection, however, the containers were not in good condition and were not closed. The Remarks portion of the inspection report noted that the drums were outside under an overhang; that a large sheet of plastic was laying over the drums, and that many of the drums were "beat-up" with nonsecure lids, but no waste appeared to have leaked to the ground. Respondent was advised by IEPA in the letter of February 14, 1985, that the waste must be stored in nonleaking containers; and that they must be stored closed and handled so as to not cause ruptures or leaks. Respondent was also informed that it was in violation for not having weekly container inspections documented, and for not having all containers stored closed. (Ex. C12 at 159, 173, 179).

International Shipments

Respondent exported hazardous waste, in the form of baghouse dust, slag or dross, to foreign countries. It was required to give notice of such shipments to U.S. EPA. In a letter of January 21, 1987 respondent advised IEPA, in part, that it did not file the export information for its 1985 and 1986 shipments to two companies in West Germany because of its misunderstanding for the need for such filings. IEPA advised respondent in a letter of February 26, 1987 that its response was received and that this "resolves the apparent violation of Section 722.150 of Title 35 of the Illinois Rules and Regulations." No further inquiries were received from IEPA concerning the foreign shipments. (Ex. R13 at 112, 113, 114; Tr. 286). It is found that respondent did not fail to notify the appropriate governmental authority concerning international shipments of hazardous waste.

Financial Assurance and Closure

In a letter of July 26, 1983, IEPA advised respondent that the law required the owner or operator of a hazardous waste management facility to provide assurance that funds will be available for properly closing such a facility and monitoring the facility after closure. Respondent was advised that it failed to submit the required financial assurance. (Ex.

C14). (At this time, it appears that IEPA had not advised respondent concerning the settling ditch question.)7/ The liability insurance problem was referred by respondent to its then counsel. Attempts by respondent to obtain insurance were made for about a year but proved unsuccessful. Other than an inquiry by respondent's broker, and its attorney at the time, no further details were provided concerning difficulty in obtaining insurance. To the "recollection" of Rice the insurance was not available. Respondent's counsel asked Rice whether applications were made to insurance companies. His response was: "I think that the insurance just wasn't available." No other evidence was offered to support the claim of unavailability. The self-serving statements of Rice do not support the claim of unavailability. (Tr. 274-275). The evidence concerning unavailability would have been more convincing if buttressed by testimony or documentary evidence in the form of letters from insurance brokers showing their efforts to obtain such insurance were futile. In a letter of August 28, 1984, IEPA notified respondent of its failure to provide financial assurance for closure and post-closure and failure to provide liability coverage for sudden and non-sudden occurrences. (Ex. C15; Tr.

7/No reference was made to the settling ditch question in the inspection of March 18, 1981. The issue apparently first surfaces in the January 25, 1984 inspection. (Ex. C19 at 314, 314A).

Tr. 92). By letter of January 10, 1985, and attachment, IEPA advised respondent, in part, of violations concerning financial and liability coverage requirements. (Ex. C16 at 255).

Concerning closure, in the letter of January 10, 1985, respondent was also advised that it was in apparent violation for failure, among others, to provide financial assurance coverage for closure and other statutory requirements associated with this. Complainant alleges that, among others, respondent's closure plan failed to describe how closure will be performed to minimize post-closure maintenance and hazardous waste release. (Par. 16(a)(1) of complaint). At the time of the November 21, 1986 inspection, subsequent to the initial complaint, Bruni stated in the inspection report concerning closure that the respondent's operation was not a disposal facility, and certain closure requirements would not be applicable. (Ex. C13 at 233, 234). However, on examination Bruni clarified this. (Infra, at 23).

Staying with closure, it is further alleged that respondent failed to provide for the decontamination or disposal of the "reduction" furnace. (Par. 16(a)(2) of complaint). The reverberatory furnace is no longer used by respondent, however. Respondent's closure plan failed to identify the maximum inventory of the facility at any time during its life. The closure cost estimate had not been adjusted for inflation, in

that the closure cost estimate was reduced from $350,000 to $66,750 at a time when the inflation factor dictated an increase to adjust for inflation. Respondent states that this reduction was due to eliminating the closure costs for the surface impoundment. (Res. Br. at 15, par. 11). This is in part true. This failure to submit is consistent with respondent's position that the settling ditch is not a surface impoundment.

On March 22, 1985, respondent entered into a closure trust agreement, with the Harris Bank Roselle. In this agreement respondent estimated its closure costs as of March 21, 1985 at $66,750, and that no post-closure costs were currently anticipated. Respondent placed $3,600 into the trust fund. The closure trust fund was to be established over a 20-year period, calling for annual amounts to be paid in the fund. Respondent has not put any monies into the fund since its initial deposit and it has admitted that payments to the fund are not up to date. (Ex. R12, 108-111; Tr. 320, 321).

Other Findings Concerning November 21, 1986 Inspection

The November 21, 1986 inspection disclosed respondent's shortcomings, as supported by record evidence.

Respondent failed to:

1. Make a determination that the slag and dross stored in the waste piles were hazardous wastes. (Ex. C13 at 185).

2. Obtain a detailed chemical analysis of each waste prior to its storage and to obtain a waste analysis plan. (Ex. C13 at 206, 207).

3. Inspect the piles of slag and dross and surface impoundment which receives runoff from piles of slag and dross. (Ex. C13 at 211).

4. Inspect areas subject to spills. (Ex. C13 at 212).

5. Record the result of inspections in a log. (Ex. C13 at 212).

6. Maintain the facility in a manner to minimize the possibility of unplanned release of hazardous waste or hazardous waste constituents. (Ex. C13 at 217).

7. Maintain operating record of required information concerning hazardous waste. (Ex. C13 at 227, 228).

8. Maintain required records of unresolved enforcement actions. (Ex. C13 at 230).

9. Submit reports concerning groundwater contamination. (Ex. C13 at 232).

10. Submit closure plan after termination of interim status. (Ex. C13 at 233).

11. Meet design requirements for surface impoundment. (Ex. C13 at 237).

12. Conduct required inspections of surface impoundment. (Ex. C13 at 239).

DISCUSSION AND CONCLUSIONS OF LAW

Surface Impoundment

A "surface impoundment" or "impoundment" means:

> A facility or part of a facility which is a natural topographic depression, man-made excavation or diked area formed primarily of earthen materials (although it may be lined with man-made materials) which is designed to hold an accumulation of liquid wastes or wastes containing free liquids and which is not an injection well or seepage facility. Examples of surface impoundments are holding, storage, settling and aeration pits, ponds and lagoons. 35 Ill. Adm. Code § 720.110.

The configuration of the swale was changed by respondent's action into an elongated depression. It was made and designed by respondent to retain the rainwater runoff from the facility including that which came from the waste piles. Its shape would not make any less a surface impoundment if it otherwise comes within the definition. The hazardous waste in the settling ditch is the sludge that accumulated therein, which hazardous waste has the EPA identification number D008, representing lead. Further, the settling ditch, is not an injection well.[8/]

[8/] An "injection well" means "a well into which fluids are being injected." 35 Ill. Adm. Code § 720.110.

Also to be considered is that SWSAs referred to the Generic Waste Name as "settling pond sludge." Further, IEPA inspectors at various times were of the view that the settling ditch was a surface impoundment. Respondent itself conceded in writing that it had a surface impoundment on the facility, and admitted it sent samples of the settling pond sludge in its applications to send waste for disposal to CID Corporation. Additionally, respondent constructed the settling ditch, in part, to prevent runoff containing lead from going into Lake Calumet.

One of the many arguments advanced by respondent is that the settling ditch's function is to channel water, not to collect sediment. (Res. Op. Br. at 12, par. 3). This is not persuasive. It does not matter that respondent's intent may have been the channeling of surface run-off water if the settling ditch meets the definition of surface impoundment. The design of the settling ditch was such that surface water runoff containing lead resulted in sludge at the bottom of the ditch containing the hazardous waste lead.9/

Respondent maintains that stormwater runoff is not a solid waste within the definition of 35 Ill. Adm. Code § 721.102. This definition provides that a solid waste is, broadly, any

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9/Referring to Surface Impoundment Retrofitting Requirements, EPA stated, in significant part, "[t]hat no additional hazardous waste, <u>or waste that generates a hazardous waste or sludge</u> shall be placed in the unit." 53 Fed. Reg. 24718 (June 30, 1988).

discarded material not otherwise excluded, which is abandoned by certain methods, materials that are recycled under certain conditions, or inherently waste-like materials; and that none of these terms applies to stormwater which collects in a low spot on the property. As further support, respondent refers to 40 C.F.R. § 261.3 which contains definitions of hazardous wastes: One of these is set forth in subsection (c)(2)(i) which provides, in pertinent part, that "any solid waste generated from the treatment, storage, or disposal of sludge, spill residue, ash, emission control dust, or leachate (but not including precipitation runoff) is a hazardous waste . . . ." It is argued, by the parenthetical language, that in EPA's own definition rainwater runoff from hazardous waste is not hazardous waste. Also, it is said, that even assuming stormwater to be considered a solid waste, the rain run-off water in the settling ditch would not be considered hazardous waste because all total lead values of the water in the ditch are less than the EP toxicity threshold for characterizing a hazardous waste (5mg/1).10/ (Res. Op. Br. at 27-28). In promulgating 40 C.F.R. § 261.3(c) an insight is provided. In pertinent part, it states:

10/Environmental Reporter - Federal Regulation - 4, page 161:1851; 40 C.F.R. § 261.24.

> It also does not cover runoff from hazardous waste facilities on the theory that the water or the precipitation runoff in many cases may not have had sufficient contact with the waste to solubilize waste constituents. (Of course, if collected, runoff would be a solid waste and, if exhibited any of the characteristics, would have to be managed as a hazardous waste . . . . 45 Fed. Reg. 33096 (May 19, 1980).

Respondent also contends that there is no reliable evidence showing that the limestone lining of the settling ditch and associated sediment exhibits EP toxicity characteristic of lead; and that the material was recycled in respondent's reverberatory furnace in 1982 and thus qualified for the then existing exemption in 40 C.F.R. § 260.6. (Res. Op. Br. at 28). Respondent's assertion is not relevant. Assuming that the limestone lining was placed in the reverberatory furnace in 1982, it does not alter the conclusion the sludge in the ditch is any less a hazardous waste under RCRA.

Assuming arguendo that precipitation runoff from the waste piles may not be a solid waste, and even when "collected" not be a hazardous waste because of 40 C.F.R. § 261.3(c)(2)(i), the complainant observes correctly that it is the sludge, not necessarily the water, in the settling ditch which is in issue. It was samples of this sludge, sent by respondent to CWM and

tested by its laboratory that showed they contained, among others, hazardous waste number D008 (lead). Respondent is the architect of its legal misfortune by not covering the waste piles and in its creation of the settling ditch. Further, it was respondent's action of permitting precipitation to enter the settling ditch, for a protracted period of time, that converted the water in the settling ditch into a hazardous waste in the form of sludge. Respondent's operations, concerning runoff, are essentially the same now as in 1982 when the samples of the sludge were analyzed, and its unchanged operation continues to produce the same type of sludge. That respondent's original actions were taken at the behest of CMSD is no defense and does not make respondent's settling ditch any less a surface impoundment if it otherwise comes within the definiton. Also, contamination of the settling ditch from other sources does not relieve respondent from responsibility. It is on respondent's property, under its control, and surface runoff from respondent's facility contributes in a large measure to the water in the settling ditch being converted to hazardous waste sludge.

Within the definition of surface impoundment is the word "facility." This is defined to mean:

> All contiguous land and structures, other appurtenances and improvements on the land use [sic] for treating, storing or disposing of hazardous waste. A facility may consist of several treatment, storage or disposal operational units (e.g., one or more landfills, surface impoundments or combination of them). 35 Ill. Adm. Code § 720.110. (Emphasis supplied.)

The same Section defines "storage" to mean "the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of or stored elsewhere." (Emphasis supplied.) It is necessary to resolve whether or not the evidence brings respondent's operations within the definition of "facility."

It is urged that because no process or waste water was ever put into the settling ditch by respondent that it is not used for treatment, storage or disposal of hazardous waste. Respondent also notes that by definition the surface impoundment has to be designed "to hold an accumulation of liquid wastes, or wastes containing free liquid . . . ." 35 Ill. Adm. Code § 720.110. (Res. Op. Br. at 29-30). However, as complainant observes it is not necessarily the run-off water in the settling ditch which is the hazardous waste, but the sludge therein; and that the CMSD was sufficiently concerned about lead from respondent's operations that respondent at CMSD's behest created

the settling ditch. (Comp. Rep. Br. at 9-11). In applying for a permit to dispose of the settling pond sludge at CID, plus the unfavorable report from CWM concerning the sludge samples, it is demonstrated that respondent was aware of the hazardous nature of the sludge, and its intent to remove same and send to the CID landfill. It did not take this route. Instead, in 1982 it removed the limestone, together with any sludge in the process, and put both in the reverberatory furnace. It was to respondent's economic benefit to dispose of the sludge on its own premises, with its own equipment (reverberatory furnace), rather than send the hazardous waste to the CID landfill. Complainant's opines that respondent in removing the materials from the ditch showed its intent, following the temporary holding of the sludge in the ditch, to dispose of it elsewhere. (Comp. Rep. Br. at 14). The ALJ concurs in this.

Continuing its definitional assault, respondent states that a surface impoundment must be designed to hold "an accumulation of liquid wastes or wastes containing free liquids . . . ." (Res. Op. Br. at 29). This is correct, and by its very design, the settling ditch resulted in sludge accumulating at its bottom, which was a waste containing "free liquids" for the reason that the analysis of the sludge samples by CWM showed it to have a water component of 18.3 percent. It is concluded that the settling ditch is a surface impoundment.

Respondent asserts that EPA brought the proceeding "under the guise of RCRA" in an attempt to control and regulate surface run-off water; that EPA seeks to regulate non-point source discharges; and that EPA lacks statutory authority to do so at present time. Respondent's thesis is that precipitation runoff is runoff not discharged from a specific pipe or point source; and that if precipitation runoff, if regulated at all, would be regulated by the Federal Water Pollution Control Act, as amended, short title, Water Quality Control Act of 1987 (CWA), 33 U.S.C. §§ 1251, et seq. (Res. Rep. Br. at 4-6). CWA does not displace RCRA on the facts here. The goal of CWA is to control the discharge of pollutants directly into navigable waters. The one exception being a point source discharge under the National Pollution Discharge Elimination System permits issued pursuant to 33 U.S.C. § 1342. Legal Environmental Assistance Foundation v. Hodel, 586 F. Supp. 1163, 1167 (E.D. Tenn. 1984); United States v. Ashland Oil and Transportation Co., 504 F.2d 1317 (6th Cir. 1974); American Paper Institute v. Train, 543 F.2d 328 (D.C. Cir. 1976). The primary purpose of RCRA, however, is the control of wastes before any discharge.

Respondent has yet another arrow in its quiver. It maintains that loss of interim status does not apply to surface impoundments or waste piles that store hazardous waste. In

substance respondent's argument is that the Loss of Interim Status Provision (LOIS) is found in RCRA Section 3005(e)(2), 42 U.S.C. § 6925(e)(2); that the Section uses the term "land disposal facility" which is not defined in RCRA; that a "disposal facility" is defined in 40 C.F.R. § 260.10, in pertinent part, as a facility where the hazardous waste will remain after closure; that this is to be contrasted to the definition of "storage" where at the end of the temporary period the hazardous waste is treated, disposed of, or stored elsewhere; that EPA has exceeded its statutory authority by defining a "land disposal facility" to include surface impoundments used for storage and all waste piles, 50 Fed. Reg. 38947 (September 25, 1985); and that EPA's interpretation is not justified by either the expressed provisions of RCRA or the facts of the case. (Res. Op. Br. at 30-31). First, it is not, as the respondent states, clear from the record "that IEPA did not consider any of [respondent's] facilities to be disposal facilities." (Res. Op. Br. at 30-31). Bruni stated clearly that respondent's operations were a land disposal facility because it had land disposal units. Respondent with iron insistence argues that, assuming arguendo, that respondent had waste piles and a surface impoundment the black and white of the statute defeats complainant's conclusion for the reason that the LOIS provision refers unequivocably to land

disposal facilities and not to storage facilities; that complainant's basis for its broad definition of "land disposal," which includes surface impoundments is limited by its own terms to RCRA Section 3004, 42 U.S.C. § 6924, and does not apply to the LOIS provision. RCRA Section 3004(k), 42 U.S.C. § 6924(k) states:

> For the purpose of this section, the term 'land disposal,' when used with respect to a specified hazardous waste, shall be deemed to include, but not be limited to, any placement of such hazardous waste in a landfill, surface impoundment, waste pile, ...

Respondent reasons that since the LOIS provision is part of 42 U.S.C. § 6925, and not Section 6924, where the "land disposal" definition is cited, it has no application to the LOIS provision in 42 U.S.C. § 6925. Therefore, respondent concludes that even if respondent operated storage waste piles and a surface impoundment for storage, the LOIS provision would not apply. (Res. Op. Br. at 32). Upon this analysis respondent challenges the EPA interpretation that, for the purposes of Section 3005(e), the term "land disposal facilities" embraces, among others, surface impoundments and waste piles as set out in 50 Fed. Reg. 33947.

A definiton of "land disposal facility" is lacking from RCRA, but "land disposal" is defined as set out in RCRA Section 3004(k) aforementioned, which includes a surface impoundment and waste pile. EPA's position in 50 Fed. Reg. 38947 that for the purposes of Section 3005(e) "land disposal facilities" emcompass, among others, surface impoundments and waste piles has judicial support as pointed out by complainant. (Comp. Rep. Br. at 16). In U.S. v. T & S Brass and Bronze Works, Inc., 681 F. Supp. 314 (D.S.C. 1988), among the questions decided was whether T & S Brass was the owner and/or operator of a "land disposal facility." In pertinent part the court stated:

> Although RCRA does not define 'land disposal facility,' Congress did provide a definition of 'land disposal.' RCRA § 3004(k) provides the term 'land disposal' . . . to include . . . any placement of such hazardous waste in a . . . surface impoundment, waste pile . . . . Thus EPA's interpretation is consistent with the statute and is reasonable. Moreover, both definitions include the term 'surface impoundment.' 42 U.S.C. § 6901(b)(7). (at 320)

Respondent also maintains that in order to come within the definition of "disposal facility" found in 40 C.F.R. § 260.10 it must be one in which "waste will remain after closure;"[11/]

[11/] The identical definition is found in 35 Ill. Adm. Code § 725.110.

that respondent intended to "clean close" its facilities, and there would be no waste remaining after closure. (Res. Op. Br. at 30-31). This was also met in T & S Brass.

> T & S argues that its surface impoundment is not a land disposal facility. Defendant's argument is based on a regulatory definition of a 'disposal facility,' at 40 C.F.R. § 260.10. Under the regulation, a 'disposal facility' is a 'facility or part of a facility at which hazardous waste . . . will remain after closure.' The definition of 'disposal facility' urged by defendant was published in 1980 and by its terms applies only to 40 C.F.R. Parts 260 through 265 of EPA's regulations. This definition is not, and does not purport to interpret what Congress meant by the term 'land disposal facility.' (at 320)

It is concluded that respondent's surface impoundment is a "land disposal" unit; and that for the purposes of Section 3005(e), the term "land disposal facilities" encompasses surface impoundments. It is further concluded that respondent's storing of hazardous waste in the surface impoundment without a permit or interim status is in violation of 35 Ill. Adm. Code § 703.121(a).

Waste Piles

Until January 2, 1986, respondent's waste piles were not subject to regulation under 35 Ill. Adm. Code §§ 702; 703; 705 or 722 through 725, nor subject to the notification requirements of Section 3010 of RCRA, 42 U.S.C. § 6930, since the wastes stored in the piles was being beneficially used or reused or legitimately recycled or reclaimed. Effective January 2, 1986, 35 Ill. Adm. Code § 721.106 was revised. On this date, pursuant to 35 Ill. Adm. Code § 721.106(c)(1), respondent's waste piles became regulated under all applicable provisions of Subparts A through L of Parts 724 and 725, and Parts 703 and 705 of 35 Ill. Adm. Code, and the notification requirements of Section 3010 of RCRA, 42 U.S.C. § 6930.12/

On brief respondent maintains that respondent's solder drosses, that are being actively reclaimed, are not solid or hazardous waste under either federal or State law currently in force; and that respondent's recyclable materials were not regulated at the time of IEPA's last TSD facility inspection. (Res. Op. Br. at 20-25). Reduced to its essentials, respondent's

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12/Admitted, Amended answer, paragraph 24. Though not significant to the resolution of the issues presented, it is observed that there seems to be some question concerning the effective date of the revised Ill. Adm. Code. In the amended complaint and on brief, complainant states the effective date of regulation to be January 5, 1986. (Amended complaint, paragraph 24, Op. Br. at 3). On brief, respondent states the effective date to be January 2, 1986. (Op. Br. at 22). Appendix C to the respondent's brief shows the date to be January 2, 1986, and it is for this reason this date is stated in the text.

analysis is as follows: Respondent's business, that of reclaiming solder or solder residues, involves the process of exposing the residual product to high temperatures, and in some cases adding some agents to produce free metal. The federal regulation when enacted in 1980 contained an exemption for reclaimed material. The regulations were revised by EPA in 1985 to cover a broad range of recyclable materials. 50 Fed. Reg. 664 (January 4, 1985), 40 C.F.R. § 261.2. These revised regulations were adopted by the State on January 2, 1986. 35 Ill. Adm. Code § 721.106, which set out the requirements for "recyclable materials." Respondent's view is that its operations are best described as "reclamation of unlisted by-products,"13/ and its recyclable material is not subject to regulation as a "solid waste" or "hazardous waste" as these terms are defined in 35 Ill. Adm. Code §§ 721.102; 721.103.

Respondent begins first with the definition of "by-product:"

> A "by-product" is a material that is not one of the primary products of a production process and is not solely or separately produced by the production process. Examples are process residues such as slag or distillation column bottoms. . . . 35 Ill. Adm. Code of § 721.101(c)(3).

13/Respondent apparently is referring here to Table 1, set out in 40 C.F.R. § 261.2, and to that described in Appendix Z to 35 Ill. Adm. Code § 721.102(c)(4). The former uses the language "reclamation" and "By-products exhibiting a characteristic of hazardous waste." Appendix Z uses the wording "reclamation" and "By-products (nonlisted/characteristic)." If material comes within these classifications it is not defined as a "solid waste" when reclaimed.

Further, respondent states its operations reclaim free metal that is used as a raw material in additional processes and thus fall within the definition of reclamation. "A material is "reclaimed" if it is processed to recover a usable product, or if it is regenerated. Examples are recovery lead values from spent batteries and regeneration of spend solvents." 35 Ill. Adm. Code § 721.101(c)(4).

Hazardous waste is solid waste if it is not excluded as a hazardous waste under 35 Ill. Adm. Code § 721.104(b), or comes within certain specified conditions.14/ Under the revised regulations "solid waste" is defined as any "discarded material" which is not excluded by the regulations. 35 Ill. Adm. Code § 721.102(a). Among others, a "discarded material" is any material which is "recycled as explained in paragraph (c)." 35 Ill. Adm. Code § 721.102(a)(2)(B).15/ Further, and in pertinent part,

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14/"(a) A solid waste, as defined in Section 721.102, is a hazardous waste if: . . . ." 35 Ill. Adm. Code § 721.103.

15/The issue of when a "discarded material" is a "solid waste" was addressed in American Mining Congress v. U.S. Environmental Protection Agency, 824 F.2d 1177 (D.C. Cir. 1987). The court held that in using the word "discarded" in RCRA Congress meant it in its ordinary sense, and it did not apply to materials for immediate reuse in the ongoing production process. American Mining does not apply to materials "accumulated speculatively" since these are not involved in the ongoing production process. 53 Fed. Reg. 523 (January 8, 1988).

> recycling, equals at least 75 percent by weight or volume of the amount of that material accumulated at the beginning of the period. In calculating the percentage of turnover, the 75 percent requirement is to be applied to each material of the same type (e.g. slags from a single smelting process) that is recycled in the same way (i.e. from which the same material is recovered or that is used in the same way). Materials accumulating in units that would be exempt from regulation under Section 721.104(c) are not to be included in making the calculation. . . . Materials are no longer in this category once they are removed from accumulation from recycling, however. 35 Ill. Adm. Code § 721.101(c)(8). (Hereinafter sometimes ".101(c)(8)").

Respondent urges that the presumption of material being accumulated speculatively can be overcome by showing that the material is potentially recyclable, that there is a feasible means of it being recycled, and during the calendar year commencing on January 1, the amount of material actually recycled equals 75 percent of the volume or weight accumulated at the beginning of the period. Its position is that the slag and dross stored at the facility in waste piles meet the criteria for being potentially recyclable and that it has a feasible means of accomplishing this. In support, respondent contends that the material is recyclable because of its tin content; that it was sold to Germany or sold to blast furnace operators;

that the revised recycling regulation became effective on January 2, 1986; and that the only remaining issue was whether or not the respondent could actually recycle enough material in the following year to "overcome the presumption" that the material was accumulated speculatively. Respondent then postulates that since the regulation became effective on January 2, 1986, the presumption in the regulation could be overcome by showing it recycled 75 percent of the material during the period January 1, 1987 to January 1, 1988, and since the calendar year was not over at the time the hearing was held in November 1987, the parties could not address the issue for the reason that the question was not ripe for determination at the time of the hearing. (Res. Op. Br. at 25-26).

To overcome the presumption that the material in the waste piles was accumulated speculatively respondent has to show that it meets each of the three requirements in .101(c)(8), as they are worded in the conjunctive not the disjunctive. First, respondent must show that the material is "potentially recyclable." It is not enough for respondent to state merely that the material was potentially recyclable because of its tin content and that it was sold to a customer in Germany or sold to blast furnace operators. Before the collapse in the tin market the slag was sold locally and internationally. Respondent exported about one fifth of the slag, and one-half of the

baghouse dust, which was sold to a company in Germany. However, respondent stopped using its reverberatory furnace and at hearing time it was not producing baghouse dust. Respondent has not shown the material in the piles would be potentially recyclable in the amount of 75 percent. Regarding feasibility, respondent also has the burden of proving there is a feasible means of recycling the material. For example, is the recycling economically feasible. 50 Fed. Reg. 634, 635 (January 4, 1985). Respondent has not demonstrated that since the collapse of the tin market, that the material in waste piles was economically feasible to recycle. If respondent has evidence that would show that the waste piles were potentially recyclable and that there was a feasible means of it being recycled, it stands mute at its peril. Failure to come forward with relevant evidence, which is in respondent's control, raises the presumption that if produced the evidence would be unfavorable to its cause. United States v. Johnson, 288 F.2d 40, 45 (5th Cir. 1961); Morgan v. Gardner, 264 F. Supp. 576, 577 n. 3 (S.D. Miss. 1967).

Respondent's position that the 75 percent requirement in .101(c)(8) first became applicable in the calendar year beginning January 1, 1987 is interesting but unconvincing. Respondent has not overcame the presumption by stating, without more, that the phrase "commencing January 1" means January 1, 1987, and that the initial application of .101(c)(8) is the calendar year

January 1, 1987 to January 1, 1988. By way of history, EPA issued a proposed rule which addressed, in pertinent part, waste that is accumulated speculatively. 40 Fed. Reg. 14472 (April 4, 1983). There, EPA spoke of its concern where a recycling market does not develop or where one is not expected to materialize within a reasonable time, and the need to recycle 75 percent of the material within a year. EPA solicited comments concerning, among others, "as to when the one-year period begins." 40 Fed. Reg. 14490. When the final rule was promulgated, 50 Fed. Reg. 614 (January 4, 1985), (codified at 40 C.F.R. Part 261), the preamble discussed, in pertinent part, when the one year period began. In the preamble explanation, dealing with "accumulated speculatively," a clear indication is given concerning when the calendar year is to begin. It was stated that:

> We are making one other change to the proposed rule by requiring that 75% of the accumulated materials be recycled during the <u>calendar</u> year, <u>starting on January 1, 1985</u> . . . . (at 635, Emphasis supplied in part.)

The State adopted the revised regulation on January 2, 1986, in respondent's words, with "no substantive changes." (Res. Op. Br. at 22). The wording of .101(c)(8) is identical to that of 40 C.F.R § 261.1(c)(8). The "calendar year" under either provision commenced January 1, 1985.

Respondent conceded that since October 1985, when the tin market fell, the volume of slag and dross at the facility remained basically the same. Dross in the form of a 20,000 pound sample was sent to Europe in the year preceding the hearing. In 1986 only samples were shipped off-site by respondent, usually 20,000 to 40,000 pound samples. It is just not believable on this record that these amounts comprised 75 percent of the material accumulated. If remotely this were not the case respondent cannot stand silent. Its failure to come forth with relevant and important evidence concerning the volume of material recycled or transferred to a different site for recycling, and the other two requisites in .101(c)(8) raises the presumption that if produced the evidence would not be to its benefit. Supra, United States v. Johnson; Morgan v. Gardner. It is concluded that respondent's waste piles were accumulated speculatively, and that the materials were regulated at the time of IEPA's last inspection; and that the "waste piles" for reasons mentioned supra under the discussion of surface impoundments, are "land disposal" units as that term is defined in RCRA 3004(k), and a "land disposal facility" for the purposes of RCRA 3005(e), as interpreted in 50 Fed. Reg. 38949. It is further concluded that respondent's storing of hazardous waste in waste piles without a permit or interim status is a violation of 35 Ill. Adm. Code § 703.121(a).

Financial Responsibility

An owner or operator of each facility must establish financial assurance for its closure. Various options are afforded the owner or operator to accomplish this, one of which being a closure trust fund. 35 Ill. Adm. Code § 725.243. Respondent admitted that its closure cost estimate submitted on March 1985 failed to provide closure of the surface impoundment because it was of a view that the settling ditch was not a surface impoundment. Respondent, however, did operate a surface impoundment and has not placed any monies in the closure trust fund from March 1985 to the time of hearing, and its trust fund payments are in arrears. Financial assurance for post-closure for a facility with hazardous waste disposal units is required by 35 Ill. Adm. Code § 725.245. Assurances for post-closure care also must be obtained by owners or operators of surface impoundments, and 35 Ill. Adm. Code § 725.247(b) requires liability coverage for non-sudden occurrences to be obtained for these. Respondent urges, however, that for over a year it made a good faith effort to obtain non-sudden coverage based upon the asserted "mistaken impression" that the settling ditch was a surface impoundment. (Res. Op. Br. at 32-33). The burden rested with respondent to come forward with something more than the statements of Rice to establish the unavailability of such insurance. Respondent failed to demonstrate sufficient

good faith efforts to obtain insurance. Even if respondent had been able to establish that it made good faith efforts, this does not excuse its failure in obtaining the required insurance. This issue was also met in T & S Brass:

> Neither of the arguments raised by T & S, namely that it made a good faith effort to obtain the insurance and that the insurance was impossible to obtain, are sufficient defenses. 'Good faith' effort is not available as a defense to liability after November 8, 1985, even if T & S could have established it. Prior to November 8, 1985, EPA had allowed regulated facilities which were in compliance with every other aspect of RCRA, but were unable to obtain non-sudden liability insurance to certify compliance with the regulations if the facility had made 'good faith efforts' to obtain insurance. However, this agency-created 'good faith' exception to the insurance requirement terminated on November 8, 1985. The language of § 3005(e) is unambiguous, and Congress chose not to vary it. Thus, after November 8, 1985, a facility's 'good faith' efforts to obtain insurance is not a defense to RCRA § 3005(e) liability. (at 321, emphasis supplied.)

Other Violations

a. Groundwater Monitoring. The inspection of February 26, 1986 and that of January 31, 1987 disclosed the following violations: Respondent's deficiencies in its groundwater sampling and analysis plan were a violation of 35 Ill. Adm. Code § 725.192(a); that respondent's failure to conduct groundwater sampling on a quarterly basis for one year was a violation of 35 Ill. Adm. Code § 725.192(b) and (c)(1); and that respondent's nonperformance concerning groundwater sampling at least semiannaully and annually, and its dereliction regarding groundwater surface elevations and modifications in the number, depth and location of the monitoring wells were violations of 35 Ill. Adm. Code §§ 725.192(d)(1), (2) and (e); 725.191(a); and 725.193.

Violations Associated with November 21, 1986 Inspection

Failure of respondent to determine if the dross and slag being stored in the waste piles were hazardous waste is a violation of 35 Ill. Adm. Code § 722.111. In not obtaining a chemical analysis of each waste prior to storage, and failing to have an adequate waste plan, respondent is in violation of 35 Ill. Adm. Code § 725.113(a)(b)(c). Respondent's delinquency in inspecting the piles of slag and dross and surface impoundment which received run-off water from piles of slag and dross and

its failure to have an adequate inspection schedule, including an inspection log, is a violation of 35 Ill. Adm. Code § 725.115(a)(b)(d). Respondent's shortcomings in maintaining the facility in a manner to minimize the unplanned release of hazardous waste or hazardous waste constituents from waste piles is in violation of 35 Ill. Adm. Code § 725.131. The lack of an operating record of required information by respondent concerning hazardous waste is a violation of 35 Ill. Adm. Code § 725.173(b). Respondent's failure in maintaining records of unresolved enforcement actions is a violation of 35 Ill. Adm. Code § 725.174(b). When respondent did not submit reports concerning any groundwater contamination as required by 35 Ill. Adm. Code §§ 725.193 and 725.194, it was a violation of 35 Ill. Adm. Code § 725.177(b). Respondent's default in not submitting a closure plan after termination of interim status is a violation of 35 Ill. Adm. Code § 725.212. In that respondent does not meet the design requirements for its surface impoundment it is in violation of 35 Ill. Adm. Code § 725.321(a)(b); and its lapses in conducting required inspections of the surface impoundment are in violation of 35 Ill. Adm. Code § 725.326(a)(b).

ULTIMATE CONCLUSION

Respondent is in violation of Section 3004 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6924, and pertinent provisions, aforementioned, of 35 Illinois Administrative Code.

ORDER[16]

Pursuant to Section 3008 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928, the following order is entered against respondent Inland Metals Refining Co.:

I. For the reasons set out in the initial decision under seal, of even date, no civil penalty is assessed against respondent at this time.

II. The following compliance order is entered against respondent.

A. Respondent shall cease immediately the placement of any additional hazardous or non-hazardous waste, except in accordance with a closure plan approved pursuant to 35 Ill. Adm. Code § 725.212(d), into its hazardous waste surface impoundment, or waste piles.

B. Respondent shall within 30 days of the receipt of this order cease all other treatment, storage and disposal of hazardous waste, except where such treatment, storage and disposal is conducted in complete compliance with the applicable standards of 35 Ill. Adm. Code Parts 722 and 725, with specific reference to the following:

1. Prepare a closure plan which:

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[16]Unless an appeal is taken pursuant to 40 C.F.R. § 22.30, or the Administrator elects to review this decision sua sponte, this Initial Decision shall become the final order of the Administrator. 40 C.F.R. § 22.27(c).

a. Shall minimize the need for further maintenance. 35 Ill. Adm. Code § 725.211(a).

b. Shall control, minimize or eliminate post-closure escape of hazardous waste or hazardous waste constituents. 35 Ill. Adm. Code § 725.211(b).

c. Shall provide for decontamination or disposal of facility structures and soils. 35 Ill. Adm. Code § 725.214.

2. Prepare a closure cost estimate which:

a. Provides for the closure of the surface impoundment. 35 Ill. Adm. Code § 725.242(a).

b. Adjusts for inflation of closure costs. 35 Ill. Adm. Code § 725.242(b).

3. Transfers hazardous waste from containers that are in poor condition to containers which are in good condition. 35 Ill. Adm. Code § 725.271.

4. Keep all containers of stored hazardous waste closed. 35 Ill. Adm. Code § 725.273(a).

5. Handle and store containers in a manner which will prevent rupture or cause them to leak. 35 Ill. Adm. Code § 725.273(b).

6. Implement a program for maintaining at least two feet of freeboard in the surface impoundment. 35 Ill. Adm. Code § 725.322.

7. Provide Schedule A for the closure trust. 35 Ill. Adm. Code § 725.243(a).

8. Provide certificates of insurance, executed on state forms, without additions or deletions in the verbiage of the forms. 35 Ill. Adm. Code § 725.251.

C. Respondent shall, within 30 days of receipt of this order submit the following:

1. Closure plans for the hazardous waste surface impoundment and waste piles to the IEPA as required by 35 Ill. Adm. Code § 725.212. These closure plans must meet the requirements of 35 Ill. Adm. Code §§ 725.211; 725.212; 725.213; 725.215; 725.328 and 725.358. IEPA shall approve, disapprove or modify the closure plans; and respondent shall perform the closure activities in accordance with the approved plans and schedules. Following completion of closure, respondent shall certify in writing to IEPA that the surface impoundment and waste piles have been closed in accordance with the approved closure plans and schedules; and that respondent shall also submit, or cause to be submitted to IEPA, a written certification of same from an independent registered professional engineer.

2. A post-closure plan to IEPA as required by 35 Ill. Adm. Code § 725.218(c), which plan IEPA will approve, disapprove or modify, and respondent shall perform all post-closure activities detailed in the approved post-closure plan according to the approved schedules therein.

3. A plan to IEPA, for its approval, regarding the groundwater monitoring program for the facility which meets the requirements of 35 Ill. Adm. Code §§ 725.191; 725.192; 725.193 and 725.194, which plan shall be implemented immediately upon its approval by IEPA.

4. A plan and implementation schedule to IEPA for approval concerning a groundwater quality assessment program capable of determining (a) the rate and the extent of migration of hazardous waste or hazardous waste constituents in the groundwater, and (b) the concentration of the said waste or constituents in the groundwater. This groundwater assessment program shall make the determination and follow the procedures specified in 35 Ill. Adm. Code § 725.193(d); and that upon approval of the groundwater quality assessment program by IEPA, respondent shall implement immediately the program pursuant to the approved schedule.

D. Respondent shall, within thirty (30) days from receipt of this order, implement the following to correct violations discovered by IEPA during its November 21, 1986 compliance investigation:

1. Collect samples for analysis to determine if dross and slag being stored in waste piles are hazardous wastes. 35 Ill. Adm. Code § 722.111.

2. Develop and maintain an adequate waste analysis plan which specifies procedures for sampling and analyzing each waste prior to storage. 35 Ill. Adm. Code § 725.113.

3. Conduct required inspections of the facility. 35 Ill. Adm. Code § 725.115(a).

4. Develop an adequate written inspection schedule for inspections of the facility. 35 Ill. Adm. Code § 725.115(b).

5. Maintain inspection logs of the facility. 35 Ill. Adm. Code § 725.115(d).

6. Maintain the facility to minimize the possibility of the unplanned release of hazardous waste or hazardous waste constituents to air, soil or surface water. 35 Ill. Adm. Code § 725.131.

7. Maintain all required information in the operating record for the facility. 35 Ill. Adm. Code § 723.173(b).

8. Maintain all required records during the course of unresolved enforcement action. 35 Ill. Adm. Code § 725.174(b).

9. Submit groundwater contamination and monitoring data to IEPA. 35 Ill. Adm. Code § 725.177(b).

10. Pending closure, conduct the necessary surface impoundment inspections. 35 Ill. Adm. Code § 725.326.

Notwithstanding any other provision of this Order, an enforcement action may be brought pursuant to Section 7003 of RCRA, 42 U.S.C. § 6973, or other appropriate authority, should U.S. EPA find that the handling, storage, treatment, transportation, or disposal of solid waste at the facility represents an imminent and substantial endangerment to human health and the environment.

Frank W. Vanderheyden
Administrative Law Judge

Dated: September 27, 1988