UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Millipore Corporation, Inc.,	)	Docket No. II-RCRA-85-0303
	)	
Respondent	)	

DECISION ON REMAND

Pursuant to 40 C.F.R. § 22.30(c), the Chief Judicial Officer remanded this proceeding in the above matter to the Administrative Law Judge in order that the specific reasons for the penalty assessed in this case may be clarified.

On July 30, 1986, an Initial Accelerated Decision was issued assessing a civil penalty of $2500 against Millipore Corporation (Respondent) for failure to submit a closure plan 180 days prior to initiation of closure, as required by the Resource Conservation and Recovery Act (RCRA) and its implementing regulations. The Environmental Protection Agency (Complainant) proposed a $17,500 penalty.

In the Order For Remand the Chief Judicial Officer correctly states that if a presiding officer decides to assess a penalty different from the penalty recommended, EPA's regulations require the presiding officer to set forth the specific reasons for an increase or decrease in the penalty. 40 C.F.R. § 22.27(c). And further, that in this case the specific reasons for the decrease are not clear -- and are not otherwise supplied

by the Aministrative Law Judge's liberal reliance on the parties' briefs for the text of his initial decision.

The confusion expressed by that order arises primarily from the initial decision's findings on the two factors which make up the gravity-based component of the penalty: potential for harm and extent of deviation from statutory or regulatory requirements. Complainant charged that Respondent's actions constituted a "major" potential for harm and a "moderate" extent of deviation. On the penalty calculation matrix in EPA's RCRA civil penalty policy, 1/ this combination results in a penalty range of $15,000 - $19,999 with a midpoint of $17,500, the amount proposed by Complainant. After reviewing the arguments on both sides, the Initial Decision concluded instead that Respondent's violations constituted a "minor" potential for harm and a "major" extent of deviation. The Chief Judicial Officer states that the reasons for the Administrative Law Judge's departure from Complainant's characterization of these two factors are not clear for reason that the categorization of the potential for harm as minor, for example, appears to be inconsistent with other

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1/ EPA's RCRA civil penalty policy creates a penalty calculation system that helps assure penalties are assessed in a fair and consistent manner. According to the penalty policy, a penalty is set by (1) determining a gravity-based penalty for a particular violation, (2) considering economic benefit of noncompliance, and (3) adjusting the penalty for special circumstances. As noted above, the two factors that make up the gravity-based component of the penalty are potential for harm and extent of deviation. To determine the amount of the gravity-based component, the penalty policy furnishes a matrix with potential for harm on the vertical axis and extent of deviation on the horizontal axis. For each factor, the violation is classified as major, moderate, or minor, and thus, a penalty range can be obtained by referring to the appropriate matrix cell for these two factors.

statements in the decision. On page 13 of the decision, the Administrative Law Judge acknowledges that the penalty policy characterizes the potential for harm as major (the same as complainant's characterization) if a violation has or may have a substantial adverse impact on the RCRA program; he finds that Respondent's actions may indeed have such a substantial adverse impact. Despite these findings, the decision inexplicably concludes that the potential for harm is minor. Regarding the extent of deviation factor, Complainant characterized the violation as moderate, rather than major (as the penalty policy would otherwise prescribe), since Respondent had submitted a closure plan (and thus the state Environmental Quality Board at least had notice of Respondent's intention to close its hazardous waste facility, albeit a defective notice). The initial decision concluded that the deviation was major, but offered no explanation for elevating the classification from moderate to major. On remand, the Chief Judicial Officer requests a clarification of the Administrative Law Judge's reasons for departing from the gravity-based component calculated by Complainant.

The discussions set forth in the Initial Decision under the heading "Amount of Civil Penalty" through the two full paragraphs on page 15 do spell out the basis for Complainant's conclusions of "Potential For Harm-Major" and "Extent of and Deviation-Moderate." These discussions point out that if EQB had fully cooperated according to the Rules, these designations would be correct. However, failure of EQB to cooperate as required provides the vehicle and basis for the Administrative Law Judge to deviate from what would normally be the result as applied by the Penalty Policy.

The real substance and reason behind the conclusions reached by the Administrative Law Judge in the Initial Decision is set forth therein on page 18 as follows:

> "For the regulatory system to function properly, there must be a meaningful exchange between the regulator and the regulated community. The regulatory system was not designed to work and, at best, is only marginally effective when the regulated community receives little or as in this instance, no feedback from the regulator."

The Court is not constrained to apply the terms of the Penalty Policy. This Policy presents a reasonable and workable basis for determining a penalty and, if applied, based upon all facts of a case, could yield a fair and just result. This is exactly the type of result attempted to be reached by the Initial Decision.

Respondent submitted a defective but curable Partial Closure Plan. Complainant received the Plan, detected the potential violation and did not notify Respondent in a timely manner as required. On this set of facts, neither party is blameless, but for purposes of the amount of the civil penalty the Initial Decision places the ultimate and substantial burden on the Complainant for its failure to follow through. Except for this factor, this case would not exist.

In the Order For Remand the Chief Judicial Officer states that the Administrative Law Judge should explain the basis for the downward

adjustments for good faith, lack of willfullness, and other unique factors, and the weight given to them in his computation.

The RCRA Civil Penalty Policy, VIII.A. Adjustment Factors - states that "RCRA § 3008(c) states that in assessing civil penalties, EPA must take into account any good faith efforts to comply with the applicable requirements. The new Agency civil penalty policy sets out several other adjustment factors to consider. These include the degree of willfullness and/or negligence, history of noncompliance, ability to pay, and other unique factors. The adjustment factors can increase, decrease or have no effect on the penalty amount to be paid by the violator."

The complaint in this proceeding charges Respondent with the specific violation of Rule I-805-A(3)(a) of the Commonwealth of Puerto Rico Rules for the Control of Hazardous and Nonhazardous Solid Waste which requires the owner or operator to submit a closure plan to the Environmental Quality Board at least 180 days before the date he expects to begin closure. This is the only violaton charged in the complaint.

As discussed above except for the failure of EQB to timely respond to the initial submission of the partial closure plan of Respondent the proceeding would not have matured to the stature it has now attained. The initial impulse of the Court was to dismiss the complaint, but keeping in mind the vital importance of compliance with Rule I-805-A-(3)(a) to maintain the integrity of the EPA regulatory system, it was deemed that some monetary penalty is warranted.

The penalty assessed herein is basically without regard to the matrix in the Penalty Policy. It does, however, conform to the goals established by the Agency on February 16, 1984:

1. Deterrance;
2. Fair and equitable treatment of the regulated community; and
3. Swift resolution of environmental problems.

Neither the complaint nor the file have expressed concern or sufficient facts relating to potential for harm or extent of deviation. The conclusions reached in the Initial Decision and supplemented by this Decision are, therefore, confirmed.

It is so ordered.

Edward B. Finch
Administrative Law Judge

DATED: April 30, 1987
Washington, D.C.