

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Southern Pine Wood Preserving)	Docket No. RCRA-87-13-R
Company & Brax Batson,)	
)	
Respondents)	

1. RCRA, closure of surface impoundment - A surface impoundment was not clean-closed and freed from the requirements of post-closure care under a State regulation identical to Section 265.228, when there were detectable levels of K001 hazardous constituents in the underlying soil.
2. RCRA, Section 3008 - Although State received final authorization to administer its own RCRA program, where evidence showed that soil underlying a surface impoundment contained detectable levels of hazardous constituents of K001 waste, ruling by State Commission that surface impoundment was clean-closed in accordance with the EPA guidelines and a State regulation identical to Section 265.228, was erroneous and the EPA was not precluded from bringing an enforcement action under Section 3008 to obtain compliance order directing post-closure care.
3. RCRA, personal liability of corporate officer - Corporate officer held personally liable for failure to properly close a surface impoundment where he was responsible for corporation expending its funds in an effort to clean-close the impoundment which the EPA rejected as not meeting regulatory requirements and the corporation did not have sufficient funds to comply with the post-closure care requirements.

APPEARANCES:

Alvin R. Lenoir, Esquire, U.S. EPA, Region IV, 345 Courtland Street, N.E., Atlanta, GA 30365, for Complainant.

Jack Parsons, Esquire, Parsons & Matthews, P.O. Drawer 6, Wiggins, MS 39577; Robert W. Pittman, Jr., Esquire, Mize, Blass, Ingram, Matthews, Stoud & Lenoir, 307 West Pine, Hattiesburg, MS 39401; and John A. Crawford, Esquire, Butler, Snow, O'Mara, Stevens & Cannada, P.O. Box 22567, Jackson, MS 39225-2567, for Respondents.

INITIAL DECISION

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (hereafter "RCRA"), Section 3008, 42 U.S.C. 6928, on a complaint and compliance order based on alleged violations of the Act.¹

The complaint was issued on November 25, 1987 and an amended complaint was issued on May 3, 1988. The amended complaint alleged, in general that Respondents Southern Timber Products, Inc., d/b/a/ Southern Pine Wood Preserving Company and Mr. Brax Batson operated a hazardous waste management facility in the form of a 300,000 gallon surface impoundment used for the treatment of cresote wood preserving wastewater, which generated and disposed of a hazardous waste (hazardous waste No. K001). It was alleged that Brax Batson personally arranged for the treatment, storage or disposal of hazardous waste on behalf of Southern Timber Products, Inc., or was directly responsible for the treatment, storage or disposal of its hazardous waste. It was further alleged that Respondents were required to comply with the interim status

¹ Section 3008(a)(1) of the Act provides that the Administrator whenever he determines that any person has violated or is in violation of Subchapter III of the Act (Sections 3001-3020) may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both. The complaint here contains only a compliance order. No civil penalty has been assessed.

hazardous waste management regulations of the State of Mississippi, which were identical to the federal regulations, including the interim status requirements for closure and post-closure responsibility. When called upon by Mississippi Department of Natural Resources ("MSDR") to submit a Part B permit application, Respondents notified MSDR that they intended to close the facility, submitted a closure plan which was approved by the Mississippi Bureau of Pollution Control and on November 11, 1986, certified that they had closed the surface impoundment. Finally, it was alleged that the Mississippi Commission on Natural Resources ruled that Respondents had clean-closed the impoundment, but that the EPA has determined that this ruling was incorrect and inappropriate, and that there are post-closure requirements which Respondents must comply with but have not done so. The compliance order requires Respondents to submit a post-closure plan in accordance with the interim status standards, to immediately begin proper post-closure care as required by the standards and within 20 days to establish financial assurance for post-closure care as required by the standards.²

Respondents in their answer denied that they had committed the violations charged in the complaint asserting that they had complied with all orders and instructions of the State of Mississippi and had received clean-closure approval from the State.

² The complaint also charged other violations of the interim status regulations which were dropped. Tr. (IIB) 192. (For explanation of record citation, see infra, p. 4, n. 3.

Respondent Batson denied that he arranged for treatment, storage or disposal of any hazardous waste on behalf of Southern Timber Products, Inc. or that he was directly responsible for the treatment, storage or disposal of hazardous waste on behalf of said company. Affirmatively, they alleged that the EPA is estopped to complain of actions by the Bureau of Pollution Control, which had issued a clean-closure to Southern Timber Products, Inc.

A hearing was held in Gulfport, Mississippi. The hearing was in two parts. The first part was held on November 29-December 1, 1988, and the second part was held on April 18 - 19, 1989. Thereafter each party submitted briefs. On consideration of the entire record and the parties' submissions, the following decision is rendered. All proposed findings of fact and conclusions of law inconsistent with this decision are rejected.

The Facts

The following facts are by way of background. Additional findings on disputed issues are contained in the discussion section below. ³

³ References to the record are as follows:

"CX" refers to Complainant's Exhibits; "RX" refers to Respondent's Exhibits. In referring to the transcript, "(I)" refers to the transcript of hearing held Nov. 29 - Dec. 1, 1988 (bound in a brown cover); "(IIA)" refers to the transcript of hearing held on April 18, 1989, (bound in a green cover); "(IIB)" refers to the transcript of hearing held on April 19, 1989, (bound in a green cover).

(continued...)

The Organization and Operation of Southern Pine

Respondent Southern Timber Products, Inc. (hereafter "Southern Pine"), was incorporated under the laws of the State of Mississippi on March 22, 1977. It is located in Wiggins, Mississippi and was engaged in the business of the pressure impregnation of wood products with the preservatives creosote or pentachlorophenol. ⁴

The corporation has four shareholders. Respondent Brax Batson owns 10% of the stock, John Barber, who is Brax Batson's brother-in-law, owns 40% of the stock, Ellen Batson, the wife of Brax Batson owns 40% and Elizabeth Barber, the wife of John Barber owns 10%. ⁵ These four individuals are also directors and officers of the corporations. John Barber is President, Elizabeth Barber and Ellen Batson are Vice Presidents and Brax Batson is Secretary-Treasurer. ⁶

Brax Batson is a consulting civil engineer residing in Wiggins, Mississippi and is President of Batson and Brown, Inc. consulting engineers. John Barber is a professional engineer

³(...continued)

References to the briefs are as follows:

EPA's main brief is cited as "EPA Br.", and its reply brief is cited as "EPA's R. Br." Respondent's main brief is cited as "Resp's. Br." and their reply brief is cited as "Resp's. R. Br."

⁴ RX 7, RX 53. The plant ceased operations in March 1986.
Tr. (IIA) 189-191.

⁵ Tr. (IIA) 56, 259-260.

⁶ RX 53; Tr. (IIA) 259-260, 266.

living in Hattiesburg, Mississippi, which is located about 35 miles north of Wiggins.⁷

Southern Pine was formed for the purpose of purchasing the wood treating plant and personal property of Southern Pine Wood Preserving Company, Inc. After the purchase, it continued the wood treating business under the trade name Southern Pine Wood Preserving Company.⁸

The day to day operations of the business were left in the hands of a plant manager. The directors, however, had the ultimate decision over matters that involved the substantial expenditure of corporate funds. When a matter came up which the manager could not handle or which was beyond the scope of his duties, he consulted with Mr. Brax Batson. Mr. Brax Batson was delegated this duty by the directors because he lived in Wiggins and had his office there. If the matter was beyond the scope of what Mr. Batson had been told to do, Mr. Batson discussed it with Mr. Barber, the President, before any final decision was reached.⁹

Located on the property purchased from Southern Pine Wood Preserving Company was a surface impoundment which had been constructed by Southern Pine Wood Preserving Company for the containment of wastewater from the treating process.¹⁰ It is

⁷ Tr. ((IIA) 41-42, 73, 262; RX 69.

⁸ Tr. (IIA) 56-50; RX 55, 56.

⁹ Tr. (IIA) 72-77; (IIB) 178-181 (Stipulation of Facts).

¹⁰ Tr. (IIA) 91-91.

undisputed that sludge had settled in the bottom of this impoundment which was hazardous waste listed under EPA hazardous waste No. K001. ¹¹

Pursuant to statute and regulations, Southern Pine was required to file by August 19, 1980, a notification of hazardous waste activity. Continued operation of the activity after November 19, 1980, was prohibited unless a permit had been obtained or the facility had achieved interim status allowing for continued operation until a permit was issued. Interim status was achieved if the notification of hazardous waste activity had been filed on time and Part A of the permit application had been submitted by November 19, 1980. ¹²

Southern Pine did not file its notification of hazardous waste activity for the surface impoundment until January 5, 1982. Its Part A permit application was filed on November 18, 1981. ¹³ The permit application was signed by Brax Batson, "Sec.-Treas.," as owner and by Ray Meadows, plant manager, as operator. ¹⁴

Although Southern Pine failed to comply with the requirements for achieving interim status, the State notified the EPA that the

¹¹ CX 1. Hazardous waste No. K001 is bottom sediment sludge from the treatment of wastewater from wood preserving processes that use creosote or pentachlorophenol. 40 C.F.R. 261.32.

¹² See RCRA, Sections 3005(e), 3010, 42 U.S.C. Sections 6925(e), 6930. Regulations listing K001 waste were issued on May 19, 1980. 45 Fed. Reg. 33084, 33123. For qualifying for interim status see 40 C.F.R. 270.70 (formerly 40 C.F.R. 122.13).

¹³ CX 1 (also RX 1), RX 3.

¹⁴ CX 1; Tr. (IIA) 73.

company has demonstrated an attitude of cooperation and willingness to comply with the regulations and that continued operation was in the public interest.¹⁵ Continued operation under interim status standards was recognized in a consent order settling a proceeding between the EPA and Southern Pine issued on February 22, 1983. The order was signed on behalf of Southern Pine by Ray Meadows as general manager.¹⁶

Initial Steps at Closure of the Hazardous Waste Impoundment

Southern Pine stopped using the impoundment to treat its plant wastewater in January 1983. Thereafter, the wastewater was discharged into two treatment tanks where it was treated to remove the creosote and pentachlorophenol residues. The treated water was then discharged into the City of Wiggins' publicly owned treatment plant.¹⁷

At the time that plans were made to discontinue using the impoundment, the decision was also made to close it. There were two ways to close a facility under the regulations. One was to remove all hazardous waste materials from the impoundment. If it could be demonstrated that this was in fact done and that no hazardous wastes remained in the impoundment and in the underlying or surrounding soil, the impoundment was no longer subject to the

¹⁵ RX 2. The State's letter was sent at the request of EPA Region IV. See CX 2.

¹⁶ RX 3.

¹⁷ Tr. (IIA) 97-99, (IIB) 61.

interim status requirements.¹⁸ This has been referred to in this proceeding as "clean-closure."

The alternative to clean-closure was closure in place. This required, in general, stabilizing and containing the waste in place and covering the impoundment with an impermeable cover. Although these initial measures were relatively inexpensive, post-closure care of the facility, including maintenance of the facility and groundwater monitoring, was also required for 30 years.¹⁹

Because removal of all contaminants to nondetectable levels could be prohibitively expensive, the EPA had under study the question of whether a facility could not be granted clean-closure with some acceptable level of contaminants remaining in it. There was, however, no published guidance on what minimal detectable

¹⁸ Impoundment closure requirements are set forth in 40 C.F.R. 265.238. For these requirements as they existed prior to September 17, 1987, see Appendix to this decision. Mississippi received interim authorization for Phase I of its state program on January 7, 1981. See notice of tentative determination on Mississippi's application for final authorization, 49 Fed. Reg. 10132 (March 19, 1984), of which official notice is taken. Interim authorization includes the authority to administer the interim status standards. 40 C.F.R. 271.121(b) (formerly 123.121(b)). It is assumed that the State's requirements under interim authorization like its present requirements were identical to the federal requirements.

¹⁹ See Appendix *infra*; Tr. (IIB) 68-69; 40 C.F.R. 265.228 (1988). While closure in place requirements have been amended since 1983, the basic requirements appear to have remained the same.

amounts would be acceptable.²⁰ Brax Batson explained that notwithstanding this uncertainty, clean-closure was selected on the expectation that something less than removal of all contaminants would be allowed, because the corporate officers did not want to burden the corporation with the responsibility for post-closure care for 30 years.²¹

On October 25, 1982, Southern Pine submitted a closure plan to the Mississippi Bureau of Pollution Control ("BPC") to clean close the facility. This plan contemplated removing the contaminants to background levels based on soil samples taken from locations on Southern Pine's property outside the impoundment. As a result of comments by the BPC, a modified plan to accomplish clean-closure was submitted in April 1983.²²

²⁰ Tr. (I) 95-96; (IIB) 69-71. In March 1987, the EPA did issue a policy statement on the subject with respect to its amended impoundment closure requirements. In the amended Section 265.228 (which is the regulation presently in effect) the wording to achieve clean closure was changed to require that the facility owner must "remove or decontaminate" all hazardous waste materials. The EPA in its preamble interpreted this language to mean that it must be demonstrated that Agency recommended limits for a hazardous waste constituent are not exceeded if a recommended limit exists for that constituent. If no recommended limit exists, the facility owner must either remove the constituent down to background levels, submit its own toxicity data to enable the EPA to determine the environmental and health effects of the constituent, or follow landfill closure and post-closure requirements. 52 Fed. Reg. 8706 (March 19, 1987).

²¹ Tr. (IIA) 101-102, (IIB) 71. It would have been too costly to remove all contaminants to nondetectable levels.

²² RX 6A, 7, 31, 33, 34, 35; Tr. (IIA) 102-104.

On September 2, 1983, BPC issued its order against Southern Pine in its complaint No. 649 83. The order stated in part as follows:

2.

The Respondent [Southern Pine] has not installed ground water monitoring wells as required by the Mississippi Hazardous Waste Management Regulations, or closed the regulated facility.

3.

The Respondent cannot fully close the facility due to absence of agency closure limits. However, a risk-assessment model to define closure limits and/or groundwater monitoring requirements, is being developed. After these limits are identified, a new schedule will be established for the completion of the closure and maintenance activities.

4.

The continued existence of the facility presents the potential for unpermitted discharges in wet weather and discharge to groundwater.

* * *

As a result of the BPC findings, Southern Pine was ordered to install a groundwater monitoring system, submit information demonstrating that a minimum of 2 feet of freeboard will be maintained in the impoundment, and submit evidence of compliance

with all sections of the Mississippi Hazardous Waste Management Regulation.²³

In accordance with the order, Southern Pine in April 1984 installed four groundwater monitoring wells consisting of one upgradient well (Well No. 1) and three downgradient wells (Well Nos. 2-4). Employees of BPC were present to monitor the installation.²⁴

Final Closure of the Impoundment by the State

The next significant action with respect to the impoundment as disclosed by the record was that on June 11, 1984, BPC issued its order No. 719 84, directing Southern Pine to notify BPC by July 20, 1984 as to whether it intended to close the facility or to submit a Part B application. If closure was elected, a draft closure plan had to be submitted by October 22, 1984, and a final plan by December 20, 1984. If the facility was not closed, Southern Pine was directed to submit a draft Part B permit application by October 22, 1984, and a final application by December 20, 1984. Finally, Southern Pine was directed to furnish certain groundwater monitoring data.²⁵ This Order appears to have been accompanied by a letter from BPC informing Southern Pine that the State was granted final authorization by RCRA to operate in lieu of a federal hazardous waste program and that permits would

²³ RX 8, 9, 39.

²⁴ RX 27, 30; Tr. (IIA) 117-124.

²⁵ RX 5.

be issued by the Mississippi Pollution Control Permit Board rather than by the EPA.²⁶

On July 18, 1984, Southern Pine notified BPC that it intended to close the facility and requested a meeting with BPC to determine what will be acceptable in a closure plan.²⁷ Thereafter on September 14, 1984, Brax Batson and Martin Rollins, the consultant engaged by Southern Pine to advise on RCRA compliance, met with officials of BPC and discussed closure of the impoundment. The undisputed evidence of what happened shows that BPC continued to hold out hope for a clean-closure at less than removal of all contaminants to nondetectable levels and they told Southern Pine in the meantime to remove the sludge and to put a clay cap over the impoundment. BPC was unable to provide guidance on what would constitute clean-closure, but, in the words of Mr. Rollins, "it was still their belief that they would be able to provide or accept something other than nondetectable levels as clean."²⁸

A draft closure plan was submitted to BPC on October 18, 1984, and commented on by BPC. A revised plan was submitted on December 20, 1984. The plan in both the draft form submitted on

²⁶ RX 14 (letter from BPC dated June 15, 1984). For grant of final authorization see also the Federal Register Notice of June 13, 1984 (49 Fed. Reg. 24377), CX 11. The Notice stated that final authorization means that Mississippi now has the responsibility for permitting treatment, storage and disposal facilities within the state and for carrying out all other aspects of the RCRA program, CX 11.

²⁷ CX 14.

²⁸ Tr. (IIB) 77-80; see also (IIA) 136-137; RX 10.

October 18, 1984, and the form submitted on December 20, 1984, stated that Southern Pine has attempted to remove and dispose of all waste and visibly contaminated soils, and that the site has been covered with an approximate 2 foot depth of low permeability clay. It was recognized, however, that closure could not be completed until the State had completed its risk assessment model for clean-closure certification.²⁹

The following other facts relative to clean-closure of the facility while closure was pending before the State for its determination should also be noted:

First, the groundwater monitoring data in the plan turned out to be statistically invalid.³⁰ Accordingly, further samples were drawn from the monitoring wells in March 1985. The analysis was done by the Mississippi State Laboratory and showed no constituents of K001 waste or of creosote or pentachlorophenol as being present.³¹

Second, the closure plan was approved on July 24, 1986, but with the condition that Southern Pine sample to the depth of 2 feet underneath the clay cap. The sampling had to be done by August 15, 1986. If the samples showed residual contamination above

²⁹ RX 12; RX 13. Cost information to accomplish complete closure was also omitted because the company was still awaiting for the analytical limits that the State would accept as demonstrating clean closure. RX 13.

³⁰ Tr. (IIA) 166-167, (IIB) 81-83. For groundwater data in plan see RX 13 (Exhibit 9), and for T-Test results see CX 30.

³¹ RX 43; RX 14 (letter from Robert A. Lee to Batson dated May 28, 1985); Tr. (IIB) 85, (IIA) 163-164.

background levels, the impoundment had to be closed as a land disposal unit and a Post-Closure Part B Application had to be submitted.³² The samples were obtained and tested and the reported results were sent BPC on October 6, 1986. They showed detectable levels of naphthalene, fluoranthene, phenanthrene and carbazol using solvent extraction, but nondetectable levels using the EP Toxicity procedures.³³ No background levels were determined because Southern Pine was instructed that soil samples from the site would not be acceptable as background levels.³⁴

Third, on November 8, 1984, shortly before Southern Pine submitted its final plan, the Hazardous and Solid Waste Amendments of 1984 ("HWSA") was enacted.³⁵ This Act amended RCRA Section 3005(a) to provide that an interim status land disposal facility, which by definition included a surface impoundment, will lose its interim status on November 8, 1985, unless the facility applies for

³² CX 43, RX 15 (BPC Order No. 1074 86).

³³ RX 17, CX 47. The average values of the detectable substances for the four soil extraction tests (the first two on samples taken at 0" - 12", and the latter two on samples taken at 12" to 24") were as follows (values are in parts per million):

Napthalene (2.32, 2.14; 6.3, 7.6	-	4.59 ppm
Fluoranthene (13.1, 44.1; 124.9, 79.9)	-	65.5 ppm
Phenanthrene (25.5, 70.5; 288.6, 200.3)	-	146.25 ppm
Carbazole (3.1, 9.54; 21.4, 24.6)	-	15.91 ppm

Napthalene and fluoranthene are hazardous constituents of K001 waste. See 40 C.F.R. Part 261, App. VII; Tr. (I) 58.

³⁴ Tr. (IIB) 170.

³⁵ Pub. L. 98-616, 98 Stat. 3221 (1984).

a final determination regarding the issuance of a permit and certifies compliance with all applicable groundwater monitoring and financial responsibility requirements by that date. The final authorization previously received by the State did not apply to administering the new requirements added by the amendments.³⁶

In a letter dated October 10, 1985, to Mr. Batson, apparently in response to a request by Mr. Batson for information, BPC addressed the issue of post-closure permits under the amended law. In pertinent part, it stated as follows:

Mr. Brax Batson
Southern Pine Wood Preserving
P.O. Box 636
Wiggins, Mississippi 39577

Dear Mr. Batson:

Re: Post-Closure Permitting Issues

Permit issues under the Hazardous Waste Regulatory Program have traditionally been very difficult for the regulated community to follow. This is especially true at the current time, with the various dates that are imposed. This letter is an attempt to clarify some of these issues.

* * *

. . . The following are examples of typical categories of permitting activities:

1. Facilities Intending to Close Surface Impoundments

For facilities in the process of closing impoundments or intending to cease using impoundments soon, it has been determined by EPA that post-closure permitting will be required, unless the underlying soil can be cleaned to a non-detectable level for all listed hazardous constituents. However, if hazardous constituents have

³⁶ The changes effected by HWSA are discussed in the EPA's "Notice of Implementation and Enforcement Policy" published on September 25, 1985, 50 Fed. Reg. 38946, included in the record as CX 33.

been detected in the groundwater, clean-closure is a moot point.

EPA will soon send letters calling for Part B permit applications for post-closure. These will be joint EPA-State letters, since portions of the regulatory authority rest with each agency. The application will be due six months after receipt of the letter.³⁷

* * *

On November 3, 1986, Southern Pine submitted a certification by Martin Rollins that the facility had been closed in accordance with the approved plan. His certification made clear that the issue of closure cleanliness had still to be decided.³⁸

Thereafter, Southern Pine was informed by the Director of the Division of Hazardous Waste of BPC in a letter dated January 7, 1987, that BPC had determined that there had not been clean-closure and they were going to recommend to the State Commission on Natural Resources that the company be ordered to comply with post-closure requirements.³⁹ Specifically, the letter stated as follows:

Mr. Brax Batson
Southern Pine Wood Preserving Company
P.O. Box 636
Wiggins, Mississippi 39577

Dear Mr. Batson:

Re: Status of Hazardous Waste Impoundment
at Wiggins Facility
MSD008208886

After reviewing the analyses of soil samples taken at your facility on October 6, 1986, the Bureau of Pollution Control finds that

³⁷ RX 14 (letter from Jack McMillan to Brax Batson dated October 10, 1985).

³⁸ RX 21; Tr. (IIB) 99-100.

³⁹ CX 51, CX 64, CX 65; Tr. (I) 202-203, (IIA) 193-194.

significant levels of constituents of the EPA listed waste K001 (wood preservative wastes) remain at the closed impoundment unit. Therefore, the closure of the hazardous waste impoundment cannot be deemed a clean closure.

By this letter the Bureau is advising you that post-closure care will be required for the closed impoundment unit at Southern Pine. As required by Section 265.118 of the Mississippi Hazardous Waste Management Regulations, a written post-closure plan with a post-closure cost estimate and documentation of financial assurance for the post-closure costs must be submitted to our office within 90 days of receipt of this letter. The Bureau will ask the Commission on Natural Resources to issue an order to that effect at the Commission's meeting on January 28, 1987.

Southern Pine must also obtain a hazardous waste post-closure permit to monitor and maintain the closed impoundment unit. Regulations require that a company be given 6 months to develop and submit a permit application. At our meeting of December 30, 1986, we provided the company with a permit application and format. We will ask the Commission to include in its January 28th order a requirement that Southern Pine submit a complete application for a post-closure permit by July 31, 1987. Because groundwater contamination has not been detected at the site, six months should be adequate to prepare the application.

Should you have any questions, please contact me at 961-5171.

Sincerely,

Sam Mabry, Director
Hazardous Waste Division ⁴⁰

The meeting mentioned in the letter was put over to February 25, 1987, and at Brax Batson's request, he and Martin Rollins appeared to support clean-closure. After hearing arguments from BPC and Southern Pine, the Commission voted against BPC's request for an order requiring post-closure care. Instead, it ruled that the impoundment had been clean closed, and was not further subject to the hazardous waste regulatory program. ⁴¹

⁴⁰ CX 51.

⁴¹ CX 64, RX 25; Tr. (IIA) 199-200; (I) 276-280.

Following the granting of clean-closure, Southern Pine shut down its monitoring wells. ⁴²

The EPA's Post-Closure Inspection and Enforcement Action

On April 14, 1987, Mr. William Bokey and Dan Hunter of the EPA, Region IV made a RCRA sampling investigation of Southern Pine. Seven soil samples (SP 1-7) and one water sample (SP 8) were collected. Three soil samples (SP 1-3) were collected from auger hole No. 1 located in the west cell of the impoundment at depths of from 4.2 to 8.3 feet. Three soil samples (SP 4-6) were also collected from auger hole No. 2 located in the east cell of the impoundment at the same depths. One soil sample (SP 7) was collected from auger hole No. 3 located about 10 feet downgradient of the impoundment, and a water sample (SP 8) was also collected from auger hole No. 3. ⁴³ The report noted that analysis of the soil samples showed the presence of hazardous constituents of K001 waste in the soil taken from the impoundment ranging from an estimated concentration of 500 ug/kg (micrograms per kilogram or parts per billion) of benzo-a-pyrene (sample SP-1) to 830,000 ug/kg of naphthalene in sample SP-5. Pentachlorophenol was detected in all soil samples taken under the impoundment (SP-1 to SP-6) ranging from an estimated concentration of 2,500 ug/kg in sample SP-1 to

⁴² CX 58; Tr. (IIB) 139-140).

⁴³ CX 58; Tr. (I) 290-299; (IIA) 159. The location of auger holes Nos. 1, 2 and 3 is shown on RX 45. The monitoring wells installed by Southern Timber could not be used because they had been closed after Southern Timber was given clean closure.

350,000 ug/kg in sample SP-5. ⁴⁴ Analysis of the water sample (SP-8) ranged from an estimated concentration of 1,000 ug/l (micrograms per litre or parts per billion) of benzo (gh 1) perylene to presumptive evidence of dimethylnaphthalene at an estimated concentration of 100,000 ug/l. ⁴⁵

On July 31, 1987, the EPA notified the Director of the Division of Solid/Hazardous Waste Management of the Mississippi Department of Natural Resources that preliminary results from the groundwater and soil sampling conducted by the EPA indicate that the facility does not meet the standard for clean-closure, and that

⁴⁴ CX 58 (Page 3 and Appendix A). As to estimated values, identified by the letter "J", Mr. Rollins stated that he interpreted this as meaning either that the data falls outside the quality control limits or that the sample retention time exceeded that specified in the manual. Tr. (IIB) 155. Mr. Bokey's first explanation was that the estimate meant the value was near or close to the detectable limits although he did qualify this later in his testimony. Tr. (I) 352, 365-366. The laboratory procedures, however, were admittedly outside of Mr. Bokey's expertise and he was only generally familiar with them. Tr. (I) 353-354. The EPA's explanation in its brief, pp. 24-25, does appear to be based on extra-record material. The EPA complains of my reserving ruling on the admissibility of the analytical operations and control manual (CX 26 for identification) until the complete document was made available to Respondents. EPA R. Br. at 10. See Tr. (I) 312-318. The offer to admit the document was apparently not renewed. In any event, Mr. Rollins had reviewed the laboratory manual as part of his testimony. Tr. (IIB) 144-145. If he had misread the manual, this presumably could have been brought out on cross-examination.

⁴⁵ CX 58 (Appendix A). Dimethylnaphthalene is not listed as a hazardous constituent of K001 waste, or even as an organic compound present in either the pentachlorophenol or creosote wood preserving process. See CX 58 (Table I). Presumptive evidence, identified by the letter "N", is a tentative identification.

the EPA intends to initiate enforcement action against the facility to ensure compliance with the applicable regulations pertaining to post-closure care and financial assurance for post-closure care.⁴⁶

Discussion

A jurisdictional issue raised by Respondents must be considered first. Respondents claim that this proceeding is a collateral attack on action taken by the State pursuant to its grant of final authorization, and they assert that the EPA has no authority to proceed in this fashion.

Jurisdiction to bring this action is asserted by the EPA under RCRA, Section 3008(a)(2) (42 U.S.C. 6928(a)(2)). That section provides as follows:

In the case of a violation of any requirement of this subtitle where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 3006, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

The Judicial Officer has ruled in several cases that under Section 3008(a)(2), the EPA retains authority in an authorized state to enforce state regulations under RCRA Subchapter C as well as the federal regulations.⁴⁷ Those cases, however, did not deal with the question raised here which is the EPA's authority when the

⁴⁶ CX 59.

⁴⁷ Commonwealth Oil Refining Company, Inc., RCRA (3008) Appeal No. 87-16 (Sept. 21, 1989); Municipal & Industrial Disposal Co., RCRA (3008) Appeal No. 87-4 (Nov. 1, 1988); CID-Chemical Waste Management of Illinois, Inc., RCRA (3008) Appeal No. 87-11 (Aug. 18, 1988).

State has affirmatively acted to approve a course of action under its regulations. It is Respondents' position that the EPA has no authority to challenge this action except by judicial review in the state courts.⁴⁸

In the case of Martin Electronics, Inc., RCRA (3308) Appeal No. 86-1 (Order of Judicial Officer on sua sponte review, June 22, 1987), the Judicial Officer reversed the initial decision of the administrative law judge who had dismissed a charge in the complaint on the grounds that the violation had been adequately disposed of by a State consent agreement. The Judicial Officer ruled on the authority of an opinion by the EPA General Counsel that even if a State's enforcement action is adequate the EPA may still seek penalties for the same RCRA violation. Martin Electronics, supra at 7-9. The Judicial Officer did go on to say, however, that the EPA as a matter of policy will not take enforcement action unless a State fails to take timely and appropriate action. Martin Electronics, supra at 9.

The EPA in support of its position cites the Memorandum of Agreement between the State and the EPA stated to be applicable to the period after October 1, 1986.⁴⁹ The Memorandum states that the EPA "will generally defer to State action except where it is deemed necessary to ensure an appropriate and timely enforcement response consistent with national policy." The Memorandum goes on

⁴⁸ Resp's. Br. at 47-48.

⁴⁹ See CX 52 for Memorandum of Agreement.

to say that the EPA will initiate direct enforcement action in accordance with Section 3008(a)(2) "where the Regional Administrator determines the State has failed to initiate timely and appropriate formal enforcement action."⁵⁰

The Memorandum indicates that the Regional Administrator's determination that the State's action was not timely and appropriate, and that the EPA should take its own enforcement action is an unreviewable exercise of prosecutorial discretion. It could be argued, however, that if the Memorandum is to be construed in accordance with the policy stated in Martin Electronics, there is a review of the Regional Administrator's determination on whether the State has in fact failed to take timely and appropriate action. If it is assumed for the purpose of this case that there is such a review, the facts clearly show that the State's action granting clean-closure was not appropriate action.

The letter from the Commission notifying Southern Pine of its action approving clean-closure stated as follows:

At its meeting on February 25, 1987, the Mississippi Commission on Natural Resources determined that, in accordance with Section 265.228(a) of the Mississippi Hazardous waste Management Regulations (MHWMR), the hazardous waste surface impoundment at Southern Pine Wood Preserving Company had been clean closed by removal of the following materials from the impoundment:

- (1) Standing liquids;
- (2) Waste and waste residues;
- (3) The liner, if any; and
- (4) Underlying and surrounding contaminated soil.

⁵⁰ CX 52, pp. 25, 26.

Based on these closure activities, the Commission further determined that, in accordance with Section 265.228(b) of the MHWMR, the impoundment is not further subject to the hazardous waste regulatory program.⁵¹

The letter, thus, simply states in conclusory terms that the materials listed in the regulation as then written have been removed.⁵² It omits to state, whether by intention or oversight, that "all" of the listed impoundment materials have been removed. In view of the results of the soil samples underneath the liner taken on August 15, 1986, it is difficult to see how the Commission could have found that all underlying contaminated soil had been removed.

The only other writing reflecting the decision of the Commission appears to have been the minutes of the meeting. These read as follows:

Southern Pine Wood Preserving Company

The Staff briefed the Commission regarding its investigation of a recent closure of the hazardous waste impoundment at the Southern Pine Wood Preserving Company. More particularly, the briefing related to noncompliance by the company of those requirements contained in the Hazardous Waste Regulations for clean closing its hazardous waste disposal facility.

Considerable discussion ensued. Present and participating in the discussion were Mr. Brax Batson, Principal and Operator; Mr. Martin Rawlings, Consultant; and Mr. Jack Parsons, Attorney, all with the Southern Pine Wood Preserving Company. Mr. Batson explained to the Commission the recent closure process at the facility's hazardous waste impoundment. He reported that all available resources had been committed to this project to ensure total removal of hazardous waste constituents and assured the Commission that the impoundment had been closed according to guidelines by EPA in current hazardous waste regulatory program.

⁵¹ RX 25.

⁵² See Appendix.

Mr. Batson asked the Commission to certify that the hazardous waste surface impoundment had been clean closed.

The Commission, having considered the information presented, determined that Mr. Batson had complied with appropriate guidelines by EPA in such closures. Accordingly, a motion was made by Mr. Travis that the recent closing of the hazardous waste disposal facility at Southern Pine Wood Preserving Company be declared a clean closure.⁵³ The motion was seconded by Mr. Goldman and carried unanimously.

One can only speculate from reading the minutes as to what made the Commission decide that Southern Pine had complied with the EPA guidelines notwithstanding the fact that there were detectable levels of K001 hazardous constituents in the soil underlying the impoundment. Read literally, the regulation required the removal of all contaminated soil.⁵⁴ The EPA had not established any "risk base" closure guidelines at the time allowing a facility to be clean-closed with detectable levels of K001

⁵³ CX 64.

⁵⁴ Respondents argue that the regulations require only that the soil be decontaminated to no significant risk to human health and the environment. Resp. R. Br. at 5. The plain wording of the regulation states that the owner or operator to avoid post-closure care must either remove all underlying and surrounding contaminated soil, which Respondents have not done, or demonstrate under Sections 261.3(c) and (d) that none of the remaining soil is a hazardous waste. Appendix, infra. Sections 261.3(c) and (d) have exclusions for certain kinds of waste as hazardous wastes but not soil contaminated with K001 constituents. If Respondents are arguing that the levels of K001 hazardous constituents found in the soil are not a significant risk, Peronard's testimony cited by Respondents provides no support for their argument, for they were not able to demonstrate that the contaminants had been removed either to background levels or to below detection levels. See Tr. (I) 96.

hazardous constituents still remaining in the underlying soil.⁵⁵ Neither had the EPA approved the use of the "leachate extraction" method used by Southern Pine to show nondetectable levels of hazardous constituents in the soil.⁵⁶ The Commission's ruling, in short, was clearly in error.

Since the General Counsel's opinion referred to in Martin Electronics has not been made available by the parties, it is instructive to examine the legislative history on the point. The following statement about Section 3008(a)(2) was made in the House Committee Report which accompanied the bill in its consideration by Congress:

This legislation permits the states to take the lead in the enforcement of the hazardous wastes laws. However, there is enough flexibility in the act to permit the Administrator, in situations where a state is not implementing a hazardous waste program, to actually implement and enforce the hazardous waste program against violators in a state that does not meet the federal minimum requirements. Although the Administrator is required to give notice of violations of this title to the states with authorized state hazardous waste programs the Administrator is not prohibited from acting in those cases where the state fails to act, or from withdrawing approval of the state hazardous waste plan and implementing the federal hazardous waste program pursuant to title III of this act.⁵⁷

⁵⁵ Tr. (I) 97-98. Respondents argue that clean-closure could mean removal of hazardous constituents to background levels. Resp's. R. Br. at 5. In fact, no background levels had been determined. Tr. (IIB) 170.

⁵⁶ Tr. (I) 88-90; (IIA) 193.

⁵⁷ H.R. Rept. No. 94-1491, 94th Cong., 2d Sess., pt. I at 31, reprinted in 1976 U.S. Code Cong. and Admin. News 6269.

In discussing the provision dealing with retention of State authority, RCRA, Section 3009, 42 U.S.C. 6929, the report also stated:

Further, the Administrator, after giving the appropriate notice to a state that is authorized to implement the state hazardous waste program, that violations of this Act are occurring and the state failing to take action against such violations, is authorized to take appropriate action against those persons in such state not in compliance with the hazardous waste title.⁵⁸

The EPA gave notice to the State of its enforcement action on July 31, 1987.⁵⁹ The original complaint was issued on November 25, 1987. It is neither claimed by Respondents nor is there evidence in this proceeding that the State intends to take any further action against Southern Pine, notwithstanding that there are still hazardous constituents in the soil underlying the impoundment, and with the only explanation being the clearly erroneous one that Southern Pine had complied with the EPA guidelines.

If there were any question about the authority granted the EPA under Section 3008(a)(2), the legislative history makes clear that the EPA may step in where the State has failed to take appropriate action against a violation. That the State's refusal to act is in the form of an affirmative order rather than a passive acquiescence to a violation is immaterial. The same consequences follow in

⁵⁸ H.R. Rept. No. 94-1491, supra, at 32, reprinted in 1976 U.S. Code Cong. and Admin. News 6270.

⁵⁹ CX 59.

either case, namely, a violation is left standing if the EPA does not act.⁶⁰

Consideration of the cases cited by Respondents does not require a different conclusion than that reached here.

The case of Northside Sanitary Landfill, Inc. v. Thomas, 804 F.2d 371 (7th Cir. 1986), contains language that would appear to support Respondents' position, for the court said that the EPA is without authority to bring an independent enforcement action if the State in its enforcement action has exercised its judgement in a reasonable manner and within its statutory authority. 804 F.2d at 382. The court used this language in construing RCRA Section 3006, 42 U.S.C. 6926. At issue was whether the court should entertain an appeal by Northside of statements that the EPA made in denying Northside's Part B permit application on the extent of Northside's property that must be closed, a subject that was then being considered before a State environmental hearing officer. The State involved, Indiana, had authority to administer its own program under Section 3006. The court held that Northside did not have standing to appeal because of what the court considered to be the preclusive effect of the State action. As an alternative ground, the court held that the matter was not ripe for review. There is

⁶⁰ Respondents argue that they are not charged with any violation of RCRA. Resp's. Br. at 44; Resp's. R. Br. at 2. This is giving too narrow a reading of the amended complaint. When it is read in its entirety, including the compliance order which is sought, it is plain enough that Respondents are being charged with the failure to comply with the requirements of the regulations for closure and for post-closure care and for establishing financial assurance for post-closure care.

no mention in the court's opinion of Section 3008. The only conclusion that can be drawn, then, is that it was not before the court. Viewed solely from the standpoint of Section 3006, the court's opinion is understandable. One can only speculate how the court would have decided if it had been asked to interpret Section 3006 in light of Section 3008, with its clear legislative history supporting the EPA's authority to bring enforcement actions in authorized states. Consequently, I do not regard that case as authority for the question raised here.

United States v. Conservation Chemical Co. of Ill., 660 F. Supp. 1236 (N.D., Ind.) (1987), is in point. That case involved a motion to dismiss an enforcement action by the EPA under Section 3008 charging Conservation Chemical and its President with violations of RCRA. Conservation Chemical was also located in Indiana like Northside, so the same question of the effect of Indiana's final authorization was involved, only this time it was directly raised in an enforcement proceeding under Section 3008. The EPA's action was brought while a State enforcement action against Conservation Chemical in which the same violations were involved was still pending.⁶¹ The court rejected defendants' claim that the EPA lacks enforcement authority because Indiana was an authorized State, holding that Northside Sanitary was distinguishable because it was not an enforcement action under Section 3008. The court found that the EPA's authority to bring

⁶¹ See Conservation Chemical, 660 F. Supp. at 1241.

the enforcement action was supported both by the statute and its legislative history. Respondents argue that the case is distinguishable because no final determination had been made in the State action and the State had elected to stay its own enforcement action pending the outcome of the EPA's suit.⁶² Here, so Respondents argue, the State has made a final determination granting Southern Pine clean-closure.⁶³ I find that distinction not persuasive. The determination of clean-closure by the State Commission was no more than a ruling by the State that it will not act to guard against future releases from the impoundment notwithstanding the presence of detectable levels of hazardous constituents in the impoundment. In short, this is an instance where the State has failed to uphold federal minimum requirements, and where the legislative history is clear that the EPA has authority to bring its own enforcement action. To hold that the EPA would be barred would be to elevate the form in which the State decides not to act over the substance of what it actually does.

Williamsburgh-Around-the-Bridge Block Assn. v. New York, 30 Env. Rep. Cas. (BNA) 1188 (N.D.N.Y., 1989) involved a citizen's suit against the State of New York for issuing a permit allegedly in violation of RCRA. New York had been granted final authorization to administer its own program. At issue was whether the district court had jurisdiction of this action under 42 U.S.C.

⁶² Conservation Chemical, 660 F. Supp. at 1243.

⁶³ Resp's. Br. at 50.

Section 6972(a), RCRA, Section 7002(a). The court construed that section as not conferring jurisdiction on the federal courts to decide citizen suits involving the State's administration of its authorized program. Instead, the plaintiffs had to pursue their remedy under State law. In the alternative, the court held that plaintiffs could petition the EPA to notify the State that it is not complying with the Federal program. Williamsburgh-Around-the-Bridge Block Assn, supra, at 1195. ⁶⁴ It is not necessary to decide here whether the court properly construed the citizen suit provision. The EPA's jurisdiction in this case is asserted under RCRA, Section 3008(a)(2) which does give the EPA jurisdiction to enforce state programs.

General Motors Corp. v. EPA, 871 F.2d 495 (5th Cir. 1989), and American Cyanamid Co. v. EPA, 810 F.2d 493 (5th Cir. 1987) are also clearly distinguishable. Those cases involve the effect of statutory time requirements in the Clean Air Act, 42 U.S.C. Sections 7401 et. seq., within which the EPA must approve or disapprove either a State-issued delayed compliance order, as in the case of General Motors, or a revision to a state implementation plan, as in the case of American Cyanamid. The court held that the EPA must comply with these time requirements, noting that it was inequitable to the regulated company and poor enforcement policy if the EPA did not do so. General Motors, supra, 871 F.2d at 500-501, American

⁶⁴ Respondents' motion for leave to supplement its briefs in this matter with the memorandum discussing the Williamsburgh-Around-the-Bridge case, is granted.

Cyanamid, supra, 810 F.2d at 501. There are not similar time limits governing the EPA's enforcement actions under Section 3008(a)(2). Further, there is no claim, and indeed no evidence, that there has been any prolonged delay in bringing this action such as was apparently involved in those cases.

In conclusion, accordingly, I find that the EPA has jurisdiction to bring this action under Section 3008(a)(2).

The Order to Be Enforced

The order which the EPA seeks in this case would require the following:

- A. Within twenty (20) days, submit an interim post-closure plan in accordance with 40 CFR 265.118-119. Proper post-closure care in accordance with 40 CFR 265.117-120 should begin immediately. This will include the requirement to monitor the groundwater as required by 40 CFR 265.118(a) and specified in 40 CFR 265 Subpart F.
- B. Within twenty (20) days, establish financial assurance for post-closure care as required by 40 CFR 265.145. This should be established by choosing from options as specified in 40 CFR 265.145(a) through (e), and demonstrated by the submittal of an instrument with wording identical to that specified in 40 CFR 264.151.⁶⁵

The required documents are to be submitted to the EPA and to BPC. The order also provides for the payment of penalties for noncompliance.

⁶⁵ See Amended Complaint. As stated in Par. 2 of the complaint, references to the Part 265 regulations constitute a citation to the equivalent State requirements.

The Liability of Respondentsa. Southern Pine

Southern Pine is undisputably the owner of the facility and has been the operator since 1977. As such, there is no question but that it must comply with the compliance order which the EPA seeks. The liability is absolute, imposed by law, and without regard to whether Southern Pine was negligent in its efforts to comply with RCRA.

b. The Personal Liability of Brax Batson

The EPA is ambivalent as to the precise ground on which it would hold Mr. Batson liable. During the hearing EPA counsel stated that the EPA's position was that if the corporation is held to a standard of strict liability so should Mr. Batson who made all the important decisions with regard to closure.⁶⁶ In its brief, however, the EPA argues that the decision to accomplish clean-closure was imprudent and has left the corporation insolvent and unable to properly close the impoundment.⁶⁷

As to Mr. Batson, the record does show that he was very much involved in and played a leading part in the decision to seek a risk-based clean-closure and in carrying it out. He was the corporate officer who communicated with the State on the matter and with whom the State communicated, the corporate officer who met with the State officials on September 14, 1984, and the corporate

⁶⁶ Tr. (IIA) 27.

⁶⁷ EPA's Br. at 13-16, 33.

officer who defended the closure before the State Commission on Natural Resources. He even took it upon himself to attempt to get his congressional representatives to intervene with the EPA to get the State to approve clean-closure for Southern Pine.⁶⁸ No doubt closure was discussed with the other three principals and Mr. Batson made sure that he acted with their assent. The inescapable conclusion to be drawn from the evidence, however, is that his was the active role in pursuing clean-closure with the others simply approving what was being done.

At the same time, there is no evidence that Mr. Batson acted in such a way as to make the corporation his alter ego and justify piercing the corporate veil.⁶⁹ Although Southern Pine is presently insolvent, there is no evidence that at the time of its organization in 1977, it lacked sufficient funds or capital of its own to carry on its business.⁷⁰ Neither is there evidence that Mr. Batson treated the corporate assets as his own personal assets adding or withdrawing capital at will. Although this was a small

⁶⁸ See CX 21, 29.

⁶⁹ For "alter ego" theory of piercing the corporate veil see 18 Am. Jur. 2d, Corporations, Section 45.

⁷⁰ At what point in time, Southern Pine's financial condition deteriorated is not disclosed in the record. An analysis done for the EPA for the years 1984, 1985, and 1986, apparently in connection with the issuance of the amended complaint in March 1988, indicated that Southern Pine's financial condition was such that it could not afford to pay civil penalties. RX 33. The plant ceased operations in 1986. Tr. (IIA) 189-191. See also CX 53 (letter from Brax Batson to Sam Mabry dated January 15, 1987, stating corporation is insolvent and post-closure care will pass to State if clean-closure is not granted.)

closely-held corporation where the formalities of corporate conduct are not likely to be as rigorously observed as in a large, widely-held corporation, the weight of the evidence is that sufficient attention was paid to maintaining the separate identity of the corporation to make Southern Pine a bona fide corporate entity and not simply a facade to shield an individual business operation.⁷¹

Even though there are not grounds for piercing the corporate veil, Mr. Batson can still be held individually liable because of the responsible part he played in the violation whereby a surface impoundment has been improperly closed and the corporate owner is without resources to now properly close the facility. That situation is directly attributable to Mr. Batson's insistence on seeking a risk-based closure.

Mr. Batson must necessarily have known from the very beginning that if the corporation was not successful in getting its risk based closure accepted, the corporation would have to close in place and have post-closure care. When the first closure plan was submitted by Southern Pine in 1982, Mr. Rollins stated in the forwarding letter, "Should the site not ultimately be closed to the

⁷¹ See stipulation of facts, Tr. (IIB) 178-182. The stipulated facts are also set forth in Respondent's proposed finding No. 81, Resp's. Br. at 25-26. The EPA points to the RCRA Part A permit application, CX 1, but it is signed by Mr. Batson in his corporate capacity as "Secy-Treas." The EPA also cites some corporate correspondence where Mr. Batson failed to include his corporate title. EPA Br. at 32. An examination of this correspondence shows that some of it was done on Southern Timber's letterhead, e.g., CX 3 and CX 7, and in the other the context is such as to make it clear that Mr. Batson was acting on behalf of the corporation, e.g., CX 4, CX 5.

satisfaction of the Mississippi Department of Natural Resources, all of the post-closure requirements can be imposed." ⁷² It is difficult to believe that Mr. Rollins would have made this statement without the knowlege and consent of Mr. Batson. ⁷³

In the second and final closure plan submitted in December 1984, it was stated that a complete closure plan could not be submitted until the State's Risk Assessment Model had been completed. The plan, again, went on to say as follows:

In the event that the evaluation provided by the risk assessment indicates that the site has not achieved a level of cleanliness suitable for certification as no longer hazardous, Southern Pine Wood Preserving Company will submit the information necessary for obtaining a post-closure permit for the facility. ⁷⁴

Thus, according to the representation made to the State, Southern Pine was prepared to go ahead with post-closure care, if its risk based closure was not accepted. In a letter Mr. Batson wrote to the Director of BPC on March 12, 1985, somewhat less than three months later, a somewhat different approach was taken with respect to the consequences of not accepting clean-closure. There, Mr. Batson stated as follows:

Dear Charles:

I am enclosing a copy of a letter I wrote to Mr. McMillan regarding the serious financial condition of Southern Pine Wood Preserving Company. We do not have the financial resources to continue trying to meet mindless requirements. We have removed the waste, we have capped the site with clay, we have put down

⁷² RX 6A, p.2.

⁷³ See Tr. (IIA) 103-104, (IIB) 70-72.

⁷⁴ RX 13, pp. 2-3.

monitoring wells, and we have run the meaningless water test; all at a price which we could not afford. We do not have the money to take any further action. Perhaps, we should have quit business two years ago when we could not get a definitive answer from Mr. McMillan on "how clean is clean," but we chose to believe that if we could remove the waste and cap the site, then we would have met a reasonable test, so we spent the money. Now we need an opportunity to pay the money back and try to save the business.

We have requested a "Clean Closure" and have submitted the paper work to document the same. I am hopeful that reason and common sense will prevail and the Clean Closure is accepted as being adequate even though it may not meet every dot and tittle of the impossible law. Any further demands on our slim financial resources will put us out of business.

Yours truly,

Brax H. Batson, P.E. ⁷⁵

In this letter Mr. Batson could possibly have been simply speaking as an advocate on behalf of Southern Pine to have the State accept clean-closure and that Southern Pine could meet the requirements for post-closure care, if necessary. The more likely reading is that Southern Pine spent all its resources attempting to close in a manner that it hoped would persuade the State to grant it clean-closure, leaving it without the funds necessary for post-closure care. If this latter reading is correct, and it fits with what the record discloses about Southern Pine's financial condition at the time, ⁷⁶ then Batson had not been prudent in risking corporate resources on attempting to clean-close the facility if this meant that the company could not fulfill its

⁷⁵ RX 14.

⁷⁶ Supra, p. 34, n. 70.

obligations for post-closure care if clean-closure was ultimately rejected.

Mr. Batson's personal liability is not excused by the State's representations that a risk-based model would be adopted for two reasons:

First, until acceptable levels of contaminants had been set, it was not known whether what Southern Pine did was sufficient to obtain clean-closure. Hence, closure in place and post-closure care was always an eventuality Southern Pine had to be prepared for.

Second, the letter to Mr. Batson from BPC in October 1985, informed him that the EPA would not accept clean-closure unless the underlying soil was cleaned to nondetectable levels, which information was followed up by another letter from BPC in January 1987, that BPC would recommend against clean-closure. Mr. Batson nevertheless continued with his efforts to get the State to accept clean-closure. Respondents argue that they were warranted by the final authorization granted the State to obtain a ruling of clean-closure from the State.⁷⁷ If Mr. Batson had read the final authorization carefully, he would have noted that the EPA reserved the right to take enforcement action under Section 3008.⁷⁸ This

⁷⁷ Resps. Br. at 44-45.

⁷⁸ CX 11. Contrary to what Respondents may imply in their proposed finding No. 60, Resp's. Br. 17-18, there was no stipulation between Respondents and the State or between Respondents and the EPA that would affect the EPA's enforcement authority under Section 3008.

should at least have alerted him that the State may not have the final say on the matter and that it would be unwise to continue with clean-closure when he knew the EPA would not approve it because of the presence of the contaminated soil. The clean-closure he sought was questionable, based as it was on a policy that he had hoped would be forthcoming but had not been, while the BPC's and EPA's position was in accordance with the regulations.⁷⁹

The proper closure of impoundments and other ground facilities which contained hazardous wastes is an important part of RCRA, so important, in fact, that Congress enacted the Hazardous and Solid Waste Amendments of 1984 to ensure that they did not present a hazard to the environment.⁸⁰ Batson acted as the corporate officer in charge of Southern Pine's compliance with this important part of RCRA. He relied on the BPC as long as their advice was favorable to his plan to clean close the facility, but when it no longer was, he proceeded to act on his own mistaken assumption that he could still free the impoundment from any further regulation under RCRA by getting the State to approve clean closure. This assumption was not justified in view of the express reservation by

⁷⁹ Respondents argue that the impoundment met the requirements of Sections 265.228(a) and (b), or if judged not clean closed the requirements of Section 265.228(c) for closure as a landfill. Resp's. R. Br. at 5-6. The reference is to the regulations as they read at the time. See Appendix, *infra*. It has already been shown that they did not meet the requirement of Sections 265.228(a) and (b). *Supra*, pp. 25-26. Respondents also overlook the fact that Section 265.310 setting forth the requirements for closure of a landfill requires post-closure care.

⁸⁰ See CX 33.

the EPA of its authority under Section 3008, and as already shown it is not in accordance with law.⁸¹ Mr. Batson, under these circumstances, cannot be said to have shown a responsible effort to comply with the closure requirements.

There is, of course, to be said in mitigation of Mr. Batson's conduct that what was done in the effort to achieve clean-closure did result in decreasing the environmental hazard created by the impoundment.

Thus, the EPA argues that removal of the sludge was a needless waste of corporate funds.⁸² The alternative, of course, was stabilizing the waste in place.⁸³ Removal of the sludge did obviate the need to stabilize the waste in place and, in addition, all visibly contaminated soil was removed, which it would appear was not necessary for closure in place.⁸⁴ How much more costly removing the sludge and visibly contaminated soils was than closing in place is not shown by the record but the record does indicate

⁸¹ Supra, pp. 26-32.

⁸² EPA Br. at 14.

⁸³ Stabilizing the sludge meant putting it in condition (possibly by dewatering it) to enable it to support the cap that was placed over it. Tr. (IIB) 69.

⁸⁴ Tr. (IIA) 140; RX 13, p. 5. The State originally required in its order in complaint No. 649-83, that the sludge and contaminated soils be removed. RX 8. Mr. Rollins protested this order proposing that Southern Pine undertake groundwater monitoring. RX 36. The amended order did delete the requirement to remove the sludge and contaminated soils and directed that groundwater monitoring be instituted. RX 9. Southern Pine went ahead anyway with the removal of the sludge and contaminated soils in connection with its subsequent closure plan. RX 11, 12.

that the company's financial condition was such that its resources needed to be conserved as much as possible and that closing in place by stabilizing the sludge would be cheaper.⁸⁵ Nevertheless, the impoundment was undoubtedly left less hazardous by removal of the sludge and visibly contaminated soil.

The EPA also argues that Southern Pine's groundwater monitoring system was improperly installed and incapable of evaluating groundwater in the uppermost aquifer.⁸⁶ The record demonstrates that the system was properly designed with one monitoring well installed hydraulically upgradient and three wells installed downgradient at the limits of the impoundment. The actual placement and drilling was done under the supervision of BPC officials.⁸⁷ The weight of the evidence is that the wells were drilled to the depth necessary to monitor what was most likely to be the uppermost aquifer and that the wells did adequately monitor pollution in this aquifer.⁸⁸ It is possible that under current standards the EPA might have questioned the adequacy of the system. The record shows, nevertheless, that the system was approved by the

⁸⁵ See Tr. (IIB) 69; RX 14 (letter from Mr. Batson to Charles Chisolm dated March 12, 1985); supra, p. 34, n. 69.

⁸⁶ EPA Br. at 28-29.

⁸⁷ Tr. (IIA) 117-123, (IIB) 90. For placement of the wells, see RX 51. The well logs are found at RX 30. See also RX 14(n) and 14(o) for correspondence with BPC on installing the monitoring wells.

⁸⁸ The wells were installed in the pink sand which was encountered at a depth of about 30 feet. RX 30. Ms. Gettle did not question that pink sand represents an aquifer. Tr. (I) 151, 152.

State as in compliance with its requirements at the time and that Respondents could in good faith rely on the results obtained from the sampling done by the State showing no K001 constituents in the aquifer being monitored. ⁸⁹

The EPA argues that Southern Pine had several indications that there had been a release from the impoundment, namely the trace odors of creosote noted in Well Nos. 3 and 4 above the pink sand but at a depth below the impoundment. ⁹⁰ Undoubtedly this was evidence of the presence of K001 waste constituents in the surrounding soil, but it was not inconsistent with the evidence showing no pollution in the aquifer identified by the soil borings. ⁹¹

⁸⁹ Supra, p. 14. Mr. Bokey in his drilling on April 14, 1987 found water in Auger Hole No. 3 at a depth of about 6 feet. Tr. (I) 345. Mr. Bokey did not claim this was leachate from the impoundment but groundwater from a saturated zone. Tr. (I) 354, 357-358. The evidence is inconclusive on whether this was truly groundwater as defined in the regulations, 40 CFR 260.10 (water in a zone of saturation) or water from soil not saturated but with a high moisture content. See Mr. Rollins' analysis, Tr. (IIB) 123-126; see also, RX 45. The type of soil encountered by Mr. Bokey in Auger Hole No. 3 is not identified other than the fact that it was a clay type material. See CX 58; Tr. (I) 348. For a possible explanation that the contaminants in the soil and in the water from auger hole No. 3, which was located outside the impoundment, came from a source not attributable to the impoundment, see Mr. Rollins' testimony, Tr. (IIB) 141-143.

⁹⁰ EPA Br. at 28. Well No. 3 showed light brown sand with a trace odor of creosote at depth of about 16 feet and Well No. 4 showed light brown sand with a trace odor of creosote at a depth of about 19 feet. RX 30. The impoundment was about 5 feet deep. RX 13, p. 4.

⁹¹ Tr. (IIB) 87-88.

Nevertheless, the net result of the efforts to obtain clean-closure was an impoundment still in violation of RCRA's requirements because detectable levels of contaminants remained and a company with insufficient funds to provide post-closure care. Mr. Batson's personal involvement in the corporate decisions that created this situation justify holding Mr. Batson individually liable for the violation and subject to the compliance order.

Authority to support Mr. Batson's individually liability is found in the cases of United States v. Conservation Chemical Co. of Ill., 660 F. Supp. 1236 (N.D. Ind., 1987), and United States v. Northeastern Pharmaceutical & Chemical Co., Inc., 810 F.2d 726 (8th Cir. 1985).

In Conservation Chemical, a company storing hazardous waste in surface impoundments on its property lost its interim status and was required to submit closure and post-closure plans. The company failed to do so and the EPA brought an enforcement action under Section 3008 to compel the company and its President and principal stockholder to comply with the closure and post-closure requirements.⁹² The complaint alleged that the President was responsible for the overall operation of the plant and made decisions concerning environmental compliance.⁹³ The court refused to dismiss the complaint against the President individually, saying that he was a "person" within the meaning of Section 3008(a) and that holding

⁹² Conservation Chemical, 660 F. Supp. at 1241-1242.

⁹³ Conservation Chemical, 660 F. Supp. at 1245.

corporate officers liable under RCRA is consonant with congressional intent.⁹⁴ The court cited with approval the following statement from Northeastern Pharmaceutical & Chemical Co., supra, 810 F.2d at 745:

More importantly, imposing liability upon only the corporation, but not those corporate officers and employees who actually make corporate decisions, would be inconsistent with Congress' intent to impose liability upon the persons who are involved in the handling and disposal of hazardous substances.⁹⁵

In Northeastern Pharmaceutical & Chemical Co., a company had contracted for the disposal of hazardous waste on a site not suitable for the disposal of hazardous waste. The EPA brought suit against the company and the corporate officers who were responsible for arranging for the disposal, seeking among other relief injunctive relief and reimbursement of response costs for cleaning up the site, pursuant to RCRA, Section 7003, 42 U.S.C. Section 6973. That section authorizes the EPA upon receipt of evidence that the past or present disposal or other management of hazardous waste may present an imminent and substantial endangerment to health and the environment to bring suit against any person who has contributed or is contributing to such disposal or other management of the waste to restrain the person and obtain such other relief as necessary. The complaint also sought relief

⁹⁴ Conservation Chemical, 660 F. Supp. at 1246.

⁹⁵ Conservation Chemical, 660 F. Supp. at 1246.

under Sections 104 and 107 of the Comprehensive Environmental, Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. Sections 9604, 9607. The district court dismissed the Section 7003 count on the grounds that liability under this provision required a finding of negligence. On appeal, the court of appeals reversed. Pertinent to this case is the court's holding that though there were no grounds for piercing the corporate veil, the corporate officer who arranged for the transportation and disposal of the waste and the corporate officer who had the ultimate authority to control the disposal of the waste could be held individually liable for contributing to an imminent and substantial endangerment to health and the environment.

In this case, there is no finding that the impoundment may create an imminent and substantial endangerment to health and the environment. ⁹⁶ But the definition of "person" for purposes of

⁹⁶ The EPA argues that the impoundment poses an environmental threat to the nearby groundwater. EPA Br. at 16. The evidence is in conflict as to how serious that threat may be. Respondents' sampling showed no contamination of the groundwater. Mr. Bokey's one sample may or may not have been taken from groundwater in a saturated zone. See supra, p. 42, n. 89. Mr. Bokey also found additional evidence of hazardous waste constituents in the soil. See CX 58. Mr. Rollins was of the opinion that while such levels would be of tremendous concern if found in drinking water, this would not necessarily be true if they were found in the soil. Tr. (IIB) 166-167. The question need not be resolved here. Proof that the environmental threat caused by the violation is not serious might be relevant in considering the appropriate penalty, see RCRA, Section 3008(a)(3), 42 U.S.C. 6928(a)(3). It is sufficient for requiring post-closure care that the impoundment has not met the requirements for clean-closure, and that there is soil contaminated with hazardous constituents which may present an environmental threat remaining in the impoundment. (continued...)

Section 3008 is as broad as for purposes of Section 7003. In addition, it seems obvious that post-closure care is required in order to forestall the impoundment from reaching the point where it may become an imminent and substantial endangerment to health and the environment, or, at least, to insure a prompt response if there is evidence that is likely to happen. Thus, the same reasons that led the court to hold the individuals personally liable under Section 7003 as individuals who contributed to the imminent and substantial endangerment to health and the environment seem equally applicable here.

It is also not necessary to reach the question whether Mr. Batson, like the individuals in Northeastern Pharmaceutical, should be held strictly liable. Unlike the facts in Northeastern Pharmaceutical, where the disposal occurred before RCRA became effective in 1976, the violation here occurred after the regulation became effective, and for the reasons noted above, it is also held that Mr. Batson was negligent in persisting in his efforts to achieve clean-closure to the point where the company was unable to comply with post-closure care requirements and then aggravating the company's noncompliance by making the groundwater monitoring wells unusable.⁹⁷ If personal liability can be

⁹⁶(...continued)
If the contaminated soil, in fact, is not hazardous there is a procedure under the regulations for petitioning to have it excluded as a hazardous waste. See 40 C.F.R. Sections 260.20 and 260.22 (referenced in 261.3(d)).

⁹⁷ See CX 58.

established for corporate non-negligent behavior, then there are stronger reasons for holding individually liable a corporate officer like Mr. Batson, who was responsible for the negligent handling and disposal of hazardous substances. ⁹⁸

It is accordingly held that Mr. Batson is individually liable and properly made subject to the compliance order.

ORDER ⁹⁹

Pursuant to RCRA, Section 3008(a), 42 U.S.C. 6928, Respondents Southern Timber Products, Inc. d/b/a Southern Pine Wood Preserving Company and Mr. Brax Batson are hereby ordered to take the following actions upon receipt of this order:

A. Within twenty (20) days, submit an interim post-closure plan in accordance with 40 C.F.R. 265.118-119. Proper post-closure care in accordance with 40 C.F.R. 265.117-120 should begin immediately. This will include the requirement to monitor the

⁹⁸ Northeastern Pharmaceutical, 810 F.2d at 745. In the case of Joslyn Corp. v. T.L. James & Co., Inc., 696 F. Supp. 222 (W.D. La. 1988), the court refused to pierce the corporate veil and hold the parent of a subsidiary whose stock was wholly owned or controlled by the parent liable for response costs under CERCLA, Section 107, 42 U.S.C. 9607. These costs were incurred in cleaning up a facility owned and operated by the subsidiary. The court's language indicating that personal liability cannot be imposed upon corporate officers under CERCLA unless there are grounds for piercing the corporate veil, 696 F. Supp. at 226, appears to reflect only this court's particular view with the weight of authority being the other way. See the very law review comment cited by the court, 38 Mercer L. Rev. 677 (1987).

⁹⁹ Unless an appeal is taken pursuant to the Rules of Practice, 40 C.F.R. Section 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. See 40 C.F.R. Section 22.27(c).

groundwater as required by 40 C.F.R. 265.118(a) and specified in 40 C.F.R. 265 Subpart F.

B. Within twenty (20) days, establish financial assurance for post-closure care as required by 40 C.F.R. 265.145. This should be established by choosing from options as specified in 40 C.F.R. 265.145(a) through (e), and demonstrated by the submittal of an instrument with wording identical to that specified in 40 C.F.R. 264.151.

C. Respondents shall pay a penalty of \$1,000 per day for each day of noncompliance after the twenty (20) day schedule set forth in paragraphs A and B above, has elapsed. Noncompliance with each individual regulatory requirement under this schedule shall constitute a separate day of violation for the purpose of calculating the amount of any penalties.

D. All documents required in paragraphs A and B above shall be submitted to:

- (1) Patrick M. Tobin, Director
Waste Management Division
U.S. Environmental Protection Agency
345 Courtland Street, N.E.
Atlanta, Georgia 30365
- (2) Charles Chisolm, Director
Bureau of Pollution Control
Mississippi Department of
Natural Resources
P.O. Box 20305
Jackson, Mississippi 39209

Notwithstanding any other provision of this Order, an enforcement action may be brought pursuant to Section 7003 of

RCRA, 42 U.S.C. Section 6973, or other statutory authority should EPA find that handling, storage, treatment, transportation, or disposal of solid waste or hazardous waste at the facility may present an imminent and substantial endangerment to human health or the environment.

Gerald Harwood
Gerald Harwood
Chief Administrative Law Judge

DATED: November 13, 1989
Washington, D.C.

APPENDIX

40 C.F.R §265.228

(Prior to September 15, 1987)

(45 Fed. Reg. 33246 (May 19, 1980))

§ 265.228 Closure and post-closure.

(a) At closure, the owner or operator may elect to remove from the impoundment:

- (1) Standing liquids;
- (2) Waste and waste residues;
- (3) The liner, if any; and
- (4) Underlying and surrounding contaminated soil.

(b) If the owner or operator removes all the impoundment materials in paragraph (a) of this section, or can demonstrate under § 261.3(c) and (d) of this chapter that none of the materials listed in paragraph (a) of this Section remaining at any stage of removal are hazardous wastes, the im-

pondment is not further subject to the requirements of this part.

[*Comment:* At closure, as throughout the operating period, unless the owner or operator can demonstrate, in accordance with § 261.3 (c) or (d) of this chapter, that any solid waste removed from the surface impoundment is not a hazardous waste, he becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of Parts 262, 263, and 265 of this chapter. The surface impoundment may be subject to Part 257 of this chapter even if it is not subject to this part.]

(c) If the owner or operator does not remove all the impoundment materials in paragraph (a) of this section, or does not make the demonstration in paragraph (b) of this section, he must close the impoundment and provide post-closure care as for a landfill under Subpart G and § 265.310. If necessary to support the final cover specified in the approved closure plan, the owner or operator must treat remaining liquids, residues, and soils by removal of liquids, drying, or other means.

[*Comment:* The closure requirements under § 265.310 will vary with the amount and nature of the residue remaining, if any, and the degree of contamination of the underlying and surrounding soil. Section 265.117(d) allows the Regional Administrator to vary post-closure care requirements.]