

11/24/03

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Burlington Northern Railroad Co.,) Docket No. CAA-VIII-92-12
)
Respondent)

INITIAL DECISION

CAA, section 113(d) - Adequate notice given that a rule prohibiting the open burning of creosote-treated railroad ties was included in the State's SIP.

CAA, section 113(d) - State's SIP found to have been violated when Respondent burned creosote-treated railroad ties under a permit granted by the State pursuant to an amendment to a rule in its SIP prohibiting the open burning of creosote-treated railroad ties and the amendment had not been approved by the EPA.

CAA, section 113(d) - Proposed penalty reduced for open-burning of creosote-treated railroad ties, when burning did not affect implementation or maintenance of national ambient air quality standards and was done in accordance with permit conditions designed to protect human health and welfare.

CAA, section 113(d) - The burning of ten piles of treated railroad ties, stacked 20 ties to a pile, on the same day within the area specified in a state-issued burning permit constituted one violation.

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OPINION

The EPA, proceeding under the Clean Air Act ("CAA"), section 113(d), 42 U.S.C. 7413(d), seeks to assess a civil penalty in the amount of \$65,530, against Respondent, Burlington Northern Railroad Co. ("BNR"), for an alleged violation of a requirement of Montana's applicable implementation plan.¹

BNR answered and denied the violation and raised several defenses both to the violation and to the appropriateness of the proposed penalty for any violation that may be found.

A hearing was held in Helena, Montana, on June 15 - 16, 1993. Both sides have submitted posthearing briefs. On consideration of the entire record and the submissions of the parties, this initial decision is issued.

¹ CAA, section 113(d), 42 U.S.C. 7413(d) provides for the assessment by the Administrator of civil penalties of up to \$25,000 per day against a person found, after an adjudicative hearing under 5 U.S.C. 554 and 556, to have violated any requirement or prohibition of an applicable implementation plan. An "applicable implementation plan" is defined as that portion of a state implementation plan (developed under the CAA, section 110, 42 U.S.C. 7410), or most recent revision, which has been approved by the Administrator. CAA, section 302(q), 42 U.S.C. 7602(q).

Proposed findings of fact inconsistent with this decision are rejected.

Preliminary Statement

BNR is a Delaware Corporation that conducts business in Montana.² On July 17, 1991, BNR, pursuant to a permit granted by the Air Quality Bureau of the Montana Department of Health and Environmental Sciences ("AQB") burned 200 railroad ties in an area about two miles from Naismith, Montana.³ The permit had been granted by AQB under Montana's open burning rule, which on January 21, 1991, had been changed from an unqualified prohibition against the open burning of waste creosote-treated railroad ties to allow for the granting of permits to burn them under prescribed conditions. This modification had not been approved by the EPA.⁴

The parties have raised two issues with respect to the above incident:

First, whether BNR had fair notice that the change in Montana's open burning rule to allow the open burning of creosote-treated waste railroad ties by permit was a revision to Montana's approved state implementation plan ("SIP"), and required EPA approval before it could go into effect.

Second, if BNR violated the SIP by its open burning of the railroad ties, whether the proposed penalty of \$65,300, is

² Admitted, answer Par.1.

³ Respondent's Exhibit 4.

⁴ The modification was submitted to the EPA on April 9, 1991. EPA Exhibit 7. It was disapproved by the EPA by notice published in the Federal Register on December 21, 1992. EPA Exhibit 17.

appropriate given the circumstances under which the burning was done.

I. The Facts

The Montana SIP

Montana's implementation plan consists of the various measures adopted by the State to implement, maintain and enforce primary and secondary ambient air quality standards ("National Standards") prescribed by the EPA.⁵ The plan and any revisions thereof must be submitted to the EPA for approval within a certain time after a National Standard has been prescribed.⁶ Once the submission, either the initial plan or any revision thereof, is approved by the EPA, it becomes by definition part of the State's "applicable implementation plan" or SIP, and enforceable by the EPA as well as by the State.⁷

Montana's current SIP is not compiled and published in one comprehensive document.⁸ To find out what the SIP consists of, one has to go to the publication of the SIP in the Code of Federal Regulations, 40 C.F.R Part 52, Subpart BB (sections 52.1370 - 52.1388). Certain Federal Register publications are also stated to

⁵ CAA, section 110, 42. U.S.C. 7410.

⁶ The Administrator reviews the submission to determine whether it meets with the statutory requirements. If the Administrator determines that it does not meet with the statutory requirements, the Administrator is authorized to apply certain sanctions against the state. CAA, sections 110(k) - (l), 42 U.S.C. 7410(k) - (l).

⁷ Supra, p. 1, n.1.

⁸ The latest compilation was in 1981. Transcript of proceedings (hereafter "Tr.") 93.

be incorporated by reference into the Part 52 identification of the SIP.

The Open Burning Restrictions As Part of the SIP

In April 1979, Montana submitted to the EPA its revised SIP in response to the 1977 amendments to the Clean Air Act. Included in the revised SIP was Montana's open burning regulation, which among other measures, prohibited the open burning of treated railroad ties. The regulation was referred to as part of Montana's strategy to control ambient particulate matter for which National Standards had been set.⁹

On April 22, 1982, AQB submitted to the EPA a revised version of the open burning rule. Among other changes, the revised rule provided for the granting of temporary permits for the disposal by open burning under prescribed conditions of wood and wood byproduct trade wastes and untreated wood waste that was in a licensed landfill site.¹⁰ In its letter of submittal, AQB requested that the revised rule be incorporated in the State's SIP, saying that "this should not be a problem since the previous open burning rules were not specifically used in an analysis of attainment for any of the non-attainment areas....we believe the rule provides for an equally effective air pollution control strategy as the existing SIP."¹¹

The open burning of treated railroad ties was not affected by

⁹ EPA Exhibit 1 (Rule 16-2.14-S1490); Tr. 73-74. According to the EPA, the State's open burning regulation has been a part of the SIP since it was first issued in 1968. See EPA Exhibit 13.

¹⁰ EPA Exhibit 4.

¹¹ EPA Exhibit 4.

the revisions, and was still prohibited.¹²

The revisions in the open burning rules were approved by the EPA by notice in the Federal Register for July 15, 1982.¹³ The notice stated as follows:

The State has revised its open burning regulation. Under the revised regulation, minor open burners (as defined in the regulation) will not be required to get a permit for every open burn, but will be required to burn only during the months of March through August. Major burners will be required to employ Best Available Control Technology (as defined in the regulation).

These changes in the State's regulation are primarily procedural in nature and are expected to have little, if any, impact on existing air quality.¹⁴

In the compilation of Montana's SIP in the Code of Federal Regulations, there is the following reference to the revised open burning rule in the section headed "Identification of Plan":

¹² EPA Exhibit 4.

¹³ EPA Exhibit 5. The Federal Register for this date is also listed as one of the documents incorporated by reference into Part 52. See Volume for 40 C.F.R. Part 52, p. 955.

¹⁴ EPA Exhibit 5. Actually, the revision deleted a restriction against the burning of trade wastes except in a device that limited the opacity of the smoke emission and replaced it with the granting of permits where the Department of Health and Environmental Services determined that open burning constituted best available control technology ("BACT") as defined in the regulation and that the emissions would not endanger public health or welfare or cause a violation of any Montana or National standard. Compare Rule 16-2.14(1)-S1490(4)(c) (EPA Exhibit 1) with Rules 16.8.1301(1), 16.8.1302(2)(s) and 16.8.1307(a) (EPA Exhibit 4).

On April 21, 1982, and April 22, 1982, Montana submitted revisions to the open burning regulation and redesignated the Anaconda area from nonattainment to the attainment for sulfur dioxide (SO₂).¹⁵

Thus, neither the Federal Register notice nor the reference in the EPA regulations specifically say that under the revised rule the open burning of treated railroad ties was still prohibited. One would actually have to read the revised rule to find this out.

The 1991 Amendment to the Regulation

The 1991 amendment to the regulation to allow creosote-treated railroad ties to be burned under conditional permits came about because the Board of Health and Environmental Sciences ("Board") on application by BNR and the other Montana Railroads had been granting variances from the rule to allow for the burning of railroad ties in specific instances.¹⁶ These variances were granted pursuant to the Montana Clean Air Act, which provided in pertinent part as follows:

75-2-212. Variances-renewals-filing fees. (1) A person who owns or is in control of a plant, building, structure, process, or equipment may apply to the board for an exemption or partial exemption from the rules governing the quality, nature, duration or extent of emissions of air pollutants. The application shall be accompanied by such information and data as the board may require. The board may grant an exemption or partial exemption if it finds that:

(a) the emissions occurring or proposed to occur do not constitute a danger to public health or safety; and

(b) compliance with the rules from which exemption is sought would produce hardship without equal or greater

¹⁵ 40 C.F.R. 52.1370(c)(10).

¹⁶ Respondent's Exhibit 1 (Transcript of Hearing, p. 5).

benefits to the public.¹⁷

The Montana Clean Air Act, of which this provision was a part, was included in the revised SIP submitted to the EPA in 1979.¹⁸

None of the variances granted by the Board were submitted to the EPA for approval. The EPA, however, was notified of the hearings for the variances.¹⁹

The Board became dissatisfied with the process of continual variance requests and directed AQB to work with Montana's railroads to see if there was not a better solution to the problem of disposing of waste railroad ties. The result was a proposal submitted by BNR and other Montana railroads to amend the open burning rules in a manner similar to the earlier amendment allowing for conditional open burning permits for wood trade wastes. The proposal would exclude creosote-treated railroad ties from the unconditional prohibition against the open burning of treated wood, and allow permits to be issued for the temporary open-burning of creosote-treated ties if the Board determines the following:

- (i) Emissions from such open burning would not endanger public health and welfare or cause a violation of any Montana or federal ambient air quality standards; and
- (ii) such open burning constitutes the best available method for disposal of creosote-treated railroad ties, taking into account current and expected meteorological

¹⁷ MCA, section 75-2-212, BNR's post-hearing br. at 14, n.2. The complete text can be found at Env't Rep. (BNA) at 431:0104.

¹⁸ Tr. 44, 97.

¹⁹ Tr. 104, 234. The EPA did nothing about the variance hearings because, as Mr. Finke explained, it would not normally be the practice of the EPA to testify at a hearing before the Board unless the EPA were asked to testify. Tr. 89, 104.

conditions, proposed burn locations as they relate to topography, impact, area, populations, and any other factors the department deems relevant.²⁰

The proposed rule also provided that an air quality open burning permit for creosote treated railroad ties would be valid for a period not to exceed one year.²¹

A hearing on the proposal before the Board was publicly noticed and was held on November 9, 1990. The EPA was notified but in accordance with its practice did not appear.²² Several persons testified including a Certified Industrial Hygienist, Ms. Elizabeth Taylor, who was sponsored by BNR. Ms. Taylor discussed the scientific evidence relating to the risk of cancer from the open burning of creosote treated railroad ties, including a Minnesota study. In her opinion, the burning of creosote treated railroad ties under the conditions in the proposed rule would not expose people to the risk of cancer.²³ On January 21, 1991, the Board adopted the proposed rule.²⁴ On April 9, 1991, the State submitted the revised rule to the EPA as a modification of the State's SIP.²⁵

²⁰ EPA Exhibit 6.

²¹ EPA Exhibit 6.

²² Tr. 56. The EPA might have saved itself the expense of this lawsuit, however, if it had at least alerted AQB about the EPA's concerns with respect to burning creosote-treated wood.

²³ Respondent's Exhibit 1 (Transcript of Hearing, pp. 22-41).

²⁴ EPA Exhibit 7, which is the submission to the EPA. (The Board's notice of adoption is Part 5 of the submission.)

²⁵ EPA Exhibit 7.

In May 1991, BNR applied for a permit to burn 1000 railroad ties in piles of 50 at a location in Toole County, 2 miles from Naismith, stated to be the nearest community. Although AQB had submitted the amended rule to the EPA, it did not wait for EPA's action on the submission but granted BNR's application. BNR was notified on June 24, 1991, that the application had been granted.²⁶ BNR reported that it burned 200 railroad ties on July 17, 1991, in accordance with the permit and the conditions prescribed therein.²⁷ This was the only burning done under the permit, because on August 2, 1991, AQB notified BNR that the EPA was questioning the rule change.²⁸

The EPA's Disapproval of the Amendment

The amended rule was submitted to the EPA as a modification of the State's SIP on April 9, 1991.²⁹ On June 12, 1991, the EPA notified AQB that the submittal was administratively and technically complete but that the EPA had serious concerns about the approvability of the revision because creosote is a suspected carcinogen and mutagen and creosote-treated wood could be considered hazardous waste if it exhibited any of the characteristics of hazardous waste. The State was requested to

²⁶ Respondent's Exhibit 4.

²⁷ Respondent's Exhibit 4.

²⁸ Respondent's Exhibit 6.

²⁹ EPA Exhibit 7.

respond by June 28, 1991.³⁰

Receiving no response to its letter, the EPA sent a second letter on September 12, 1991, warning that it would not approve the revision as submitted. In its letter, the EPA stated as follows:

EPA has determined that the State submittal cannot be approved as submitted. EPA believes that the open burning of creosote treated railroad ties is in direct conflict with Section 75-2-102 of the Montana Clean Air Act, which states that it is the public policy of the State to "achieve and maintain such levels of air quality as will protect human health and welfare..." (The Montana Clean Air Act is found in Chapter 13 of the approved Montana SIP.) The State's open-burning regulations do not adequately specify the measures the State plans to implement to regulate the burning of creosote-treated railroad ties for the protection of human health and welfare.

In addition, in the EPA's Position Document 4 on "Wood Preservative Pesticides: Creosote, Pentachlorophenol, Inorganic Arsenicals", EPA's position on disposal of treated wood is as follows:

Dispose of treated wood by ordinary trash collection or burial. Treated wood should not be burned in open fires, or in stoves or fireplaces because toxic chemicals may be produced in the smoke and ashes.

Because the State's open-burning regulations do not clearly spell out the specific requirements applicable to sources that burn creosote-treated railroad ties it is not evident that the state regulation will adequately protect human health and welfare.³¹

The EPA further stated that it "recently became aware" of the conditions under which the permit was granted to BNR. It questioned

³⁰ EPA Exhibit 9. It was also pointed out that the open burning of railroad ties could have an impact on PM-10 nonattainment areas, but this concern was not given as a reason for the EPA's final disapproval. See EPA Exhibit 13.

³¹ EPA Exhibit 11.

whether the requirement that open burning not be done within two miles of any community adequately protects human health and welfare, the absence of specific instructions on how the burning was to be done so as to limit emissions and, lastly, the absence of a requirement that BNR determine whether any of the treated ties being burned exhibit the characteristics of hazardous waste.³²

The EPA concluded its letter by saying that unless the EPA receives additional information by October 1, 1991, the EPA will propose to disapprove the revision to the open burning rules. It warned that if the revision is disapproved any source for which a permit has been issued may be subject to an enforcement action based upon the previous open burning regulation.³³

The State's response to the EPA's letter was not submitted within the time requested and notice of the EPA's proposed disapproval, essentially repeating the objections already given to the State, was published in the Federal Register for January 2, 1992.³⁴

II. BNR Had Fair Notice of The Open Burning Restrictions in the

SIP

The record establishes that Montana's open-burning regulation as revised in 1982, was submitted to the EPA as part of the State's SIP and approved by the EPA. The evidence also shows that this was

³² EPA Exhibit 11. For the permit conditions see EPA Exhibit 10.

³³ EPA Exhibit 11.

³⁴ EPA Exhibit 13. The State had indicated to the EPA that it could not respond to the EPA's concerns by October 1, 1992. Id.

the version of the regulation in the SIP when the ties were burned in 1991. There is no question, then, but that BNR's open burning of the 200 railroad ties in 1991 was a violation of the SIP.

BNR claims that it had no notice that the open-burning rules were part of the SIP, because the rule itself was not included in the regulation identifying the SIP or in any compilation of the SIP.

To find out what comprised the SIP, BNR would have to search no further than the EPA regulations dealing with Montana's SIP. There, under the section headed "Identification of Plan" it would have found the reference to the revisions to the open-burning regulation being submitted in 1982. Notice of the EPA's approval was also published in the Federal Register.³⁵

This is not a case where the reference to the open-burning rules was to some obscure regulation buried in the State's files. BNR was fully aware of the terms of the open-burning rule. The fact that BNR had been cited by the State for violation of the rule and

³⁵ This particular Federal Register was also listed as a document incorporated by reference in the regulations. It is questionable to what extent copies of the Federal Register can be incorporated by reference. See 1 C.F.R. section 51.7(c) (Materials published in the Federal Register are not appropriate for incorporation by reference). Nevertheless, publication in the Federal Register in itself is constructive notice of the contents. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). If BNR had examined the list of Federal Registers incorporated by reference, the pertinency of this particular Federal Register, following as it did the 1982 submission and being in the same year, would have been brought to BNR's attention.

variances from the rule is proof of that.³⁶

Nor is this an instance where the published references to the open-burning rules were subject to two inconsistent interpretations both of which were equally reasonable.³⁷ The lack of notice BNR complains about arose from what was left unsaid. I do not agree that the EPA was required either to include the terms of the rule in the regulations or incorporate by reference in the regulation a compilation of the SIP containing the rule.³⁸ The published references were sufficient to put BNR on notice that the 1982 revised rule had been submitted to the EPA as part of the State's implementation plan. I do not see how they could be subject to any other interpretation. I find that this was all the notice that was required, given that BNR had actual notice of the rule itself.

BNR argues, however, that the fact that variances were granted by the State prior to 1991, without EPA approval is proof of the lack of adequate notice that the rules themselves were part of the SIP. There are really two questions to be considered in addressing this argument.

The first question to be answered is whether the variances

³⁶ See EPA Exhibits 21-26 (State court proceedings in 1984, 1985 and 1987, against BNR for violations of the rule or of a variance).

³⁷ Cf. Rollins Environmental Services, Inc. v. U.S.E.P.A., 937 F. 2d 649 (D.C. Cir. 1991).

³⁸ The requirement in the CAA, section 110(h)(1), 42 U.S.C. 7410(h)(1) that the EPA publish a comprehensive document setting forth each state's SIP was directory and not mandatory, since the statute does not specify that any consequences are to follow for failure to comply. Twin Pines Coal Co. v. U.S. Dept. of Labor, 854 F 2d 1212, 1216-17 (10th Cir. 1988).

from the rule granted by the State were plan revisions that must be approved by the EPA. The EPA's interpretation is that they were, and this is accepted as the correct interpretation here.

The second question is whether the State knew or should have known that the variances required EPA approval. If the regulations were insufficient to put the State on notice that the variances required EPA approval, they were also insufficient to put BNR on notice, since there is no evidence that BNR knew or should have known more about the variance requirements than the State did.

The State could reasonably assume that the authorization in Montana's Clean Air Act to grant variances was part of the SIP. The variance provision was included in the State's Clean Air Act submitted in April 1979.³⁹ There is no indication in either the regulations themselves or in the Federal Register notices that are listed as incorporated by reference that it was not included in the EPA's approval of that submission.⁴⁰

The reasonable interpretation of an SIP is that what is not disapproved in a State implementation plan is approved. Otherwise a party would be left guessing as to what parts of the submission do constitute the SIP and this would not be adequate notice of the

³⁹ Supra, p. 8.

⁴⁰ Tr. 96; 40 C.F.R. 52.1370(c)(10) and Subpart BB generally; 40 C.F.R. Chapter I (Part 52) at 955. The Federal Register notices incorporated by reference which discuss the revised plan submitted in April 1979, are the Federal Register for January 10, 1980 (EPA Exhibit 2), and the Federal Register for March 4, 1980 (EPA Exhibit 3).

SIP's provisions.⁴¹

The EPA argues, nevertheless, that variances even if granted under an SIP that authorizes variances, are plan revisions and as such must be approved by the EPA. The EPA's regulations, however, do not clearly show this. In the section dealing with revisions, it is provided that in order for a variance to be considered as a revision to the SIP, it must be submitted in accordance with the requirements for a revision.⁴² A reading of the entire section discloses that the revisions therein discussed are revisions affecting the attainment or maintenance of National Standards.⁴³

Nothing in this record shows that the open-burning that was done either by variance or by permit affected the maintenance or achievement of the National Standard for particulate matter or of any other National Standard.⁴⁴ In fact, the evidence is to the

⁴¹ Mr. Finke, an EPA employee in the Helena, Montana Office, and Mr. Homer, an employee of AQB, both testified that they were uncertain whether the EPA approved variances as part of implementation plans. Tr. 97-98, 220. They did not, however, identify any specific published policy to support their testimony. In fact, the case of Train v. Natural Resources Defense Council, 421 U.S. 60 (1975), cited by the EPA, would indicate that the EPA did approve variances as part of an SIP, since that case involved the validity of the EPA's approval of a variance procedure in an SIP.

⁴²40 C.F.R. 51.104(g).

⁴³ 40 C.F.R. section 51.104.

⁴⁴ There is no specific standard applicable to emissions from burning creosote-treated wood and creosote is not listed as a hazardous air pollutant under the CAA, section 112(b), 42 U.S.C. 7412(b). Tr. 79, 130.

contrary.

For one thing, the 1982 amendment with respect to the open-burning of trade wastes substituting controlled open-burning by permits for the restriction that hitherto applied was submitted by AQB as not affecting the attainment of National Standards and as being as effective in controlling air pollution as the existing rule. The EPA in its approval appeared to agree, describing the change as "procedural." The burning of trade wastes, however, could contribute to the emissions of particulate matter.⁴⁵

For another, the EPA disapproved the amendment allowing for permits for the burning of railroad ties not because of the effect of the open burning on achieving or maintaining any National Standard but because it did not meet the State's own requirement that the State achieve and maintain such air quality as will protect human health and welfare.

The State's granting of the variances, consequently, must be judged against the lack of specificity in the law and regulations as to how variances from state requirements in an SIP are to be treated. If the State found that the emissions from the open-burning did not affect the achievement or maintenance of any National Standard (which the EPA seemed to agree with) and were adequately controlled by the conditions imposed by the variance with respect to protecting human health and welfare (which was a State requirement for granting the variance), the State reasonably

⁴⁵ Mr. Finke, Chief of the Air, Hazardous Waste and Toxics Branch, in the EPA's Montana office did testify generally that open-burning is a source of particulate matter. Tr. 66.

could believe that variances for burning railroad ties, granted pursuant to its authority in the SIP, did not have to be submitted to the EPA as a plan revision.⁴⁶ That the State in good faith believed that the variances did not have to be submitted to the EPA is shown by the fact that it did submit the amendment to the rules as part of the SIP.⁴⁷

There is, however, a difference between a variance granted as an exception to a requirement and a revision to a regulation which regularizes the procedure through a permitting process. While the EPA's regulations may have been ambiguous with respect to whether the variances from the open-burning restrictions had to be approved by the EPA, the same cannot be said with respect to whether EPA approval was necessary for the amendment to the rules included in the SIP. The State itself recognized this for it submitted the amended rule to the EPA in April, stating that it was doing so to make the SIP consistent with the State's plan.⁴⁸

It is true that after its submission of the amended rule to

⁴⁶ Tr. 97-98, 220. For conditions imposed by a variance, see EPA Exhibit 24 (Order Granting Temporary Variance).

⁴⁷ The EPA cites the case of Train v. Natural Resources Defense Council, 421 U.S. 60 (1975) as authority for its argument that variances must be approved as SIP revisions. That case, however, dealt with the authority of the EPA to approve state plans that provided for variances that could affect the achievement or maintenance of National Standards. The fact that the EPA had to approve the variances was assumed by the Court and not really contested by the parties. See 421 U.S. at 92. The issue of whether the EPA's rules themselves gave adequate notice that all variances of whatever nature from the requirements in an SIP must be approved by the EPA as revisions was not really involved.

⁴⁸ EPA Exhibit 7.

the EPA, AQB went ahead and granted a permit to BNR notwithstanding that it had received a letter from the EPA on June 12, 1991, questioning the amendment and asking for further information.⁴⁹ The reasoning behind the State's action is explained in the following testimony of Mr. Homer, an employee of AQB:

It was our impression that open burning was not a great concern to EPA and that we had issued a permit to Burlington Northern and that based on those two things they hadn't shown an interest and wouldn't take action.⁵⁰

Mr. Homer went on to explain further that AQB's understanding that the EPA was not concerned with the change to provide for temporary permits because the EPA had not involved themselves in the variance proceedings before and in the previous rule change.⁵¹

It is evident that the State's action in granting the permit cannot be ascribed to any lack of notice that the SIP prohibited the burning of creosote-treated ties, but on its interpretation of the EPA's prior actions. Nothing that the EPA had done previously, however, can be construed as inconsistent with the questions it was now raising about the amendment to the rule. True, the EPA had not sought to intervene in or question the variances granted by the State, but then, apparently, the EPA had never been expressly requested to do so. The EPA had never been given the opportunity to rule upon the variances because they had never been submitted to it. While the EPA had accepted the previous amendment as

⁴⁹ EPA Exhibit 9.

⁵⁰ Tr.223.

⁵¹ Tr. 224.

procedural, that amendment had involved the burning of a different product. The only thing that may have come as a surprise to the State is the fact that the EPA was questioning the permit as a violation of the State's requirements and not because of its effect upon any National Standard. BNR, however, has not pointed to any provision in the law or regulation which would preclude state requirements regulating emissions into the air from also being part of an SIP. The State also assumed too much in believing that the EPA would defer to the State's action. As already noted, the question of the acceptability of burning creosote-treated ties had never been put directly to the EPA.

It is found, accordingly, that BNR had adequate notice that the open burning of creosote-treated ties was prohibited by the SIP. It is further found that the burning of the creosote-treated ties pursuant to the permit granted under the amended rule was a violation of the SIP and that the State's decision to go ahead and permit the burning was based upon a misinterpretation of the EPA's position with respect to the open-burning rules and not upon any deficiency of notice as to what constituted the SIP.

Finally, it is found that the action taken by BNR upon reliance upon the State's interpretation of the EPA's position with respect to the open-burning rules does not excuse the violation. The statute requires EPA approval of State plans, including amendments and revisions thereto, and gives the EPA authority to enforce SIP violations separate and apart from the State's enforcement authority. It is clear from these statutory provisions

that the EPA's views on the propriety of the amended rule and the burning done thereunder were as important as the State's. BNR's argument, accordingly, that the State's interpretation of the SIP is what controls is incorrect. Instead, having been put on notice that the rule was identified as part of the State's plan submitted to the EPA, BNR should have sought advice not only from the State but also from the EPA as to whether the EPA had any objections to the rule change, or waited until the EPA had acted on the submission.⁵² In fact, there is no evidence that BNR ever actually sought advice either from the State or the EPA as to whether the open-burning rules were part of the SIP. Instead, BNR relied upon the State's silence, the State's willingness to go ahead with the permit amendment and upon the absence of any EPA participation in the process.

None of the cases cited by BNR are inconsistent with the conclusion reached here. They concerned situations where the notice was either ambiguous or omitted any reference to the requirement to which the party was being held.⁵³ The reference to the open-burning

⁵² It should be noted that the propriety of the EPA's disapproval is not a proper issue for consideration in this proceeding. The statute provides for direct judicial review of EPA's actions on state implementation plans and further provides that such action may not be reviewed in an enforcement proceeding. CAA, section 307(b), 42 U.S.C. 7607(b). Although not expressly referring to administrative enforcement, no reason is found why the same restriction should not also apply to administrative enforcement proceedings.

⁵³ See, e.g., Gates & Fox, Inc. v. OSHRC, 790 F. 2d. 154 (D.C. Cir. 1986) (the agency could not interpret a standard to include a requirement where the language itself was ambiguous); PPG Industries, Inc. v. Costle, 659 F. 2d. 1239 (D.C. Cir. 1981) (Agency could not interpret a regulation to include a requirement

rules as part of the State's plan was unambiguous and BNR's assumption that the open-burning rules were not included in the SIP could only have been reached by disregarding the regulation.

III. The Appropriate Penalty

The EPA's proposed penalty of \$65,530, is derived from the EPA's CAA Stationary Source Civil Penalty Policy, dated October 25, 1991 ("Penalty Policy").⁵⁴ I am required to consider this policy but am not bound by it, if I find reason to depart from it or to not apply it to a specific situation.⁵⁵

The statute provides for a maximum penalty of \$25,000 per day for each violation.⁵⁶ The EPA's penalty of \$65,530, is computed on the basis that since ten separate piles of ties, each containing 20 ties, were burned, there were ten separate violations, bringing the maximum penalty that could be assessed to \$250,000.

The evidence shows that the ten piles were all burned on the same day in accordance with the conditions specified in the permit, which applied to all the burnings, and that the burnings were done in the one mile area specified in the permit.⁵⁷ This is essentially a situation where the same facts underlie all ten violations. The

that was not supported by the regulation but by a guideline not contained in the regulation or incorporated by reference).

⁵⁴ Tr. 75. Official notice is taken of this document.

⁵⁵ 40 C.F.R. section 22.27(b).

⁵⁶ CAA, section 113(d), 42 U.S.C. 7413(d).

⁵⁷ The report of the burning showed that it took place between mile posts 93 and 94 along the right of way. Respondent's Exhibit 4.

only difference is that instead of one pile of 200 ties being burned, the ties were stacked in ten separate piles.

The EPA argues that if each burning is not held to be a separate violation, BNR will not be concerned about the extent of the land area that may be affected by its burning. The record shows, however, that the burning was done within an area that met the conditions specified by the permit, and not that the burning was done without regard to the locale.

Logically, the EPA's reasoning would mean that burning the 200 ties in piles smaller in number but each containing a greater number of ties, merits a smaller maximum penalty. This just does not make sense. If danger to the environment or to people is what governs, there isn't the slightest basis in this record for assuming that burning the ties in larger piles (or in adjacent piles which the EPA also seems to argue) would have been safer for the environment or for the personnel doing the burning.

I find, accordingly, that the burning of the ten piles of ties under the facts in this case constituted one violation.

The EPA's assessment is broken down into different factors mentioned in the Penalty Policy. After giving consideration to each of these factors, I am adjusting the proposed penalty as follows:

The EPA computed \$2,212, as the economic benefit realized by BNR from the violation. This is based on an estimated cost of \$11.08, a tie to haul the ties to an industrial furnace for

incineration.⁵⁸ The study from which this cost was derived also estimated a cost of \$2.60, per tie for open-burning, or a total of \$520 for the 200 logs.⁵⁹ The economic benefit would appear to be the difference between the costs. Consequently, this component of the penalty is reduced to \$1,692.

For the gravity component, the EPA assessed a penalty of \$5000, for a one day violation. The penalty policy makes no distinction between a violation, in this case the emissions from the burning ties, that lasts only one day and one that lasts a month. The reasoning is not clear, if, as the EPA says in the Policy Statement, the longer a violation continues, the greater the risk of harm.⁶⁰ Here, the record shows that the burning was done so as to be completed before dark, since this was required by the permit.⁶¹ If a one-month violation merits a \$5,000 penalty, it would seem appropriate to assess a smaller penalty for a one day violation. Accordingly, I find that an appropriate penalty for the one day violation in this case is \$1,000.

With respect to the importance of the violation to the regulatory scheme, the EPA considered the open burning a "work practice" violation that was a significant hazard to humans and the environment, and assigned a penalty of \$15,000, to this component.

⁵⁸ Tr. 76; EPA Exhibit 14. For the analysis of costs, see Respondent's Exhibit 1 (Railroad Tie Disposal Study, p. 22.)

⁵⁹ Respondent's Exhibit 1 (Railroad Tie Disposal Study, p.25.)

⁶⁰ Policy Statement, p. 10.

⁶¹ Respondent's Exhibit 4.

The burning was done two miles from the nearest community in a locality approved by AQB. The permit required that the burning be done during a period of good atmospheric dispersion. There is no evidence that BNR did not comply with this condition as well as other conditions in the permit inserted to protect human health and welfare.⁶² I find, accordingly, that the burning was done under conditions that minimized the risk to human health and welfare, and that the appropriate penalty should be assessed at the lower limit of \$10,000.⁶³

The EPA determined an amount based on BNR's size, by doubling the penalty already computed for economic benefit, importance to regulatory scheme and length of time, so that the penalty for this factor would not be more than one-half the total penalty for all these factors, termed the "preliminary deterrence amount". If the same procedure is followed here, the penalty for size of violator is reduced to \$12,692. Since this results in a penalty in excess of the \$25,000 maximum, the preliminary deterrence amount is assessed

⁶² Respondent's Exhibit 4; Tr. 205, 212-213.

⁶³ Dr. Wuerthle's testimony as to the hazards of burning creosote-treated wood was not specific as to the burning done at Naismith. Although, Dr. Wuerthle questioned some of the conclusions drawn by Ms. Taylor, BNR's expert witness at the State Board hearing, she did not really question Ms. Taylor's competency as an expert, and Ms. Taylor, unlike Dr. Wuerthle, appears to have been thoroughly questioned by the Board on her conclusions. Respondent's Exhibit 1 (Transcript of Hearing, pp. 22-41). Nor are the hazards created by creosote-treated railroad ties shown to be necessarily as great as the hazards created by other creosote-treated wood. See EPA Exhibit 9 (letter of David Bussard to Paul G. Buckholder) (the hazardous constituents in creosote-treated railroad cross-ties are generally not of a high enough concentration to bring the ties within the definition of a hazardous waste).

at \$25,000.

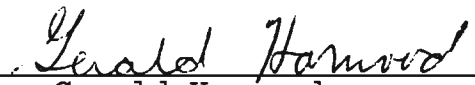
Since the penalty so computed is at the maximum amount, the upward adjustments contended for by the EPA could be made even if they were warranted. I further find, however, that on the facts in this case no upward adjustment would be warranted either for negligence or for BNR's asserted noncompliance. There is nothing in this record to charge BNR with greater knowledge about the SIP requirements than the State. The State acted on a good faith, but mistaken belief that it could amend the rule and grant the permit without EPA approval. The negligence that is shown here by BNR in relying upon State action is not such as to warrant any increase in the penalty. Also, whatever may have been the facts with respect to the other violations cited by the EPA, in this instance BNR did comply with the conditions imposed by the State to protect human health and welfare.

Accordingly, I find that the appropriate penalty is \$25,000.

ORDER⁶⁴

Pursuant to the Clean Air Act, section 113(d), 42 U.S.C. 7413(d), a civil penalty of \$25,000, is assessed against Burlington Northern Railroad Co. The full amount of the penalty shall be paid within sixty (60) days of the effective date of the final order. Payment shall be made in full by forwarding a cashier's check or a certified check in the full amount payable to the Treasurer, United States of America, at the following address:

EPA - Region 8
(Regional Hearing Clerk)
P.O. Box 360859M
Pittsburgh, PA 15251



Gerald Harwood
Senior Administrative Law Judge

Dated: November 24 1993

⁶⁴ Unless an appeal is taken pursuant to 40 C.F.R. 22.30, or the Environmental Appeals Board elects, sua sponte, to review this decision, this decision shall become the final order of the Agency. See 40 C.F.R. 22.27(c).