

The complaint herein charged respondent International Paper Company with numerous violations of regulations issued by the United States Environmental Protection Agency (EPA) pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6912, 6924, including the "alternate" ground-water monitoring system provisions of 40 CFR § 265.9(d) and regulations referred to therein 1/ and 40 CFR § 270.14(c), which requires, in connection with hazardous waste permit applications, the submission of certain information relating to the ground-water underlying a hazardous waste facility or connected hydraulically with the ground-water. The complaint also charged respondent with violations of the Washington Administrative Code, at 173-303-400(3) (Interim Status Facility Standards) which incorporate by reference 40 CFR § 270.14(c) 2/.

Respondent moved for summary judgment in connection with the complaint on the grounds of res judicata, arguing that the same charges had been the subject of a previous consent agreement and final order (in effect a final judgment) on September 30, 1985, between respondent and complainant. On April 19, 1990, respond-

1/ 40 CFR § 265.93(d)(3), 4), (5) which set forth design, monitoring, and system requirements, and the reporting provisions of 40 CFR § 265.94(b). See the complaint and compliance order of March 29, 1989, III Conclusions of Law, at 10.

2/ 40 CFR § 265.90(a) provides that respondent must ". . . implement a ground-water monitoring program capable of determining a facility's impact upon the quality of ground-water in the uppermost aquifer underlying the facility."

ent's motion was granted with respect to all of the charges in the complaint except for certain ground-water quality assessment reporting charges contained in paragraph 26 J (a) - (d), 3/ to the extent that these charges related to reports that were not yet due on September 20, 1985, the date of the consent agreement. 4/ It was held that any deficiencies in such reports could not have been known at the time of the 1985 agreement and were not, therefore,

3/ These paragraphs were as follows:

J. The following deficiencies were noted in the facility's 1985, 1986, and 1987 groundwater quality assessment reports and the 1988 first quarter assessment report:

a. Laboratory QA/QC data are not presented with analytical data.

b. Information regarding the presence of immiscible phase contaminants present in some monitoring wells is not included in any of the quarterly or annual assessment reports.

c. Analytical data for some wells, which were observed to be sampled during this inspection, were not presented in the first quarter 1988 assessment report. No rationale is given for this omission. /

d. No rationale is given for changes in analytes for ground water sampling, proposed in the first quarter assessment report.

4/ See Order Granting in Part and Denying in Part Respondent's Motion for Summary Judgment on the Basis of Res Judicata, April 19, 1990.

res judicata. 5/

Subsequently, on May 24, 1990, complainant moved for "accelerated decision" as to paragraph 26 J (a) - (d), on the ground that there is no genuine issue of material fact, and that complainant is therefore entitled to judgment as a matter of law as to that paragraph. 6/

In support of its argument that there is no genuine issue of fact or law remaining with respect to paragraph 26 J (a) - (d), complainant states that each of the reports lacked quality assurance/quality control (QA/QC) data with analytical data, and lacked information regarding the presence or absence of immiscible phase contaminants in respondent's monitoring wells. Complainant points to its proposed exhibit 155, at pp. 19-22, and to the submitted direct written testimony of proposed witness Keith Pine, at pp. 5-6, 21-24. With respect to the first quarter report for 1988, complainant asserts that respondent provided in the first quarter report for 1988 neither analytical data for wells that were sampled nor the rationale for omitting such data. In support, complainant cites respondent's answer to the complaint at paragraph 27(J)(C), which admits this charge, and respondent's proposed exhibit 31.

5/ Id., at 30, 37.

6/ See Memorandum in Support of Complainant's Motion for Accelerated Decision on Paragraph 26 J, May 24, 1990, at 6.

Further respecting the first quarter ground-water quality assessment report for 1988, complainant states that respondent failed to identify analytes for future ground-water sampling that differed from analytes reported in past sampling, and did not provide rationale for such changes. In support of this charge, complainant again cites its proposed exhibit 155, 19-22, and the previously submitted direct written testimony of Mr. Pine, 5, 6, 21-24.

In its response to the motion for "accelerated decision," respondent did not reply directly to arguments made in support of the motion. Instead, respondent argued for entry of an order that required respondent to cure all reporting deficiencies, and which dismissed the entire action with prejudice. 7/

Complainant's proposed exhibit 155, a "technical enforcement support" report by Jacobs Engineering Group Inc. Environmental Systems Division, makes clear that the absence of QA/QC data,

7/ Respondent's Response to EPA's Motion for Accelerated Decision, May 31, 1990.

Respondent's answer to the paragraph 26 J (a) - (d) charges in the March 29, 1989, complaint asserts that the information alleged to be missing from the reports by subparagraphs (a) and (b) (i. e. laboratory QA/QC data and immiscible phase contaminants) was not required to be submitted by the applicable regulations. The answer admits the charge of paragraph 26 J (c). With respect to the charge of subparagraph (d), respondent stated that "the analytes were changed to the groundwater protection constituents specified in 40 CFR § 264.93".

and the absence of information regarding whether immiscible phase contaminants were present in some monitoring wells, make it impossible to determine the accuracy and precision of the reports. 7/ Further, proposed exhibit 155 states that the field sampling procedures employed in connection with respondent's report departed from the ground-water sampling and analysis plan previously submitted to EPA. 8/ Mr. Pine's proposed testimony appears to be based upon proposed exhibit 155 and gives the same conclusions, at 21-24.

7/ "Where constituents were not detected at the detection limit, only qualitative indicators of less than detection limit values are presented in the data summary tables. Actual detection limits are not presented. Because laboratory QA/QC data (i. e. surrogate recoveries, method blanks, matrix spikes) are not presented with the data (or elsewhere in any assessment report), the qualitative indicators, and the accuracy and precision of the data cannot be adequately evaluated. Given the presented data, it cannot be determined if the 'less than the limit' of detection indicators noted represents the actual absence of a contaminant, the presence of a contaminant at very low concentrations, a matrix interference problem, or some other analytical problem." Jacobs TES IV Report (complainant's proposed exhibit 155), at 19.

Further, the report states that "(B)ecause analyses have been been conducted by so many different laboratories, it is crucial that QA/QC protocols and data be provided. . . ." Id., at 20.

"Critical information regarding the presence (or absence) of immiscible liquid phase contaminants in monitoring wells is not included in any of the quarterly or annual assessment reports." Id., at 21.

8/ "The plan states that prior to well purging, a small quantity of water will be removed with a bailer in such a manner as to allow for the detection of immiscible contaminants that may be present at the top of the water column (H)owever, the majority of the wells were purged using a peristaltic pump and no bailer was used to sample for floating immiscible layers. . . . "

The party that moves for summary judgment must show that there are no genuine factual issues; the party opposing the motion must meet the motion with a showing as to why there is an issue for trial, or must at least state why such a showing cannot be made, Fed. Rules Civ. Proc., rule 56, 28 U.S.C.A. Here, it is clear, and it is found, that respondent admitted the charge in paragraph 27 J (c), and that information critical to the water quality determinations envisioned by applicable regulations was missing from respondent's ground-water monitoring quality assessment reports as charged in paragraph 27 J (a), (b), and (d) of the March 29, 1989, complaint. Respondent's answer to (a) and (b), to the effect that the regulations do not require such information, does not adequately.

Accordingly, it is found that the deficiencies charged constitute violations of 40 CFR §§ 265.90(d)(4) and 265.93(d)(4), and that such violations constitute violations of a "requirement of this subchapter," § 3008(a) of RCRA, 42 U.S.C. § 6928(a) sufficient to support a compliance order.

It is further found that respondent operated a facility which generated hazardous waste through November, 1982; that respondent was subject to RCRA and submitted a Notification of Hazardous Waste Activity [§ 3010(a) of RCRA, 42 U.S.C. § 6930(a)] on or about August 18, 1980; that respondent submitted a Part A RCRA permit application, and obtained "interim status," i. e. statutory author-

ity to continue to operate pending disposition of the RCRA permit application, 40 CFR § 270.70, RCRA § 3005(e), 42 U.S.C. § 6925(e), and became subject to Subpart F and Subpart G of 40 CFR Part 265, and 40 CFR Part 270.

ORDER

It is therefore ordered that all future ground-water quality assessment reports in connection with respondent's Longview, Washington, facility shall be made in compliance with 40 CFR § 265.94(b) and shall include the following:

1. Data from the analysis of all ground-water samples shall be included in the reports.
2. Data from all field and laboratory quality assurance/quality control samples shall be presented with analytical data.
3. Data validation shall be presented with analytical results.

4. Any changes in the assessment program (for example, changes in wells sampled or constituents analyzed) shall be documented in the assessment reports.



J. F. Greene
Administrative Law Judge

Washington, D. C.
September 28, 1990

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460



IN THE MATTER OF

INTERNATIONAL PAPER CO.

Respondent

Docket No. RCRA-X-1089-01-22-3008

Judge Greene

ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT
ON THE BASIS OF RES JUDICATA

Respondent International Paper Company moved for summary judgment in connection with the complaint herein on the ground that virtually the same charges were the subject of a previous final judgment in the form of a consent agreement and final order between respondent and complainant, and are, therefore, res judicata. For the reasons set out below, the motion is granted in part and denied in part.

The complaint, filed pursuant to § 3008(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(2), on March 29, 1989, concludes that respondent violated (1) the "alternate" ground-water monitoring system provisions of 40 CFR § 265.90(d) and regulations referred to therein; 1/ (2) the Washington Administrative Code (WAC) 173-303-400(3), Interim Status Facility Standards, which incorporates 40 CFR § 265.90(a) by reference; 2/ and (3) 40 CFR § 270.14(c), which requires, in connection with hazardous waste permit applications, the submission of certain information relating to the ground-water underlying a hazardous waste facility or connected hydraulically with

1/ I. e. 40 CFR § 265.93(d)(3),(4),(5), which set forth design, monitoring, and system requirements, and the reporting provisions of 40 CFR § 265.94(b). See March 29, 1989, complaint, and compliance order, III Conclusions of Law, at 10.

2/ 40 CFR § 265.90(a) provides that respondent must ". . . implement a ground-water monitoring program capable of determining its facility's impact upon the quality of ground-water in the uppermost aquifer underlying the facility."

such ground-water. Complainant seeks \$43,750 in civil penalties for the alleged substantive violations. An additional \$81,158 is sought in consequence of respondent allegedly having benefitted economically by not complying with the regulations ("economic benefit of noncompliance"), for a total penalty of \$124,908. 3/ Respondent asserts that the same charges, or substantially the same charges, were the subject of a consent agreement and final order in 1985, following the issuance of a complaint against respondent on July 12, 1985. The record discloses, in addition, that the same parties, together with the State of Washington Department of the Environment, had previously executed a consent agreement and final order on July 20, 1984. 4/ This order also contained provisions relating to respondent's ground-water monitoring system.

3/ March 29, 1989, complaint, ¶ IV, at 11.

4/ It appears that a complaint did not issue prior to the execution of the 1984 consent agreement and final order. The 1984 agreement recites that

[T]his action was initiated as a result of telephone conversations between IPCO [respondent] . . . and Region 10 of the U.S. EPA . . . in which a temporary stay of proceedings on the part of EPA to terminate interim status at [respondent's] facility was negotiated in return for [respondent's] formal agreement to close its hazardous waste management facility under the rules and regulations of the State of Washington Department of the Environment and the terms that follow.

Background

From 1947 until 1982 respondent International Paper Company operated a wood-preserving treatment plant at its Longview, Washington, facility. The wood preserving process utilized creosote and pentachlorophenol. Treatment of waste waters from the process generated bottom sediment sludge (designated K001 in the EPA Hazardous Waste Code). 5/ From 1953 until November, 1982, the sludge was disposed of in two surface impoundments on respondent's site. 6/ The site had surface impoundment capacity of 300,000 gallons for the disposal of hazardous waste. 7/

Respondent submitted a Notification of Hazardous Waste Activity in compliance with the provisions of § 3010(a) of RCRA, 42 U.S.C. § 6930(a), on or about August 18, 1980. Around November 18, 1980, Part A of a RCRA permit application was submitted

5/ K001 is defined at 40 CFR § 261.32, Hazardous Waste From Specific Sources, as "bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol". The "hazard code" for K001 is "T," indicating that the basis for listing K001 as a hazardous waste is that it is toxic, 40 CFR § 261.30(b). See also 40 CFR Part 261, Appendix VII.

6/ Consent Agreement and Final Order of September 30, 1985, RCRA Docket 1085-04-17-3008(a), ¶ 1, at 2.

7/ Id. ¶ 3.

in compliance with 40 CFR § 270.10(e) (and later revised). 8/ Accordingly, respondent achieved "interim status," i. e. statutory authority to continue to operate pending administrative disposition of the RCRA permit application, 40 CFR § 270.70, 9/ RCRA § 3005(e), 42 U.S.C. § 6925(e) 10/ 11/, and became subject to the "interim status" standards of WAC 173-303-400(3), which incorporate by reference 40 CFR Part 265, Subpart F, Ground-
Water Monitoring, and Subpart G, which relates to closure and

8/ 40 CFR § 270.10(e) required, in relevant part, that owners and operators of existing hazardous waste management facilities submit Part A no later than six months after the date of publication of the regulations which first required compliance with standards set out in 40 CFR Parts 265-266. The regulations that applied to respondent were published on May 19, 1980.

9/ 40 CFR § 270.70 provides that any person who owns or operates an "existing hazardous waste management facility," [a facility which was in operation or for which construction commenced on or before November 19, 1980, 40 CFR § 270.2] shall have interim status and shall be treated as having been issued a permit, if the RCRA § 3010(a) notification requirements have been met and Part A of the application has been submitted.

10/ Consent Agreement and Final Order filed September 30, 1985, ¶ 4, at 2-3.

11/ § 3005(3) of RCRA, 42 U.S.C. § 6925(e) provides for the continued operation of an existing facility that meets certain conditions until final administrative disposition of the permit application is made. After the effective date of the regulations, treatment, storage, and disposal of hazardous waste is prohibited except in accordance with a permit. See § 3005(a) of RCRA, and § 270.70(a), Qualifying for Interim Status.

post-closure of hazardous waste facilities. 12/ Further, having achieved interim status, respondent became subject to 40 CFR Part 270, which, among other things, specifies the information that must be submitted in connection with Part B of the application for the hazardous waste permit that interim status

12/ 40 CFR § 265.1 provides that:

(a) The purpose of this part is to establish minimum national standards that define the acceptable management of hazardous waste during the period of interim status and until certification of final closure . . .

(b) the standards of this part apply to owners and operators of facilities that treat, store, or dispose of hazardous waste who fully complied with the requirements for interim status under § 3005(e) of RCRA and § 270.10 . . . until either a permit is issued under § 3005 of RCRA or until applicable Part 265 closure and post-closure responsibilities are fulfilled.

facilities must obtain. 13/ These regulations include 40 CFR § 270.14(c), which requires that certain additional information relating to the ground-water underlying the facility and the facility's impact upon it must be included in the Part B application. (Failure to comply with this regulation is among the violations alleged in the present complaint). 14/

13/ 40 CFR § 270.14(b)(13) provides as follows:

§ 270.14, Contents of Part B, General Requirements. . . .

(b) General Information Requirements. The following information is required for all HWM [hazardous waste management] facilities . . .

(13) A copy of the closure plan . . . required by §§ 264.112

(c) Additional Information Requirements. The following information regarding protection of the ground-water is required from owners or operators of hazardous waste surface impoundments

(1) A summary of the ground-water monitoring data obtained during interim status period under §§ 265.90-265.94, where applicable.

(2) Identification of the uppermost aquifer and aquifers hydraulically interconnected beneath the facility property, including ground-water flow direction and rate

(3) A description of any plume of contamination that has entered the ground water from a regulated unit at the time that the application was submitted

14/ March 29, 1989, complaint, III Conclusions of Law, at 10.

The interim status standards (40 CFR Part 265) require, in connection Subpart F, Ground-Water Monitoring, that owners and operators of surface impoundments used to manage hazardous waste install a ground-water monitoring system capable of determining the facility's impact upon the quality of ground-water in the uppermost aquifer underlying the facility, 40 CFR § 265.90(a). Under certain conditions, owners/operators could elect pursuant to 40 CFR § 265.90(d) to install an "alternate" ground-water monitoring system as described at § 265.90(d)(1)-(5); additional requirements of an alternate monitoring system are set out in detail at § 265.90(d)(3)-(5). The alternate system requires submission of a specific monitoring plan, which, according to these provisions, must disclose the number, location, and depth of wells; the sampling and analytical methods for the hazardous waste and hazardous waste constituents in the facility; and evaluation procedures including any use of previously gathered ground water quality information. Determinations were to be made as to the concentrations and the rate and extent of migration of hazardous waste or hazardous waste constituents in the ground water. 40 CFR § 265.93(d)(4)(i), (ii). Such determinations were to be made "as soon as technically feasible" [§ 265.93(d)(5)] but no later than one year after the effective date of the regulations

[40 CFR § 265.90(d)(2)], and a report containing an assessment of ground-water quality made to the Administrator of the U. S. Environmental Protection Agency (EPA) within 15 days after the determinations were first made. Thereafter, the determinations were to be made quarterly, 40 CFR § 265.90(d)(4), until final closure. Further, installers of alternate systems must keep records of analyses and evaluations during post-closure, and must report results of the monitoring annually to the EPA Administrator until final closure, 40 CFR § 265.94(b). Respondent elected to use an alternate system on or about November 13, 1981, and was therefore subject to the provisions of 40 CFR § 265.90(d)(1)-(5) and the regulations referred to therein, i. e. §§ 265.93(d)(3)-(5) and 265.94(d). 15/ Failure to comply with the "requirements of 40 CFR Part 265, Subpart F" is alleged in the present complaint. 16/

First Consent Agreement: July 20, 1984 17/

Respondent's first ground-water monitoring reports were submitted about May 12, 1982. The reports showed contamination of several wells from hazardous constituents of K001. On Au-

15/ Consent Agreement and Final Order of September 30, 1985, ¶ 6 at 8.

16/ March 29, 1989, complaint, III Conclusions of Law, at 10.

17/ EPA Docket 1084-07-85-3008.

gust 19-20, 1982, representatives of EPA and the Washington Department of the Environment (WDOE) inspected respondent's facility. They found that certain determinations required by 40 CFR § 265.93(d)(4) had not been made by respondent: the rate and extent of hazardous waste and hazardous waste constituents migration, and the concentration of the contaminants in the ground-water. Both EPA and WDOE informed respondent that its alternate ground-water quality assessment plan did not "adequately address the scope of work necessary" to make such determinations. ^{18/} On September 10, 1982, EPA notified respondent that it was violating 40 CFR § 265.90(d)(1) by failing to submit a quarterly ground-water quality assessment determination. ^{19/} WDOE then arranged a compliance schedule whereby respondent would submit a ground-water quality assessment report by January 1, 1983. An amendment to the existing closure plan was to be submitted by April 1, 1983. The ground-water quality assessment report was submitted on March 4, 1983. Respondent's closure assessment report and revised closure plan were submitted on December 2, 1983, together with further ground-water quality assessment determinations. Reviews by both EPA and

^{18/} As recited at ¶ 10, Consent Agreement and Final Order of September 30, 1985.

^{19/} See ¶ 11, at 5, complaint of July 15, 1985.

WDOE found "technical deficiencies" in the closure and post-closure plans. "Numerous comments" were made about the ground-water quality assessment plan at the time respondent was notified of the closure and post-closure plan deficiencies on July 13, 1984). 20/ On July 20, 1984, respondent signed a consent agreement and final order which provided for submission of complete closure and post-closure plans to WDOE and EPA by November 30, 1984. Further, the consent agreement specifically required that the plans to be submitted must address:

. . . . all of the applicable requirements of WAC 173-303-400(3), (which incorporates 40 CFR Part 265 subparts F, G, H, K, and N by reference. 21/ (Emphasis supplied).

Pursuant to this agreement, therefore, respondent agreed to comply with all of the applicable ground-water monitoring provisions of 40 CFR Part 265, Subpart F, including § 265.90(a), which the current complaint appears to charge respondent with violating 22/; and §§ 265.90(d), 265.93(d)(3)-(5), and 265.94(b),

20/ Id. ¶ 15, at 6, lines 8-9.

21/ As recited in ¶ 16, at 5, Consent Agreement and Final Order, September 30, 1985. Subpart F contains the interim status ground-water monitoring requirements. Subpart G contains closure and post-closure requirements.

22/ March 29, 1989, complaint, at section III, at 10, Conclusions of Law: "Considering the matters set forth above, [respondent] has violated . . . WAC 173-303-400(3), which incorporates by reference the requirements of 40 CFR § 265.90(a);"

all of which respondent is charged in the current complaint with violating. 22/

Second Consent Agreement, September 30, 1985.

Pursuant to the July, 1984, consent agreement and final order, respondent submitted closure plans dated November 30, 1984. Around December 28, 1984, a ground-water assessment report was submitted. Again, both EPA and WDOE found the closure plans, post-closure plans, and the ground water assessment reports, to be deficient. Discussions of the deficiencies took place at a meeting on February 8, 1985 among representatives of WDOE, EPA, and respondent, and continued thereafter by telephone. 23/ On July 12, 1985, EPA issued a complaint which sought \$44,000 in penalties, charging violations of both the closure plan requirements 24/ and the ground-water monitoring regulations. It charged, among other things, that:

c. The rate and extent of hazardous waste and hazardous waste constituents in the ground-water had not been determined. [¶ 9(c)]

22/ Id. lines 16-17. Respondent also agreed that if terms of the order were not observed, WDOE may ". . . initiate enforcement action, including the assessment of civil penalties of up to \$10,000 for each day of continued noncompliance." July 20, 1984, Consent Agreement and Final Order, ¶ 7, at 6.

23/ Id. at p. 6, ¶ 16. March 29, 1989, complaint and compliance order, p. 4, ¶ 12.

24/ [Ground-water monitoring is part of the closure plan. Attachment A, Suggested Format of a Closure Plan, ¶ 1.2, Closure Plan and Post Closure Plan 1.1, 1.2]

The 1985 complaint further pleads that on or about August 1, 1982,

. . . . both WDOE and EPA advised respondent in separate letters that respondent's alternate groundwater monitoring quality assessment plan did not adequately address the scope of work necessary to determine the rate and extent of contaminant migration or the concentration of contaminants in the groundwater. [¶ 10, at 5] n/

Further,

By letter dated September 10, 1982, Complainant formally notified Respondent that Respondent was in violation of 40 CFR 265.90(d)(1) for failure to submit a report on the first quarterly ground water quality assessment determination. . . . [¶ 11 at 5]

And that:

Respondent's ground water quality assessment report, entitled Longview Treated Wood Products Plant Alternative Ground Water Quality Assessment was submitted on or about March 4, 1983. Respondent's closure assessment . . . was submitted on . . . December 2, 1983 . . . (T)he December 2, 1983, submittals included further ground water quality assessment determinations. [¶ 14 at 5]

And that:

On or about December 28, 1984, Respondent submitted a ground water assessment report, which, upon review by EPA and WDOE, was found to be deficient. A discussion of the deficiencies was initiated at the February 8, 1985, meeting between Complainant, Respondent and WDOE. [¶ 18 at 7]

n/ It is not clear that failure to submit such a report would, by itself, violate 40 CFR § 265.90(d)(1).

The proposed penalty provisions of the July, 1985, complaint and compliance order recited that:

. . . . in view of the above cited violations of interim status closure and ground water monitoring regulations, Complainant proposes to assess a civil penalty of FOURTY FOUR THOUSAND DOLLARS (\$44,000). The penalty was computed . . . for violation of §3005 of the Act, [and] the following regulations promulgated thereunder

1. Interim status ground water monitoring requirements

WAC 173-303-400(3)

(40 CFR Part 265, Subpart F) 25/

The compliance order sought in connection with the alleged violations specified that

1. Within . . . 30 days . . . respondent shall prepare and submit to Complainant a written ground-water quality assessment plan which will insure compliance with WAC 173-303-400(3) which incorporates 40 CFR Part 265, Subpart F [Ground-Water Monitoring], by reference.

2. Within . . . (120) days . . . Respondent shall prepare and submit to Complainant a written ground water qual-

25/ Part of the proposed penalty was said to be for violations of the "Final Order" attached to the 1984 consent agreement. In that agreement, however, respondent specifically agreed to further enforcement proceedings by WDOE, including the assessment of civil penalties, if CO terms were not carried out.

ity assessment report . . . [which] must describe Respondent's determination of the rate and extent of contaminant migration, as well as the concentrations of hazardous waste and hazardous waste constituents in the groundwater, as required by WAC 173-303-400(3). [Information obtained pursuant to Respondent's Part B permit application to satisfy the information required by 40 CFR § 270.14(c) (1) through (4) may be submitted to satisfy this item, to the extent such information satisfies the information specified in 40 CFR § 265.93(d)(4)]. 26/

Settlement was reached, and, on September 30, 1985, a second Consent Agreement and Final Order was signed by the EPA Regional Administrator. The new agreement provided for "full and complete settlement of this matter." 27/ Respondent consented to assessment of a \$44,000 civil penalty, of which \$29,000 would be suspended pending complainant's review of the various groundwater monitoring and other materials submitted pursuant to the new agreement. 28/ The Final Order required respond-

26/ WAC 173-303-400 incorporates 40 CFR Part 265, Subpart F, Ground-Water Monitoring, by reference.

27/ Consent Agreement and Final Order, September 30, 1985, Section IV, Consent, at 7.

28/ Consent Agreement and Final Order of September 30, 1985, ¶.7, at 9.

ent to submit, inter alia:

1. A complete closure and post-closure plan "which fully addresses the requirements of WAC 173-303-400(3). [WAC 173-303-400(3) incorporates 40 CFR Part 265, Subparts F, G, H, K, and N by reference]."
2. A Part B application for post-closure care of the regulated units, "which fully addresses the requirements of 40 CFR Part 270," by November 8, 1985.
3. A ground water assessment report which "fully complies with WAC 173-303-400 [which incorporates 40 CFR Part 265, Subpart F, by reference]." 29/ [Emphasis supplied]

The September 30, 1985, Consent Agreement and Final Order provided (¶ 8, at 8) that a \$44,000 penalty was being assessed against respondent

For its failure to determine the rate and extent of migration and the concentration of hazardous waste constituents in the ground water, and for its failure to submit a complete closure and post-closure plan as required by previous Consent Agreement and Final Order (EPA Docket No. 1084-07-85-3008) (Emphasis supplied).

It is clear, therefore, that respondent was charged with violations of the ground-water monitoring regulations, and that

29/ Id. ¶¶ 1, 2, and 6, at 7-8.

civil penalties and corrective action were sought for such violations. As the current complaint recites, the September 1985, consent agreement "required [respondent] to, among other things, operate the facility in compliance with the groundwater monitoring requirements of WAC 173-303-400 [40 CFR Part 265 Subpart F]." 30/

Present complaint, March 29, 1989

The September 30, 1985, Consent Agreement and Final Order provided that \$29,000 of the \$44,000 proposed penalty would be "suspended and deferred until complainant completes review of respondent's submittals;" complainant agreed to (1) review groundwater monitoring and closure materials to be submitted by respondent, and to (2) notify respondent by certified mail whether the \$29,000 deferred penalty was "excused and forgiven, or immediately due."

However, after reviewing respondent's Part B application, submitted on or about November 8, 1985, as provided by paragraph two (page 7) of the September 30, 1985, order, EPA sent, on December 30, 1986, a Notice of Deficiency (NOD) advising that the Part B application was deficient because hydrogeologic

30/ Complaint and compliance order of March 29, 1989, ¶ 14, at 5.

characterizations and descriptions of the hazardous waste plume migration were inadequate. 31/ Subsequently submitted revisions to the Part B application and ground-water quality reports all were said to be deficient, and, on December 10, 1987, another NOD was sent to respondent, again noting deficiencies in connection with ground-water monitoring. During 1988, respondent and EPA exchanged views on the need for further information on hydrogeologic characterizations and plume migration at the facility. An inspection of the facility took place on February 18-19, 1988, in order to

. . . . evaluate compliance with applicable ground-water monitoring, information and characterization requirements of 40 CFR Part 265 subpart F and 40 CFR § 270.14(c). 32/

As a result of that inspection, the current complaint issued on March 29, 1989, alleging various deficiencies in both the Part B application (40 CFR Part 270) and ground-water quality

31/ See 40 CFR § 270.14(c) and March 29, 1989, complaint ¶ 26, at 7. It is not clear why EPA chose not to impose the \$29,000 deferred penalty if it believed respondent had violated the 1985 order. Counsel for complainant states only that the NOD is EPA's usual way of notifying an applicant that the Part B application is deficient. Here, however, respondent was under order to submit a Part B application which "fully addressed the requirements of 40 CFR Part 270." Final Order of September 30, 1985, ¶ 2, at 7.

32/ March 29, 1989, complaint, ¶ 26, at 7.

assessment (40 CFR Part 265, Subpart F). 33/

The complaint concludes generally that, "considering the matters set forth above" [i. e. the allegations in paragraph 26 of "deficiencies . . . determined to exist at the facility" during EPA's February 18-19, 1988, inspection],

. . . . (R)espondent has violated 40 CFR § 270.14(c) and WAC 173-303-400(3), which incorporates by reference the requirements of 40 CFR §265.90(a); and 40 CFR 265.90(d), which requires compliance with 40 CFR §265.93(d)(3), 265.93(d)(4) and §265.94(b). 34/

However, in conjunction with with the "deficiencies," or violations, alleged at paragraphs 26 A, B, C, D, E, F, G(a)-(i), H(a)-(d), I (a)-(e), and J(a)-(d) 35/, complainant has chosen not to identify the regulation(s) believed to have been violated in each instance. It is therefore not possible to make such determinations with certainty, i. e. to match the paragraph 26 charges with the regulations cited in the Conclusions of Law. While it can be surmised, for instance, that paragraph 26 (a) - (d) alleges violations of § 265.94(b), the charges in other paragraphs are not distinct or may allege violations of more

33/ Complaint and compliance order of March 29, 1989, ¶ 26 at 7 - 10; and at 10 (III. Conclusions of Law).

34/ Id. at 10 (III. Conclusions of Law).

35/ Id. at 7-10.

than one of the regulations mentioned in the Conclusions of Law. 36/ For purposes of deciding respondent's motion, and with this uncommon pleading style in mind, it is assumed that respondent has been charged in paragraph 26 A-J, pages 7-10, with violations of various subsections of 40 CFR § 270.14(c), Part B permit; and 40 CFR §§ 265.90(a), 265.90(d), 265.93(d)(3), 265.93(d)(4), and 265.94(b), ground-water quality assessment.

36/, Such difficulties increase upon considering what subsections of 40 CFR § 270.14(c) may have been violated, since 40 CFR § 270.14(c) and its numbered subsections occupy nearly two pages in the 1989 Code of Federal Regulations.

Further, complainant has not been precise as to what part of WAC 173-303-400(3) is believed to have been violated, and no penalty is sought for WAC violations. And, even though the Conclusions of Law states that

. . . (R)espondent has violated . . .
WAC 173-303-400(3), which incorporates
by reference the requirements of 40 CFR
§265.90(a);

it cannot be assumed that 40 CFR § 265.90(a) is the only section of WAC at issue, since the pleading is not so limited. This uncertainty is increased by the apparent absence of a charge in the complaint based solely upon the language of § 265.90(a), although several charges might be based in part upon it, or upon it as well as other regulations cited. Moreover, the presence of a semicolon after "40 CFR §265.90(a)" suggests that no additional parts of WAC 173-303-400(3) are involved. But all Part 265 Subpart F regulations, including those which follow in the Conclusions of Law, are incorporated by reference in WAC 173-303-400(3), as are Subparts G through R of Part 265. It is noted that both the Proposed Civil Penalty (IV at 10) and Compliance Order (V at 11) sections of the complaint refer very broadly to "40 CFR Part 265 Subpart F" and "40 CFR § 270.14(c)". The complaint states that penalties are sought for alleged violations of "Part 265 Subpart F" and "40 CFR §270.14(c)". Proposed Civil Penalty, at 10.

Conclusion and Findings

In Nathan v. Rowan, 651 F. 2d 1223 (6th Cir., 1981), the doctrine of res judicata was stated as follows: (at 1226):

Under the judicially-created doctrine of res judicata, when a court of competent jurisdiction enters a final judgment on the merits in an action, the parties and their privies are barred from relitigating in a subsequent action matters that were actually raised or might have been raised in the prior action. Cromwell v. County of Sac, 94 U.S. 351, 24 L. Ed. 195 (1877); Commissioner v. Sunnen, 333 U.S. 591, 68 S. Ct. 715, 92 L. Ed. 898 (1948); Lawlor v. National Screen Service, 349 U.S. 322, 75 S. Ct. 865, 99 L. Ed. 1122 (1955); See also, Montana v. United States, 440 U.S. 147, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979). Res judicata is applied if it does not offend public policy or result in manifest injustice. Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940); United States v. LaFatch, 565 F. 2d 81 (6th Cir. 1977). (Emphasis added).

United States v. Athlone Industries, 746 F. 2d 977 (3d Cir. 1984) at 983, states that res judicata requires a showing by respondent that there has been (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same causes of action. The court quoted its opinion in Davis v. United States Steel Supply, 688 F. 2d 166 (3d Cir. 1982), at 171:

More difficult is the question of identity of the causes of action. A single cause

of action may comprise claims under a number of different statutory and common law grounds . . . Rather than resting on the specific legal theory invoked, res judicata generally is thought to turn on the essential similarity of the underlying events giving rise to the various legal claims, although a clear definition of that requisite similarity has proven elusive . . .

The court continued:

Although we declined to adopt one specific legal theory in Davis, we indicated a predisposition towards taking a broad view of what constitutes identity of causes of action -- "an essential similarity of the underlying events giving rise to the various legal claims." We therefore do not adhere to any mechanical application of a single test but instead focus on the central purpose of the doctrine of res judicata. We are thus in keeping with "[t]he present trend . . . in the direction of requiring that a plaintiff present in one suit all the claims for relief that he may have arising out of the same transaction or occurrence." 1 B J. Moore & J. Wickler, Moore's Federal Practice ¶0.410[1], at 359 2d. ed. 1983).

This matter turns, in the first instance, upon whether respondent is correct in asserting that a prior consent agreement and final order in settlement of an administrative complaint is a final judgment such as will support imposition of the doctrine of res judicata. If so, subsequent relitigation of the same issues (the "same cause of action") between the same parties is barred.

Res judicata must be held to apply to consent agreements

and final orders in settlement of administrative complaints, since "the same principles of judicial efficiency which justify application of the doctrine of collateral estoppel in judicial proceedings also justify its application in quasi-judicial proceedings . . . ," Graybill v. U. S. Postal Service, 782 F. 2d 1567, 1571 (Fed. Cir. 1986); cert. denied, 479 U. S. 963 (1986). 37/, 38/. However, where express reservations of rights, such as the right to proceed with a civil penalty suit, are in-

37/ See also United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966); Plaine v. McCabe, 797 F. 3d 712, 718. See particularly United States v. Allegan Metal Finishing Co., 696 F. Supp. 275 at 292 (W. D. Mich. 1988):

I do not believe that [EPA] can, in effect, completely ignore the CAFO [consent agreement and final order] and relitigate all of the violations of the original administrative complaint which were "settled" . . . [I]f the terms of the CAFO had been timely complied with, then the CAFO would have precluded a subsequent enforcement action with respect to any of the same issues contained in the CAFO. To hold otherwise would indeed be to encourage litigation and discourage settlement of administrative disputes under RCRA. Such a ruling would no doubt promote the finality of consent agreements . . . [I]t is clear that such a result would be contrary to public policy. See e.g. Thomas v. State of Louisiana, 534 F. 2d 615, (5th Cir. 1976). (" When fairly arrived at and properly entered into, [settlement agreements] are generally viewed as binding, final, and conclusive of rights as a judgment.")

38/ It is noted that complainant does not deny application of the doctrine of res judicata to administrative consent orders. Complainant's arguments go to whether the issues are the same in the two proceedings.

corporated in the consent judgment, res judicata does not apply to the rights reserved, U. S. v. Athlone, supra, at 983, note 5. 39/ Here, no reservation of further action was incorporated into the 1985 consent order. Even if it can be argued that consent orders in proceedings affecting public health and safety should be construed as reserving further proceedings where, for instance, imminent and substantial endangerment to human health may be occurring, no such argument has been asserted here. Nor is it apparent that the facts underlying this action, as they have been argued here, would support it. 40/

In this case, it is determined that the parties are the same in both the 1985 and the present proceedings. It is de<

39/ Note 5 at 983. "A consent decree is generally treated as a final judgment on the merits and accorded res judicata effect . . . (W)hile the United States [the Consumer Product Safety Commission] sought to reserve its right to proceed in a civil penalty suit, such a reservation was not incorporated in the final consent judgment."

40/ In a consent order in another matter, EPA reserved the right to bring an enforcement action "notwithstanding any other provision of the Order" if it determined that ". . . the handling of solid waste at the facility may present an imminent and substantial endangerment to human health or the environment;" and further reserved that ". . . an Order pursuant to 3008(h) of RCRA may be issued to respondent concerning the identification and remediation of hazardous constituents released at the facility." In the Matter of Koppers Company, Incorporated, Docket No. V-W-86-R-44, Consent Agreement and Final Order, at 5.



11
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

3/1/80

OFFICE OF
THE ADMINISTRATIVE
LAW JUDGES

Ms. Marian Atkinson
Regional Hearing Clerk
Region X - EPA
1200 Sixth Avenue
Seattle, Washington 98101

RE: INTERNATIONAL PAPER COMPANY; DKT NO. RCRA-1089-01-22-3008

Dear Ms. Atkinson:

Enclosed for distribution in accordance with 40 CFR §22.27(a) are five copies of a Decision and Order entered in the captioned proceeding, which in accordance with 40 CFR §22.17(b) becomes an initial decision. A copy of the return receipt or other evidence of receipt of the decision by the Respondent should be provided to the Hearing Clerk.

The original of the decision together with my file in the matter have been delivered to the Hearing Clerk and it will be unnecessary for you to furnish a copy of the decision or the record of the proceeding to this office.

Sincerely yours,

Shirley Smith
— Shirley Smith
Secretary to Judge J. F. Greene

Dated: October 3, 1978

terminated further that the Consent Agreement and Final Order of September 30, 1985, was intended to be a full and complete settlement of the July, 1985, complaint; 41/ that it was intended to govern the parties' rights concerning the matters addressed therein, 42/ and that it was, and was intended to be in its effect, a final judgment "on the merits." 43/ Therefore, matters comprehensively dealt with by the 1985 agreement, such as the Part B application (40 CFR Part 270) and other matters which were or could have been dealt with, may not be relitigated.

As to whether the two proceedings are the "same cause of action," i. e. whether matters raised by the 1989 complaint were raised or could have been raised in the 1985 proceeding,

41/ Consent Agreement and Final Order of September 30, 1985, at section IV Consent: ". . . . in full and complete settlement of this matter respondent agrees to be bound by the terms of this order, consents to the assessment of the civil penalty set forth herein, and explicitly waives its right to request a hearing regarding any provision of this order."

42/ See, for instance, the letter from EPA which transmitted a copy of the 1985 Consent Agreement and Final Order on October 10, 1985, to Mr. Robert Funkhauser, respondent's Corporate Counsel, wherein Mr. Funkhauser is urged to ". . . . read the Final Order provisions carefully. The requirements contained therein must be met by International Paper Company according to the precise terms of the Final Order."

43/ A judgment on stipulation or agreement is construed as "on the merits" for purposes of res judicata determinations. Moore, Federal Practice, Volume 1 B, § 0.409 [1.2] at 307 (Second Edition, 1988). See also supra, 24 at note 39.

it is clear that EPA noted what it regarded as deficiencies in respondent's Part 265 Subpart F ground-water monitoring as long ago as August 31, 1982, when respondent was informed that its monitoring plan did not adequately "address the scope of the work necessary" to determine the rate and extent of hazardous waste and hazardous constituents migration and the concentration of contaminants in the ground-water 44/ as required by the "alternate" ground-water monitoring provisions of 40 CFR §§ 265.90(d) and 265.93(d)(3), (4). Deficiencies in respondent's ground-water assessment plans were addressed in both the 1984 and 1985 consent agreements and final orders, and are now addressed again in the current complaint, albeit in additional detail in some paragraphs and/or in a mixture with the closely related ground-water quality matters of the Part B permit application requirements at 40 CFR Part 270.

In connection with the July 12, 1985, complaint, as has been noted above [supra, pp. 14-15], complainant sought, in addition to a \$44,000 civil penalty, a compliance order requiring respondent to:

1. Within thirty (30) days . . .
prepare and submit . . . a written

44/ As recited at ¶ 9, at 4, March 29, 1989, complaint and compliance order. Cf. ¶ 26, at 7-9 and Section III, Conclusions of Law, at 10.

ground water quality assessment plan which will insure compliance with WAC 173-303-400(3) (which incorporates 40 CFR Part 265 Subpart F by reference). 45/

2. Within . . . (120) days . . . prepare and submit . . . a written ground water quality assessment report [which] must describe Respondent's determination of the rate and extent of contaminant migration as well as the concentrations of hazardous waste and hazardous waste constituents in the ground water, as required by WAC 173-303-400(3). [Information obtained pursuant to Respondent's Part B application, to satisfy the information required by 40 CFR §270,14(c)(1) through (4), may be submitted to satisfy this item, to the extent such information satisfies the information specified in 40 CFR §265.93(d)(4).] 46/ [Emphasis supplied]

Thus it is apparent that, before the issuance of the 1985 complaint, respondent had not submitted a ground-water quality assessment plan which, in complainant's view, complied with 40 CFR Part 265, Subpart F. 47/

The compliance order sought by the 1985 complaint also makes clear that respondent's ground-water quality assessment report as submitted before the 1985 complaint issued did not,

45/ Paragraph 1, at 8.

46/ Paragraph 2, at 8.

47 [See Footnote 47 on next page].

in complainant's view, comply with the requirements of 40 CFR Part 265, Subpart F. 48/

47/ See 40 CFR § 265.90(d)(1), which requires submission of

. . . . a specific plan, certified by a qualified geologist or geotechnical engineer which satisfies the requirements of §265.93(d)(3), for an alternate ground-water monitoring system;

and 40 CFR § 265.93(d)(3), which requires that the plan to be submitted under § 265.90(d)(1) must specify:

(i) the number, location, and depth of wells;

(ii) Sampling and analytical methods for those hazardous waste or hazardous waste constituents in the facility;

(iii) Evaluation procedures, including any use of previously-gathered ground-water quality information; and

(iv) A schedule of implementation.

48/ 40 CFR § 265.93(d)(4) provides that the ground-water quality assessment plan required by §§ 265.90(d) and 265.93(d) must be implemented by the owner/operator. The following must be determined, "at a minimum," and incorporated into the annual reports required by 40 CFR § 265.94(b), and the report required by § 265.93(d)(5).

(i) The rate and extent of migration of the hazardous waste or hazardous waste constituents in the ground-water

(ii) The concentrations of the hazardous waste or hazardous waste constituents in the ground-water.

In the 1989 complaint, respondent is charged with violations of ". . . . 40 CFR 265.90(d), which incorporates by reference the requirements of 40 CFR §265.93(d)(3), 265.93(d)(4), and §265.94(b);" [III. Conclusions of Law, at 10] and the compliance order [paragraph 11, at 15] requires respondent's future ground-water quality assessment reports ". . . . to be made in compliance with 40 CFR §265.94(b) and 270.14(c)" Thus, there is no question that the ground-water quality monitoring and assessment charges in the 1989 complaint cover essentially the same ground as the 1985 complaint/compliance order/consent agreement, which addressed (1) the ground-water quality assessment plan required by 40 CFR §§ 265.90(d) and 265.93(d)(3), and (2) the ground-water quality assessment report required by 40 CFR § 265.93(d)(5) which was to contain, at a minimum the information required by § 265.93(d)(4), which

49/ It is noted that the 1985 proposed compliance order of July 12, 1985, mentions a ground-water quality assessment plan [¶ 1, at 8] as well as a ground-water quality assessment report [¶ 2, at 8]. The consent agreement and final order (September 30, 1985) speaks not to the plan but to the report [¶ 6, at 8] and to other sampling and analysis that respondent agreed to and was ordered to carry out [¶ 5, at 8]. Therefore, because the consent agreement and final order settled the 1985 complaint, it is clear that any matters raised in the complaint and compliance order could have been included in the final order and may not be raised anew in the 1989 complaint.

the current complaint now alleges to be a "deficiency." [Paragraph 26, 26-c; at 7]. The annual ground-water quality assessment reporting charges of paragraph 26 J; however; are excepted from this conclusion since some or all of them were not yet due when the 1985 agreement was signed. 50/ Accordingly; any deficiencies in such reports could not have have been known at the time of the 1985 agreement and are not; therefore; res judicata.

It is also obvious that the Part B (40 CFR Part 270) permit application was a subject of the September 30, 1985 Consent Agreement and Final Order; wherein respondent was ordered to submit; by November 8, 1985, a Part B application "which fully addresses the requirements of 40 CFR Part 270." 51/ In fact, before the July, 1985; complaint issued; EPA had notified re-

50/ It is assumed that the 1985 annual ground-water quality report [see 40 CFR § 265.94(b)(2)] had not been submitted at the time the 1985 consent agreement was signed, since the regulation provides that the report ". . . must be submitted no later than March 1 following each calendar year."

51/ Consent Agreement and Final Order of September 30, 1985, ¶ 2 at 7 of the Final Order.

spondent that, as a result of the Hazardous and Solid Waste Amendments of 1984, respondent should submit its Part B application by mid-August, 1985, 52/ which coincided with negotiations between complainant and respondent over the terms of the 1985 consent agreement and final order. 53/ Having agreed, in the 1985 final order, that the Part B application was now to be regulated according to the terms of order, and having agreed further that the penalty for failure to comply (for example, if respondent's Part B application should not "fully address the requirements of 40 CFR Part 270,") would be the immediate imposition of the suspended (\$29,000) portion of the civil

52/ Complainant's Supplemental Memorandum in Opposition to Summary Judgment Motion, at 5-6.

Complainant states, in its Memorandum in Opposition to IPCO's Summary Judgment Motion, at 6, that:

Both before and after the 1985 CAFO, [consent agreement and final order] EPA's primary efforts were (and continued to be) to get Respondent to submit an adequately supported Part B permit application . . . (T)he focus of the 1985 enforcement action that was resolved by the 1985 CAFO was towards the issuance of a Part B permit that would result in Respondent's correcting the groundwater contamination problems at its Longview facility.

53/ Respondent's Response to EPA's Supplemental Brief on Res Judicata, March 2, 1990, at 4-5, note 2.

penalty, 54/ the parties are now bound by their agreement. In effect, each agreed to a "one-shot" approach regarding the permit application. On respondent's part, \$29,000 would be due at once if complainant found that the application did not "fully address the requirements of 40 CFR Part 270" when submitted on November 8, 1985, just over a month from the date of the consent agreement. EPA also agreed to a "one-shot" approach to the application, which it then did not use after a determination was ultimately made, more than a year later on December 30, 1986, that respondent's application had failed to

54/ September 30, 1985, Consent Agreement and Final Order, ¶ 8-b, at 9, provides as follows:

Provided that the submittals . . . are timely, the Twenty Nine Thousand Dollars (\$29,000) shall be suspended and deferred until Complainant completes review of Respondent's submittals. Such suspended and deferred portion of the penalty shall be wholly excused and forgiven at that time, if Respondent is found by EPA to have fulfilled its obligations under Items 1. through 7. of this Final Order. [Item 2. provided for the submission of the Part B application.] Upon completing such review, Complainant shall notify Respondent by certified mail whether the deferred penalty is excused and forgiven or immediately due. (Emphasis supplied)

"fully address the requirements of 40 CFR Part 270." 55/

Enforcement of consent orders and requirements that consent orders previously entered into be complied with is to be encouraged, and it is by no means certain that, subsequent to the 1985 order, respondent did not violate RCRA regulations. However, where a consent order has specifically provided penalties for noncompliance, as did the September 30,

55/ As noted earlier [supra, at 17-18] complainant responded to what it saw as deficiencies in the application with a Notice of Deficiency (NOD). Although complainant says the NOD is EPA's "standard means" of notifying applicants of deficiencies in Part B applications [Complainant's Memorandum in Opposition to IPCO's Summary Judgment Motion, at 6], it was not the means complainant had contracted to use in connection with deficiencies in respondent's application.

Complainant appears to adopt a time-related argument, to the effect that the 40 CFR Part 270 deficiencies "determined to exist" [¶ 26, line 14, at 7, Complaint of March 29, 1989] during inspection of the Longview facility, but discussed previously and at length with respondent after the Part B application was submitted in November, 1985, [Respondent's Supplemental Brief on Res Judicata, February 16, 1990, at 8-11, and related attachments] were somehow new or different obligations in 1988. However, it seems clear that, in connection with this respondent, because of the language of the 1985 order no charge based upon 40 CFR Part 270 may now be brought unless it has nothing whatsoever to do with a Part B application for postclosure care of the regulated units. Respondent's motion and supporting documents demonstrate that, whatever rationale the 1989 40 CFR Part 270 charges may now be given, they were the subject of discussion earlier in connection with respondent's Part B application, both before the 1985 Consent Agreement and Final Order, and after the application was submitted in response to the order. [Respondent's Supplemental Brief on Res Judicata, at 2-3, 8-11; Declaration of Mr. Grant; Declaration of Mr. Carter.]

1985 final order, enforcement now cannot include: (1) charging respondent with the same violations for which penalties were previously proposed, then imposed by way of settlement in a consent order; (2) charging respondent with alleged violations previously covered by a prior consent agreement, whether or not the specific charges had been included in the complaint which preceeded the agreement; (3) filing "new" charges which are merely extensions of, or more detailed versions of, previously settled charges; (4) amendment of a current complaint to do any of the above. Simple fairness as well as established precedent precludes these methods as remedies for what is clearly a difficult public policy matter. There is no question that issues relating to whether ground-water assessment was being properly carried out were raised and dealt with in the 1985 complaint. There is no question that the §270.14(c) Part B permit issue, which, according to complainant, was the focus of the 1985 proceeding 56/ was settled by the 1985 final order. Under the clear dictates of the Nathan court's statement of the controlling principle, complainant is barred from relitigating these issues. Inclusion of these ground-water assessment and Part B permit charges now unfairly prejudices respondent,

56/ Complainant's Memorandum in Opposition to IPCO's Summary Judgment Motion, at 6.

which negotiated and entered into the consent agreement with the understanding that the ground-water assessment and Part B permit sufficiency issues were being settled. ^{57/} Of course, enforcement for failures to file satisfactory annual reports until final closure of a facility is not precluded by the terms of the 1985 agreement. Such reports were not due until after the agreement was signed. They were not submitted in response to the 1985 agreement, as was the Part B application. Most important, the 1985 consent agreement did not provide that all annual reports must in future be timely submitted and address all of the requirements of the applicable regulations. If it had so provided, the submission of these, too, might have been governed by the terms of the agreement. Accordingly, the motion for summary judgment is denied with respect to paragraph 26 J, (a) - (d).

This case raises some of the same issues with which the court in United States v. Allegan, supra, p. 23, dealt. Strong public policy favors promoting settlements of claims. Even stronger public policy dictates that neither the letter nor the spirit of settlements freely negotiated should lightly be set aside. However, the court in Allegan noted certain problems of regulatory "overkill," and the difficulties of fairly bal-

^{57/} See United States v. Allegan, supra, at 23, note 37.

ancing enforcement of the consent agreement while holding respondent accountable for RCRA interim status violations going back to 1980. The court concluded, at p. 292:


While it is clear that this is not a criminal action, it seems . . . that some portion of the potentially substantial civil penalties plaintiff is apparently seeking may be likened to prosecutorial "overcharging." I will necessarily consider this factor in determining the appropriate civil penalty to be assessed -- an issue not presently before me. I find that this is especially true here where it appears - based on the numerous documents and arguments already presented -- that the defendant has apparently acted in good faith at all times relevant to this action

The holding in this case is not to be construed as requiring EPA to know of and allege every possible violation or forever be barred from bringing future charges. It should be read as barring future charges of violations that were fully understood to have occurred, even to the point of including remedial measures respecting them in the compliance order attached to the earlier complaint and in the CAF0, and for which, as a consequence, penalties have already in effect been collected or could have been collected, or both; and it is noted that while complainant now seeks \$81,158 in penalties for "economic benefit of noncompliance," \$29,000 more in civil penalties could have been collected in 1986 for some of the same viola-

tions alleged here had complainant chosen to observe the terms of the 1985 consent agreement.

Accordingly, it is ORDERED that respondent's motion for summary judgment be, and it is hereby, granted with respect to charges in the complaint set forth in paragraphs 26 A through I, including subsections thereof. And it is FURTHER ORDERED that the motion is denied with respect to paragraph 26 J (a) - (d) of the complaint insofar as it relates to reports that were not yet due on September 30, 1985, the date on which the Regional Administrator signed the second consent agreement and final order.

And it is FURTHER ORDERED that the parties shall confer for the purpose of attempting to settle the remaining charges of the complaint herein, and shall report upon their progress during the week ending May 25, 1990.




J. F. Greene
Administrative Law Judge

April 19, 1990
Washington, D. C.

CERTIFICATE OF SERVICE

I hereby certify that the Original of this Order was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on April 30, 1990.



SHIRLEY SMITH
SECRETARY TO JUDGE J. F. GREENE

Ms. Marian Atkinson
Regional Hearing Clerk
Region X - EPA
1200 Sixth Avenue
Seattle, WA 98101

William Blakeney, Esq.
Office of Regional Counsel
Region X - EPA
1200 Sixth Avenue
Seattle, WA 98101

Beth S. Ginsberg, Esq.
Bogle & Gates
Two Union Square
601 Union Street
Seattle, WA 98101-2322