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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
)
Everwood Treatment) Docket No. RCRA-IV-92-15-R
Co., Inc. and)
Cary W. Thigpen,)
)
Respondents)

RCRA - CERCLA - Spills - Response Actions

Even if, as contended by Respondents, CERCLA was the pervasive law governing response to a spill of chemicals, which when discharged became hazardous waste, RCRA regulations were ARARs which Respondents were required to follow.

RCRA - Authorized State Programs - EPA Enforcement

Although Alabama has been granted authorization to administer its own hazardous waste program in lieu of the federal program pursuant to RCRA § 3006, Alabama hazardous waste regulations are RCRA Subchapter III requirements and thus enforceable by EPA.

RCRA - Spills - Immediate Response

Where regulations (40 CFR §§ 264.1(g)(8), 265.1(c)(11) and 270.1(c)(3)) exempt a person, engaged in treatment or containment activities during "immediate response" to a discharge of material, which when discharged becomes a hazardous waste, from the standards applicable to owners and operators of TSD facilities and the requirement to have a permit, it is held that an "immediate response" to a spill of chemicals was not over until a reasonable time had elapsed in which to obtain drums or other suitable containers in which to store contaminated materials resulting from cleanup and containment of the spill.

RCRA - Disposal - Disposal Facility - Permits

Notwithstanding the fact that RCRA §§ 1004(3) and 3004(k) prima facie equate any placement of hazardous waste in or on the land with "disposal," only owners or operators of hazardous waste treatment, storage or disposal facilities are required to have permits and the regulatory definition of disposal facility (40 CFR § 260.10) includes a requirement that "waste will remain after closure." It is held that Respondents' action in placing hazardous waste in a lined excavation and holding of the waste in the excavation for an extended period constituted, prima facie, the operation of a hazardous waste disposal facility and that their claimed intention to remove the waste allegedly stored in the excavation at a future date was too indefinite to relieve them of the obligation to obtain a permit.

RCRA - Penalties - Penalty Policy

Where penalty demanded by Complainant greatly exceeded any actual or potential harm to the environment and failed to consider Respondents' good faith attempts to comply with applicable requirements, proposed penalty was determined to be punitive rather than deterrent and remedial, penalty policy would not be strictly adhered to and proposed penalty was substantially reduced.

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(ON THE BRIEFS)

INITIAL DECISION

This proceeding under Section 3008(a) of the Solid Waste Disposal Act, as amended (42 U.S.C. § 6928), commonly referred to as RCRA, was commenced on June 16, 1992, by the issuance of a complaint charging Respondents, Everwood Treatment Company, Inc. and Cary W. Thigpen, its President, with violations of the Act, including the Alabama Hazardous Waste Management and Minimization Act, applicable regulations at 40 CFR Parts 260 through 270, and corresponding provisions of the Alabama Administrative Code R.335-14-1 through 335-14-9.^{1/} Specifically, Everwood was charged with operating a hazardous waste disposal facility without a permit and numerous failures stemming from that conclusion, such as failure to obtain a waste analysis, failure to comply with general inspection requirements, failure to comply with groundwater monitoring requirements, failure to maintain a closure and post-closure plan, failure to establish

^{1/} Pursuant to RCRA § 3006, Alabama has been granted final authorization to administer its own hazardous waste program in lieu of the federal program (52 Fed. Reg. 46466, December 8, 1987). This authorization does not include requirements of the Hazardous and Solid Waste Act Amendments of 1984 (HSWA) (Pub.L. 98-616, November 8, 1984). Unless otherwise noted, Alabama regulations are considered to be identical to federal regulations and federal regulations are referred to herein.

a cost estimate for closure, failure to establish financial assurance for closure, failure to establish a post-closure cost estimate and failure to comply with landfill design and operating requirements. The complaint also alleged that Everwood failed to comply with land disposal restriction requirements (LDR). For these alleged violations, it was proposed to assess Everwood and Mr. Thigpen a penalty of \$497,500.

Respondents answered, contesting the Agency's jurisdiction to enforce Alabama law, denying the alleged violations, denying that any penalty was lawful or justified under the facts and asserting, inter alia, that the Agency abused its discretion in failing to dispose of this matter pursuant to CERCLA (42 U.S.C. § 9600, et seq.).

A hearing on this matter was held in Mobile, Alabama, during the period September 7 - 15, 1993.

Based on the entire record including the proposed findings, conclusions and briefs submitted by the parties,^{2/} I make the following:

^{2/} Proposed findings of the parties not adopted are either rejected or are considered unnecessary to the decision.

Findings of Fact

1. Everwood Treatment Co., Inc. (Everwood) is an Alabama corporation. Mr. Cary W. Thigpen is president of Everwood and its only active officer. Mr. Thigpen and his wife are the sole stockholders of Everwood. At all times pertinent hereto, Everwood operated a wood treatment plant at 400 Taylor Avenue, Irvington, Alabama.
2. Everwood uses a chromate, copper, arsenate solution (CCA), a restricted use pesticide, in its pressure wood treating operations. This solution is purchased from Chemical Specialty, Inc. (CSI), Charlotte, N.C., and is delivered to Everwood by tank truck. A label which accompanies each delivery describes the active ingredients of CCA 50% concentrate as chromic acid (CrO_3) 23.75%, cupric oxide (CuO)³ 09.25%, and arsenic pentoxide (As_2O_5) 17.00% (Rs' Exh 78).
3. The wood treating operation generates a sludge and, in October of 1986, Mr. Thigpen filed a Notification of Hazardous Waste Activity with the Alabama Department of Environmental Management (ADEM), listing Everwood as a small quantity generator of characteristic hazardous wastes, D004, arsenic, and D007, chromium (C's Exh 1). This sludge was placed in drums and periodically shipped to either the GSX, presently Laidlaw, facility, Pinewood, S.C., or the Chemical Waste Management facility, Emelle,

- Alabama (Hazardous Waste Manifests, C's Exhs 22a through 22d.
4. In the summer of 1990, the Everwood plant was operating 24 hours a day. Mr. Melvin Cruit, foreman and emergency coordinator for Everwood, lived in a mobile home on the plant property in 1990 (Tr. 886, 889, 891). Mr. Cruit testified that between three and four o'clock on a morning in late June 1990 he received a call from Jimmy Howard, who was operating the treatment equipment, and who informed Cruit that he had had a release of CCA (Tr. 909, 911). Mr. Cruit proceeded immediately to the treatment area and observed chemical (CCA) on the slab and on the ground (Tr. 914, 915). Cruit testified that Howard told him that he was in the process of mixing chemical and had operated the pump to add chemical to the treatment solution for two separate two-minute intervals. He (Howard) knew he had a problem when the strength of the solution didn't change (Tr. 912-13, 969). Cruit supported Mr. Thigpen's testimony (infra, finding 9) that the capacity of the chemical pump was about 14 gallons a minute. In other testimony, Mr. Cruit indicated that the procedures undertaken by Mr. Howard leading to the discovery of the spill could occupy as much as half an hour (Tr. 974-76). The evidence, however, does not support a finding that, during this period, the pump was operated for longer than the two-minute intervals reported by Cruit.

5. Mr. Cruit estimated the amount of the spill as 50 to 60 gallons and the size of the spill as about ten feet in diameter, half of which was on the slab (Tr. 930, 963, 966, 967). He marked the area of the spill in red with an X and a circle on Exhibit 61, a drawing of the Everwood plant, placing the spill between the fence and the east concrete-block wall surrounding the treatment area slab and slightly to the north of the north-south center line of the slab.^{3/} He estimated that the distance from the wall to the east fence was eight or ten feet (Tr. 966, 984).
6. After donning rubber boots and gloves, Cruit and Howard used hand shovels to dike around the spilled area and contain the spill (Tr. 929). Cruit then called Mr. Thigpen and told him they had a small spill and had it contained (Tr. 930, 932-33). Mr. Thigpen said that he would soon be there and told Cruit to start cleaning it up when Brian [Eubanks], backhoe operator, reported for work. Everwood's contingency plan and the CCA label specify that lime be applied to the spill area. They limed the area of the spill (Tr. 932, 968). When Mr. Eubanks arrived at the plant, he operated the backhoe, scraped the contaminated soil toward the concrete-block wall, scooped it up and deposited it on the concrete drip pad on the southwestern

^{3/} Tr. 965-66. Among inaccuracies in Exhibit 61, is that it fails to show a third mix tank and the red CCA tank is shown as off of the concrete rather than on the slab comprising the treatment area.

side of the treatment area slab.^{4/} Cruit estimated the amount of the contaminated soil as three or four cubic yards (Tr. 967-68). For reasons hereinafter appearing (infra, finding 10), this estimate is accepted over other evidence in the record as to the amount of contaminated soil.

7. Mr. Cruit testified that the spill was caused by a hole in a three-quarter [inch] PVC line which carried CCA from the chemical concentrate tank to one of the mixing tanks (Tr. 913, 923, 926, 927-28). He located the hole near the top of the tank where the line curved to go into the tank. He testified that he replaced the PVC line with a three-quarter inch galvanized pipe (Tr. 959-60). This testimony as to the size of the pipe is consistent with the anonymous complaint (infra finding 17) and with a pump capacity of 14 gallons a minute. Accordingly, it is accepted as accurate.^{5/}

^{4/} The drip pad is a large concrete slab upon which lumber is placed after it is removed from the pressure treatment cylinder or tank. See 40 CFR § 260.10. Drippings drain into a sump where the chemical is collected for reuse.

^{5/} Mr. Trudell, identified infra note 7, estimated the size of the galvanized pipe as 3" (Tr. 712, 768-69). ADEM inspector Wolfe also estimated the replacement galvanized pipe was three inches in diameter (infra, finding 18). An ADEM memorandum, authored by Ms. Dixie Beatty (C's Exh 7), describes the pipe as eight-inch. These opinions are "eyeball" estimates and are not accepted.

8. Mr. Thigpen testified that he learned there had been a spill at the plant when at about 5 o'clock on a Monday morning in late June 1990, he received a phone call from Wayne Cruit, foreman and emergency coordinator, that a line had broken, and they had a "small" spill of chemicals (Tr. 61, 68). Asked specifically whether Mr. Cruit had used the word "small," Mr. Thigpen replied that he asked Mr. Cruit how much was spilled and that Cruit estimated the amount of the spill on the soil--some was on the concrete--as around 40 gallons (Tr. 61, 62, 112-13).
9. Over the telephone, Mr. Thigpen instructed Wayne Cruit to take a shovel and dike around the spilled area and to apply lime. When Brian [Eubanks] reported for work, he was to use the backhoe and place the contaminated soil on the drip pad. Mr. Thigpen proceeded to the plant, stopping by the hardware store to pick up more lime.^{6/} He described the broken line as a one-half or three-quarter [inch] PVC line, which carries CCA concentrate to one of the mix tanks (Tr. 63, 67). He testified that the capacity of the pump [and line] was about 14 gallons a minute.
10. Mr. Thigpen described the spill as on the east side of the treatment area between the treatment area and the fence (Tr. 72, 74-77). He estimated the size of the spill area as approximately eight feet by 12 feet (Tr. 120-21). Some

^{6/} Mr. Thigpen is also a principal in a family owned and operated hardware store (Tr. 45, 46, 48, 49).

support for this estimate is provided by the fact that a memo authored by Ms. Dixie Beatty of ADEM, referring to an inspection of the Everwood plant on September 21, 1990 (C's Exh 7), states that the area affected by the spill could not be observed, because a truck, size not stated, was parked there. Mr. Thigpen's estimate is in rough accordance with the size of the spill area estimated by Mr. Cruit (finding 5) and is accepted as substantially correct.^{7/} Although there is no evidence of the depth to which contaminated soil was excavated, it seems unlikely that the depth would have exceeded one foot, which supports Mr. Cruit's estimate of the volume of contaminated material as three or four cubic yards.^{8/} In further testimony, Mr. Thigpen estimated the amount of the spill on the ground as no more than a 55-gallon drum, which would weigh about 500 pounds and, because one-half of the solution was water,

^{7/} The EPA case development investigation (C's Exh 10), apparently authored by Mr. John Trudell, a chemical engineer and "lead" person in charge of the ESD investigation and sampling conducted on February 13, 1991 (infra finding 19), states that the area "cleaned up" was approximately 20' by 30'. This is apparently based on his observation that an area of disturbed soil extended east of the fence. Because there is no evidence linking any disturbed soil east of the fence to the spill, this statement as to the extent of the area "cleaned up" is not accepted.

^{8/} Mr. Cruit's estimate is also supported by a calculation by John A. Trudell, supra note 7, who estimated that the contaminated soil in the "containment unit" or pit occupied an area approximately 6.5' in diameter and 3' in depth (C's Exh 10) and who calculated the volume as approximately 3.66 cubic yards (Tr. 804).

he considered that at most the chemical on the ground weighed 225 pounds.^{2/} He concluded that it was unnecessary to report the spill (Tr. 124).

11. Because Everwood didn't have any drums on hand in which to store the material, Mr. Thigpen testified that he returned to the hardware store and picked up a roll of poly (polyvinyl) (Tr. 77, 78-79). He instructed his employees to dig a hole at the end of the parking lot in the southwest corner of the property next to the back corner of a [storage] building [which runs parallel to Taylor Avenue]. Taylor Avenue borders the plant on the south. He stated that they dug a six foot by four foot deep hole, loaded the contaminated soil on a flatbed truck and hauled it "around there." The material was hauled in one trip with a flatbed dump truck (Tr. 90). He indicated that the contaminated soil was on the drip pad approximately four hours (Tr. 79, 114). He estimated the quantity as five or six cubic yards (Tr. 115). He testified that he didn't leave the contaminated soil on the drip pad, because it would have been a hazard to his employees while waiting for drums (Tr. 114). They put the poly down in a double layer, added lime to the soil and to the bottom of the liner and unloaded the contaminated soil into what he referred to as

^{2/} Tr. 113. The label which accompanies tank truck shipments of CCA (finding 2) reflects that the chemical weighs 13.6 pounds per gallon as a 50% concentrate. Therefore, 55-gallons of CCA weighs 748 pounds.

the "storage unit" (Tr. 79). The unit was capped or covered with an old cylinder treatment door, which Mr. Thigpen estimated to be eight feet in diameter and to weigh 7,000 pounds (Tr. 70; photo, C's Exh 24b).

12. Mr. Thigpen testified that after the storage or containment unit was smoothed and leveled with the backhoe, the hinge bar across the top of the door was visible above the ground (Tr. 81, 82). He estimated that it was protruding above the ground approximately an inch and a half (Tr. 83, 84, 116). Mr. Thigpen attributed the fact that the hinge was not visible at a later time to the door having settled (Tr. 117). He acknowledged that he didn't put a fence around the excavated area or any signs [warning of the presence of hazardous waste] and that he did not take any samples of the contaminated soil for analysis prior to placing the materials in the ground (Tr. 85, 86). He considered that he had done the best he could [with the contaminated soil] under the circumstances (Tr. 112). The broken PVC line was repaired or replaced with a galvanized, metal pipe (Tr. 91).
13. Mr. Thigpen stated that Everwood ordered drums [necessary for disposing of hazardous waste] from CSI and that it took two to three weeks to obtain drums (Tr. 85). He acknowledged, however, that he did not order any drums the Monday morning of the spill (Tr. 86, 87). He did not know how many drums would be required to hold the contaminated

soil (Tr. 88). According to Mr. Thigpen, he told Wayne [Cruit] about the containment area, that Everwood was getting ready to build a new plant and that the contaminated soil would be removed when the old plant was cleaned up (Tr. 89, 92). He testified that he contemplated performing the cleanup in November of 1990, but that title to the property upon which the new plant was to be constructed was tied up in a legal dispute (Tr. 92, 93). Evidence that work at the new plant site was underway or contemplated is provided by a Pope Engineering & Testing Laboratories' soils investigation and engineering study, dated September 17, 1990 (Rs' Exh 36).

14. The title dispute referred to in finding 13 apparently concerned three separate parcels, comprising approximately one-half of the 20-acre parcel, purchased by Mr. Thigpen for the new plant. Although the written evidence of this dispute, a complaint against Everwood and the Thigpens filed in the Circuit Court of Baldwin County, Alabama on April 4, 1991, and a court order entered May 16, 1991 (Rs' Exhs 9 & 10), is dated long after the November 1990 date for the cleanup of the old site allegedly contemplated by Mr. Thigpen, it is unlikely that this lawsuit was the Thigpens' first notice of adverse claims to the property. Accordingly, Mr. Thigpen's testimony that he was told of such claims in late September or early October of 1990 (Tr. 145), is accepted as accurate. Moreover, if it be assumed

that financing for the construction of the new plant was necessary, it is not surprising that adverse claims to the property would delay construction.

15. After Mr. Thigpen arrived at the plant on the morning of the spill, Mr. Cruit started the treating operation (Tr. 939). He stated that "Cary and Brian" took care of the contaminated soil and he professed not to know what they had done with it (Tr. 940-43). He testified, however, that later that day Mr. Thigpen showed him the "storage area" behind the storage building along Taylor Avenue and told him that he didn't want it disturbed (Tr. 943). This was because he had put the material in a liner and didn't want the liner punctured. According to Cruit, Mr. Thigpen stated that the material would be removed when they completed the cleanup at Irvington, i.e., sandblasting of the pit, slab and mixing tanks, etc., and moved to the new plant across the Bay (Tr. 944-45).
16. Mr. Thigpen's testimony in finding 13 is supported in part by Mr. Jerry Lambert, who is in the construction business and who was employed by Mr. Thigpen to do site clearing and concrete work for Everwood's new plant at Spanish Fort in Baldwin County (Tr. 1404-06). Mr. Lambert recalled a conversation he had with Mr. Thigpen when they were at the new plant site discussing clearing the property and Thigpen stated he was going to clean up and disassemble the old plant when the new plant was constructed. Mr. Lambert

testified they discussed Lambert furnishing the men and equipment to clean up a spill stored at the old site (Tr. 1404-05). Lambert placed this conversation as occurring in July or August of 1990 and testified that he remembered it, because of the work on the new plant and because Mr. Thigpen had stated he would need a particular type of drum in which to put the spill material (Tr. 1407-08). Under cross-examination, he was more equivocal as to the date, indicating that the conversation with Mr. Thigpen was probably in September of 1990 (Tr. 1412-13). Lambert further testified that the scheduled date for completion of the new plant was November 1 [1990], depending on weather. While he could not recall when the contract was completed, he attributed delays in completion of the project to the property dispute referred to in finding 13 and the weather.

17. On August 23, 1990, Mr. Norman L. Thomas, then a pollution control specialist in ADEM's Mobile field office, received an anonymous phone call (Tr. 292, 296, 303). The caller, who identified himself as a former employee of Everwood, reported that Everwood Treatment Company had buried chemicals, chromium oxide and arsenic, on its property approximately one month ago (Tr. 301; Pollution Incident Report, Rs' Exh 1). The material buried allegedly resulted when a 3/4-inch line burst and sprayed for approximately 15 minutes. The material was reportedly buried about seven feet deep and covered with lime and gravel. Although the

anonymous informant apparently stated that the contaminated material had been covered with a steel door (Beatty, Tr. 385), Mr. Thomas, who received the call, did not testify to that fact and the memorandum of this call (C's Exh 3) does not so state. Later that day, the caller assertedly came into the office and drew a sketch showing approximately where the materials were buried. (Tr. 298-99).

18. Investigation of the complaint concerning Everwood (referred to in finding 17) was assigned to Mr. Edward J. Wolfe, an environmental scientist in ADEM's Mobile office (Tr. 306-07). He arranged to visit the Everwood plant with Ms. Dixie Beatty of ADEM's central office in Montgomery, who was to conduct a compliance inspection and who was more familiar with hazardous waste regulations and wood treatment facilities (Tr. 309-10). Ms. Beatty and Mr. Wolfe inspected the Everwood plant on September 21, 1990.^{10/} They met with Mr. Jay Hudson, sales manager, who, when asked whether the facility had had any spills or problems, replied ". . . not that he was aware of. . . ." (Tr. 322, 341, 376; C's Exh 4). Mr. Wolfe's main objective was to verify information in the complaint as to the replacement of the pipe and disturbance of the soil (Tr. 312, 313). Everwood was not informed of this objective. He testified that he was informed by Everwood employees

^{10/} Tr. 311, 313-14, Memorandum to Files, dated October 1, 1990, C's Exh 14; Inspection Check List, C's Exh 5.

that there had been a break of a PVC line between the concentrate tank and a mixing tank (Tr. 317-18). He observed a new galvanized pipe, which he estimated to be about three inches in diameter, running between two tanks on the east side of the treatment area. Mr. Wolfe testified that as they were leaving the plant, they observed an area in the southwest corner that appeared to be fresh clay (Tr. 321).

19. Ms. Beatty and Mr. Wolfe concluded that the anonymous complaint had been sufficiently substantiated to warrant further investigation. Accordingly, by letter, dated September 28, 1990 (Rs' Exh 1), ADEM summarized the anonymous complaint, the results of the investigation to date and requested sampling assistance from EPA, Region IV. This was scheduled for February 13, 1991, and on that date representatives of ADEM, including Ms. Beatty, representatives of EPA-ESD and of Reidel Peterson, a contractor with a backhoe employed by EPA, arrived at the Everwood plant (Tr. 387; Memorandum, dated March 8, 1991, C's Exh 7; Case Development Investigation, C's Exh 10). They began excavating in the southwest corner of the plant property in the area where the informant had said the material had been buried (Tr. 391; photos, C's Exhs 11A and 11B). The first three trenches excavated did not reveal anything (Tr. 397). On the fourth attempt, a green, steel door was encountered approximately six inches to a foot

below the surface.^{11/} The door was uncovered partially by the backhoe and partially by manual shoveling (Tr. 827) and lifted on one side by means of a chain fastened to the boom of the backhoe. A pit lined with plastic sheeting and what appeared to be lime was discovered under the door (C's Exh 7; photos, C's Exhs 11H & 11I, 11M & 11N). A pool of greenish-yellow liquid was observed around the edge of the pit (Tr. 402).

20. Two leachate samples and five soil samples were collected from the waste containment area or unit (C's Exh 7). The leachate samples (Nos. 3 & 4) were taken from the greenish-yellow liquid at the edge of the pit. Sample Nos. 5, 6, 8 and 9 were soil composites, while soil Sample No. 7 was described as a "grab sample." These samples were delivered to the ADEM Central Laboratory in Montgomery by Ms. Beatty on February 14, 1991 (Chain of Custody Forms, C's Exh 9). She testified that the lab was requested to run tests for total metals, TCLP and EP toxic and that the TCLP and EP

^{11/} Tr. 400-01; C's Exh 7; photos, C's 11E, 11F and 11G; video, C's Exh 12. The video shows water bubbling from the plastic lined pit at the same time as one of the men said "puncture." This lends some support to Ms. George's supposition that contamination later found in TMW-2, an upgradient well, could have been caused by EPA "bulldozing" contaminated material around at the site (infra finding 38). Although Mr. Trudell (note 7 supra) acknowledged that it would be logical [for the digging] to have caused a puncture of the plastic, he denied that they had done so (Tr. 732-35). As further support for the claim that EPA is responsible for any contamination, Respondents rely on photos showing material against or near the west fence after the excavation was "filled in" and the area regraded (Exhs 11P, 11Q & 11R).

tox tests showed that materials in the pit were a characteristic hazardous waste as to arsenic and chromium (Tr. 415). Although the analyses reports specify "EP" for EP tox, none specifically indicate TCLP tests (C's Exh 9). The leachate sample showed chromium at 267 mg/l (ppm) and all soil samples except No. 7 showed chromium at a concentration above the regulatory limit of 5 ppm (40 CFR § 261.24). Soil Sample Nos. 8 and 9 showed arsenic at concentrations of 9.2 mg/l and 8.76 mg/l, respectively, also above the regulatory limit of 5 mg/l.

21. Samples collected during the February 13 site investigation were also analyzed by the EPA-ESD laboratory in Athens, Georgia (C's Exh 10). EV-1 was described as a background soil sample taken from a wooded area to the west of the Everwood plant. EV-2 was taken from the first trench excavated in the parking area, EV-3 was taken from the liquid on top of the plastic at the edge of the lid, EV-4 was a composite sample of contaminated soil taken from soil immediately below the tank lid, EV-5 was a sample collected from approximately three to three and a half feet below ground surface on the south side of the contaminated soil and EV-6 was collected from the north side of the contaminated soil approximately one and a half feet below ground surface. EV-3, EV-4, EV-5 and EV-6 were subjected to TCLP and the results in EV-3, EV-4 and EV-6 were above the regulatory limits of 5 mg/l, showing chromium

concentrations of 230 mg/l, 16 mg/l and 16 mg/l, respectively. Additionally, EV-5 showed a concentrate of 8.4 mg/l for arsenic which is above the regulatory limit of 5 mg/l.

22. The test results referred to in finding 20 were furnished to Everwood by a letter from ADEM, dated March 20, 1991 (C's Exh 8). The letter stated in part: "The Department will be in contact in the near future concerning the proper disposal of this waste. No waste should be removed from the site until Everwood has requested and obtained approval for such removal from the Department." Mr. Thigpen interpreted the letter as meaning that he should not do anything with the waste until he heard from ADEM (Tr. 150). He also testified that at the exit interview with Ms. Beatty on February 13, 1991, he inquired whether he could "go ahead" and clean it up and that she said "no" (Tr. 148).
23. Mr. Hudson testified that he was standing beside Mr. Thigpen when he (Thigpen) asked whether he could remove the waste and that Ms. Beatty said "no" (Tr. 270-71). Mr. Hudson also quoted Ms. Beatty as saying "not to do anything, that it would be a very expensive adventure" (Tr. 271). Ms. Beatty flatly denied ever telling Mr. Thigpen either verbally or in writing that he could not do anything with the waste, asserting "(w)e would never have done that" (Tr. 421, 592). Nevertheless, she testified that they had

to wait until the results of the analytical testing were available and the ADEM letter (finding 22) is a prohibition on removal of the waste without ADEM's permission. She quoted her supervisor, Mr. Hagan, as telling Mr. Thigpen that he should not have buried the material, even if it were not hazardous, because, as a minimum, it would require a permit from the Solid Waste Division (Tr. 419-20).

24. Mr. Thigpen testified that the next thing he heard from ADEM was a proposed order in August of 1991 (Tr. 151). Among other things, the proposed order required the submission of a site assessment plan to determine the extent of hazardous waste management areas or units at the facility. Everwood employed Environmental Management Services (EMS) to perform such an assessment which was completed and presented on November 5, 1991 (Preliminary Site Assessment, Rs' Exh 18). EMS determined that the general direction of the groundwater flow was to the northeast. Water samples were obtained from temporary monitoring wells installed to the north, west, south and east and in close proximity to the containment area (Id. Fig. 2). Analyses of these samples revealed that copper and arsenic levels in all the temporary wells were below detectable levels (Id. 19). Levels of arsenic, chromium and copper in TMW-4, which is to the north of the containing area, were also below detectable levels. Levels of chromium in TMW-1, TMW-2 and TMW-3 were above the then

MCL of 0.05 mg/l.^{12/} The highest chromium concentration (0.613 ppm) was found in TMW-2 which is to the west and upgradient from the waste containment unit. Mr. Thigpen testified that this Preliminary Site Assessment was sent to ADEM on the date it was issued, but that he never received a response (Tr. 153). According to Ms. Beatty, ADEM may comment on site or groundwater assessment plans, but never approves such plans, because the regulation is considered to be "self-implementing" (Tr. 553, 555).

25. Mr. Fred L. Omundson, vice president for regulatory affairs of Chemical Specialties, Inc. (CSI) has been in the wood chemical business for 35 years and employed by CSI since January 1, 1983 (Tr. 832). He testified that Everwood Treatment Company had been a customer of CSI since the early 1980's. He explained that CSI was required by law to include an MSDS with the first shipment of chemical in each year and that, although reportable quantities were not required to be included in MSDS, CSI included such information in an effort to be helpful to its customers (Tr. 856-57, 859). An MSDS, dated July 11, 1988, a copy of which was mailed to Everwood by CSI on December 29, 1988 (Rs' Exh 74), describes the arsenic component of CCA as

^{12/} The regulation (40 CFR § 141.11(b)) specifies that the MCL for chromium of 0.05 mg/l shall remain effective until July 30, 1992. Section 141.62(b), applicable to community water systems, specifies that the MCL for chromium is 0.1 mg/l.

"Arsenic Acid (as As_2O_5) CAS No. 7778-39-4 (19.0 - 20.10%) in water." The MSDS states that the RQ for [CCA] as chromic acid is 1,000 pounds and is silent as to the RQ for arsenic. At this time, the RQ for arsenic acid was the statutory CERCLA RQ of one pound, the RQ for arsenic pentoxide was 5,000 pounds and the RQ for chromic acid was 1,000 pounds (40 CFR § 302.4, 1989). Mr. Omundson explained that arsenic pentoxide was a white solid, which becomes arsenic acid when put into water.^{13/} Because the substance shipped was arsenic pentoxide and water, it was arsenic acid and arsenic acid was the designation on the MSDS. He pointed out that the same chemical symbol " As_2O_5 " was used so that it could be tied back or related to arsenic pentoxide.

26. EPA changed the RQ for arsenic pentoxide to one pound and the RQ for chromic acid to ten pounds, effective October 13, 1989 (54 Fed. Reg. 33425, August 14, 1989). As a service to its customers, CSI prepares a "Regulatory Compliance Manual," excerpts of which are in the record (C's Exh 71). The mentioned excerpts are from an August 1989 revision of the manual and a log of "Revised Regulatory Manual Distribution," bearing a typewritten date

^{13/} Tr. 862. The fact that arsenic pentoxide is on the label accompanying each shipment of CCA, finding 2, suggests that Mr. Omundson may have reversed the designations, arsenic acid being the white solid, which becomes arsenic pentoxide when placed in water.

of 10-2-89 and signed by Jim Gogolski, southeastern sales representative for CSI, on April 30, 1990, reflects that a copy was personally delivered to "Cary Everwood" on December 12, 1989 (Tr. 834; C's Exh 69). This revision to the manual was completed prior to the referenced changes to RQs which EPA made effective as of October 13, 1989, and by a memo, dated November 30, 1989, signed by Deborah Barker, manager of Environmental Services for CSI, "Appendix A" was distributed, which, inter alia, reflected that the RQ for arsenic acid and arsenic pentoxide was one pound and that the RQ for chromic acid was ten pounds. Recipients were advised to include the Appendix in their new Regulatory Compliance Manual. A handwritten note on the memo reflects that it was mailed on December 7, 1989, and an attachment, which Mr. Omundson testified was the mailing list (Tr. 836), includes the name of Mr. Cary Thigpen, Everwood Treatment Company. CSI completed a revision to the MSDS for CCA on December 20, 1989 (C's Exh 30(a)). This MSDS stated that the RQ for [CCA] as chromic acid was ten pounds. A CSI reply to an EPA information request (C's Exh 46) reflects, and Mr. Omundson testified (Tr. 843), that through a typographical error the RQ of one pound for arsenic pentoxide was omitted.

27. Mr. Thigpen relied on CSI for information as to regulatory requirements (Tr. 126). He understood that in case of a spill of CCA he was supposed to take immediate action to

clean it up (Tr. 123). As we have seen (finding 10), he had concluded that the spill of CCA was too small to require reporting or notification. He based this conclusion on the July 1988 MSDS from CSI, which stated that the RQ for chromic acid was 1,000 pounds.^{14/} He insisted that the July 1988 MSDS was the one in his possession at the time of the spill in June 1990 and that he did not receive another one until the new plant commenced operations in August of 1991 (Tr. 139-40).

28. Mr. Thigpen's testimony in the above respects was supported by Mr. Hudson, who testified that he received and filed all the environmental paperwork (Tr. 1426-28). He denied receiving any MSDS from CSI or Mr. Gogolski in late 1989, asserting that if any MSDS had been given or addressed to Mr. Thigpen, such papers would have been laid on "my desk." Mr. Hudson was positive that Everwood had received only three MSDS from CSI, the first in 1986, the second in 1988 and the third when they took possession of the new plant on August 6, 1991 (Tr. 1427). Mr. Gogolski's "log" concerns distribution of the compliance manual rather than MSDS. Nevertheless, Mr. Gogolski is no longer employed by CSI and

^{14/} An October 1989 brochure entitled "CSI Supa Timber Treating Plant Environmental/Personnel Protection Information" (Rs' Exh 39), apparently describes the type of "new" plant purchased and installed by Everwood. The brochure characterizes as "small" spills of up to about 50 gallons and indicates that notification of the local Water Authority was required only for spills over 50 gallons which had reached a stream or river, or threatened a public waterway (Id. H.7).

some support for the testimony of Mr. Thigpen and Mr. Hudson in the foregoing respects is provided by the fact that CSI's response to EPA's information request (C's Exh 46) does not include Mr. Gogolski as among employees known to have visited the Everwood Irvington, Alabama site.

29. On January 9, 1992, ADEM "made final" the previously proposed administrative order (finding 24) and proposed to assess Everwood and Cary Thigpen a penalty of \$50,000.^{15/} Everwood appealed the order to the Alabama Environmental Management Commission. Paragraph A of the order required the submission of a site assessment plan, Paragraph B required the installation of a groundwater monitoring system in the uppermost aquifer beneath the plant grounds, Paragraph C required the submission of a closure plan and contingent post-closure plan and Paragraph F required the development and implementation of a written plan for inspecting all monitoring and safety equipment, security devices, etc., used to prevent, detect or respond to human health hazards. This order was revoked after EPA issued the instant complaint upon the ground that it was

^{15/} Although the proposed order mentioned a civil penalty, it did not state a proposed amount. A proposed penalty of \$50,000 was, however, among items discussed at a meeting between representatives of Everwood and ADEM held on October 10, 1991 (ADEM Memorandum, dated October 21, 1991, C's Exh 16). Contrary to Complainant's assertion (Reply Brief at 66), the memorandum reflects that Respondents stated the contaminated material was placed in the lined excavation as a "temporary storage measure" (Id. at 3).

unnecessary for ADEM to duplicate the efforts of EPA in the enforcement of alleged RCRA violations (ADEM Order, dated June 17, 1992).

30. By letter, dated January 21, 1992, Everwood submitted a plan to ADEM which was intended to comply with the mentioned paragraphs of the order and which was characterized as intended for the determination of clean closure (Rs' Exh 20). Everwood requested ADEM to approve the plan. Because ADEM's authority to require the submission of such a plan was being contested, ADEM initially refused to comment or to respond in any way to the plan (letter, dated March 14, 1992, Rs' Exh 23). ADEM subsequently changed its position and requested revisions in the plan. The revisions, which principally involved location of the monitoring wells, were submitted on April 8, 1992.^{16/}
31. On May 18, 1992, Everwood submitted to ADEM a Drip Pads Closure Report prepared by Pope Engineering & Testing Laboratories (Rs' Exh 29). The report indicates that the drip pads were decontaminated using sandblasting techniques. Although initial testing on bore samples from

^{16/} Closure Assessment by Pope Engineering & Testing Laboratories, Inc., dated June 23, 1992, Rs' Exh 43 at 28. For example, it was proposed to place the upgradient monitoring well to the southwest of the property across Taylor Road, one downgradient well approximately 30 feet from the waste containment unit and three other wells approximately 150 feet from the containment unit.

the sump area revealed levels of chromium above the regulatory limit of 5 mg/l, further cleaning and testing of additional bore samples showed results well below that limit. Pope Engineering concluded that the pads could be left in place.

32. In April 1992, Everwood, through counsel, requested and received approval from ADEM to excavate the containment area or unit. Everwood, through EMS, employed Pope Engineering & Testing Laboratories for this purpose. Actual excavation was undertaken on June 5, 1992, the material being placed in a dumpster (Pope Engineering & Testing Laboratories, Inc. Report, dated June 23, 1992, Rs' Exh 43). According to the report, the total area excavated was 11 feet in diameter by 9.5 feet deep. This included approximately two feet on the sides and two feet on the bottom of the excavation after the liner was removed. The material was shipped to Chemical Waste Management, Emelle, Alabama, in separate shipments of almost identical weight, the first of 23,680 pounds and the second of 23,480 pounds, on June 23 and June 25, 1992 (Hazardous Waste Manifests, C's Exhs 22k & 22l).
33. In January 1993, ESD Region IV conducted a case development investigation at the Everwood plant (Rs' Exh 79). Seven soil samples and five groundwater samples were collected. In addition, a background soil sample was collected from a wooded area approximately 175 feet west of the western

fence line of the property. Total metals analysis of this sample revealed arsenic concentrations of 4.7 mg/kg (ppm), chromium concentrations of 19 mg/kg (ppm) and copper concentrations of 7.7 mg/kg (ppm) (Id. Table 3). Soil Sample No. 4 was collected east of the treatment area and east of the east fence line of the property, while Soil Sample No. 2 was collected from the northern and western portion of the property near the former location of a wood pile. Total metals analyses of these samples revealed an arsenic concentration of 250 mg/kg (ppm), a chromium concentration of 210 mg/kg (ppm) and a copper concentration of 140 mg/kg (ppm) in Soil Sample No. 2 and concentrations of 650 mg/kg, 390 mg/kg and 440 mg/kg for arsenic, chromium and copper, respectively, in Soil Sample No. 4 (Id. Table 3). While the report points out that the levels for these metals are elevated over background levels, TCLP and EP toxicity tests on these samples revealed arsenic concentrations of .052 mg/l and .20 mg/l (ppm), respectively, in Soil Sample No. 2 and of 1.1 mg/l and 0.70 mg/l, respectively, in Soil Sample No. 4. Chromium was analyzed for, but not detected in all tests except for the EP toxicity test on Sample No. 4 which showed a concentration of 0.006 mg/l. These concentrations are substantially below the regulatory levels of 5 ppm for arsenic and chromium (40 CFR § 261.24(b)).

34. Groundwater Sample (GW) No. 1, drawn at the time of the January 1993 EPA case development investigation, was taken from a point at or near the center of the waste containment unit, GW No. 2 was taken near the location of the former wood pile and very near the point where SS No. 2 was collected, GW No. 3 was collected at a point north of the treatment area, GW No. 4 was collected east of the treatment area and east of the fence line very near the point where SS No. 4 was collected and GW No. 5 was collected from a point northeast of the treatment area, in close proximity thereof and inside the fence line (Figure 4, Rs' Exh 79). Although Table No. 5, reflecting total metals tests on groundwater samples, does not reflect analyses for arsenic and chromium, the report states that the only CCA constituent detected in these samples was copper. Copper was detected in GW No. 4 at a concentration of 40 ug/l (ppb). There is no MCL for copper (40 CFR § 141.11). This evaluation concluded that the apparent direction of the groundwater flow is in an easterly direction (Id. 7).
35. Ms. Shannon Maher, chief of the Alabama/Mississippi unit of the RCRA compliance section, EPA, Region IV, drafted the complaint and compliance order in this case (Tr. 1182). In calculating the proposed penalty of \$497,500, she used the 1990 RCRA Civil Penalty Policy (C's Exh 48; Tr. 1220-21; Penalty Computation Worksheet, C's Exh 40). She considered

that the quantity of contaminated material was approximately nine cubic yards (Exh 40). She testified that the purpose of the policy was to assure that penalties were assessed in a fair and consistent manner and were large enough to reflect the seriousness of the violation and deter future noncompliance. She explained that the first step was determining a gravity based component, which was accomplished by considering two factors, the potential for harm and the extent of deviation from the regulatory requirements (Tr. 1222-23). "Potential for harm" involves an assessment of the risks of exposure and she pointed out that the waste was arsenic and chromium, a toxic hazardous waste (Tr. 1232). She stated that arsenic is a known human carcinogen, that the wastes were spilled into the soils and that metals are known to adhere to soils. While she opined that the largest threat posed by arsenic and chromium was by inhalation, she emphasized that what she characterized as "disposal" occurred into the groundwater table in a marshy area having a high water table (Tr. 1232-34). She also emphasized that there were mobile homes in the area, a house and a well across the street (Taylor Avenue), and that samples from temporary monitoring wells installed by Everwood's consultant showed chromium levels above MCLs (Tr. 1235-36). The penalty computation worksheet states that the fact chromium levels were above MCLs demonstrates that the illegal disposal has impacted the environment.

For all of these reasons, she considered that there was a major risk of exposure to human health and the environment, categorizing the "potential for harm" as major on the penalty matrix (Tr. 1241).

36. Turning to the extent of deviation from the regulatory requirements, Ms. Maher also characterized this as "major," asserting that if a facility operates without a permit, it renders RCRA useless as there is no oversight and no assurance that the waste is being properly managed (Tr. 1242). Because there was not even partial compliance with any of the requirements for [land disposal of hazardous waste] she considered there was a major deviation from the regulatory requirements, placing the violation in the major cell of the penalty matrix (Tr. 1243-44). She considered that land disposal of hazardous waste without a permit was the most egregious violation and assessed the maximum penalty for a single violation of \$25,000 (Tr. 1244-45).
37. Because operating without a permit was in the "major/major" category, Ms. Maher testified that she was mandated [by the penalty policy] to calculate a multi-day penalty. The multi-day penalty matrix has amounts ranging from \$1,000 to \$5,000 for major/major violations (Penalty Policy at 24) and, although Ms. Maher testified that she could easily have justified selecting the upper part of this range, she used the lower half, because otherwise Respondent could not afford the penalty (Tr. 1245-46). As permitted by the

policy, she capped the penalty at 180 days, considering that the first day of violation was July 23, 1990, the report of the anonymous call. She multiplied \$2,000 by 179 days which equals \$358,000, added an additional 25% or \$89,500 for willfulness, because she concluded that Mr. Thigpen knew of the toxicity of the waste and its proper handling, but elected not to manifest the waste off site (Tr. 1247-48). Although a separate penalty could have been assessed for each violation, the penalty as calculated is only for the principal violation, i.e., operating a hazardous waste disposal facility without a permit (Tr. 1230-31; Penalty Computation Worksheet). The LDR violation was calculated at the maximum penalty of \$25,000 for a single day (Tr. 1253-55), resulting in the total penalty claimed of \$497,500.^{17/}

38. Ms. Lois D. George was accepted as an expert geologist and hydrogeologist (Tr. 1446). She reviewed the preliminary site assessment and the closure report prepared by EMS (Rs' Exhs 18 & 43) and the case development evaluation prepared by EPA (Rs' Exh 79) (Tr. 1447-48). She also visited the site. Based on the preliminary site assessment which showed the highest concentration of chromium in TMW-2,

^{17/} Complainant has alleged that a mathematical error was made in the original penalty calculation, which should have been \$503,750 (Brief at 2, note 1). Complainant filed a motion to amend the complaint to add additional counts and to, inter alia, correct the alleged penalty calculation error. This motion was denied by an order, dated July 28, 1993.

which is to the west and upgradient of the containment area, she concluded that any impact to groundwater from the containment area at the time of sampling was minimal and limited to chromium (Tr. 1453). She viewed the video of the February 13, 1991, excavation and sampling and opined that the concentrations of chromium in TMW-1, TMW-2 & TMW-3 [revealed by the preliminary site assessment sampling] could have been caused by contaminated materials being bulldozed around to cover the excavation (Tr. 1454). Based on the testing of GW-1, which was drawn at or near the containment unit at the time of EPA's January 1993 case development evaluation, Ms. George testified that there was no impact at that location at the time of sampling (Tr. 1456). She emphasized that soil samples drawn from the excavation at the time of closure revealed results below regulatory levels.

39. Mr. Fred Mason, a geologist and chief of the Hydrogeology Unit for ADEM, explained that a groundwater assessment should involve the installation of a minimum of one upgradient well and three downgradient wells, which should be sampled on a quarterly basis to establish background water quality and to determine whether a compound above background water quality has been detected (Tr. 1849-50, 1855-56). He had reviewed the EMS preliminary site assessment of the Everwood plant and was of the opinion that the data were insufficient to make a determination as

to the impact of the containment area or unit on the groundwater (Tr. 1859). He testified that we (ADEM) would want continued monitoring and the establishment of statistical groundwater quality information on the site, comparisons of upgradient versus downgradient wells, and a further assessment to delineate any plume of contamination. He opined that, while some of the downgradient wells installed by EMS would have sufficed if left in place and monitored over time, the upgradient well was too close to the containment area or unit (Tr. 1860). Moreover, because TMW-2 contained chromium, it could not be used as an upgradient well (Tr. 1861). Mr. Mason had read EPA's January 1993 case development investigation and found it had the same deficiency, i.e., it was a one-time sampling, while sampling over time was the preferred method of determining the hydrogeology of a site (Tr. 1864).

40. Mr. Al J. Smith, a retired EPA employee, is a registered professional engineer with training and experience in soil mechanics and an attorney (Tr. 1508-18). He qualified as an expert in, among other fields, RCRA, CERCLA and the current NCP (Tr. 1546-50). He emphasized that the background sample taken on February 13, 1991, showed a concentration of 5.7 mg/kg and, relying on a U.S. Geological Survey, pointed out that background levels of chromium in that part of Alabama were such that 20 percent of the samples would read 20 to 30 mg/kg (Tr. 1569-70). He

buttressed this conclusion by referring to the background sample taken by EPA during the site investigation in January 1993, which showed a chrome concentration of 19 mg/kg (Tr. 1572).

41. Based on the soils at the Everwood plant, Mr. Smith calculated that a contaminant at the containment unit would move through the groundwater at the rate of 20.9 feet in two years (Tr. 1584). He concluded that TMW-1, -2, -3 and -4, the temporary wells installed by EMS in November 1991, were not impacted by the containment (Tr. 1585). He pointed out that, if the chromium at TMW-2 were in any way attributable to the containment unit, arsenic would also be there in some measurable form (Tr. 1591). He opined that there was no relationship between the chromium in any of the samples and the lined containment unit (Tr. 1591, 1595). Based on groundwater samples collected during the January 1993 EPA site investigation, he concluded that water at the site was suitable for public drinking water (Tr. 1565).

42. Turning to CERCLA §§ 101(25) and 101(23), which define the terms "respond or response"^{18/} and "remove or removal,"^{19/}

^{18/} CERCLA § 101(25) provides: (t)he terms "respond" or "response" means remove, removal, remedy, and remedial action, including enforcement activities related thereto.

^{19/} CERCLA § 101(23) provides: (t)he terms "remove or removal means the cleanup or removal of released hazardous substances from the environment, such actions as may be (continued...)

Mr. Smith testified that a "response" has two categories, a "removal" and a "remedial" (Tr. 1597). He defined a "removal" as the immediate action that should be taken [in response to a release or threatened release of a hazardous substance], while a "remedial" was the long-term approach to the clean up of a contaminated site (Tr. 1597-98). Referring to CERCLA §§ 104(a)(1), 106(c), 121, 122 and 40 CFR § 300.700(a), he opined that private parties have a right and the authority to undertake a response action [to reduce or eliminate the release of a hazardous substance] (Tr. 1600-01). He cited CERCLA § 121(e)(1) and 40 CFR § 300.400(e) for the proposition that no federal, state or local permits are required for on-site response actions. Asked how long a removal action could take, Mr. Smith referred to CERCLA § 104(a), actually § 104(c)(1), which, with specified exceptions, limits obligations of the fund [to \$2,000,000] or until a period of 12 months has elapsed from the date of initial response. See also 40 CFR § 300.415(b)(5). He emphasized that there was nothing in the regulations which restricted a private party to less than that time (Tr. 1602).

^{19/}(...continued)

necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.

43. Mr. Smith testified that CERCLA was the pervasive law in spill response (Tr. 1604). He cited CERCLA § 106(c), which requires the Administrator, after consultation with the Attorney General, to publish guidelines for using the imminent hazard, enforcement and emergency response authorities of that section and other existing statutes administered by the Administrator of EPA to effectuate the responsibilities and powers created by the Act (Tr. 1609-11). He asserted that there were no guidelines other than the NCP.^{20/} He opined that what Everwood [and Mr. Thigpen] did in response to the spill was consistent with the NCP, i.e., the spill was contained and [the contaminated materials] were stored on site in a lined container, something EPA has done a thousand times.^{21/} He emphasized that the containment unit was capped with [a steel door] which prevented children and animals from being exposed to

^{20/} Mr. Smith was mistaken as guidelines purporting to implement CERCLA § 106(c) were published in 1982 (47 Fed. Reg. 20664, May 13, 1982). Among other things, the guidelines indicate that, prior to undertaking enforcement action or a fund-financed cleanup, an attempt would normally be made to notify PRPs to provide them an opportunity to undertake required cleanup prior to any government action. It is clear, however, that any such PRP cleanup would be pursuant to an agreement with EPA.

^{21/} Tr. 1607-08, 1687, 1694, 1724-25. While he indicated that he would have preferred to have the contaminated material "taken straight" to Emelle or South Carolina, he pointed out that it takes a waste profile and testing for the material to be accepted, which may take from three weeks to nine months depending on the permit status of the TSD facility (Tr. 1627, 1687-88, 1690).

materials in the containment unit and asserted that the fact it was covered with dirt was more typical than not.

44. Mr. Smith referred to the almost identical language in 40 CFR §§ 264.1(g)(8), 265.1(c)(11), 270.1(c)(3) to the effect that the requirements of these parts are not applicable to, and a RCRA permit is not required by, a person engaged in treatment or containment activities during immediate response to a discharge of material which, when discharged, becomes a hazardous waste. He asserted that in order for the waivers in the cited sections to apply a person must do two things: (1) [perform] initial response and containment and (2) comply with Subparts C and D [of Parts 264 or 265] (Tr. 1613-14, 1629). He pointed out that Subpart C deals with emergency equipment and that Subpart D deals with contingency planning and having a contingency plan. He opined that, from the facts as he understood them, Mr. Thigpen had met the requirements for an exemption from the requirements of Parts [264 and 265] and had committed no RCRA violations of any kind (Tr. 1631-32).
45. Dr. Judith Sophianopoulos, who has bachelor's, master's and Ph.D. degrees in chemistry, qualified as an expert in the RCRA land disposal restrictions (Tr. 1000-01). She defined land disposal" as "placement in or on the land" and the ultimate goal of the LDR regulations as preventing hazardous waste from being put in or on the ground. She testified that the LDR applicable here, which included

wastes which were hazardous by characteristic, were known as the "Third Third Final Rule" and were published in the Federal Register on June 1, 1990 (Tr. 1004). The effect of the rule was that wastes specified in 40 CFR § 268.35 were prohibited from land disposal unless they met treatment standards of Part 268. While she noted that the statutory effective date of the rule was May 8, 1990, EPA had granted a variance which meant that wastes disposed of prior to August 8, 1990, were not required to meet the treatment standards (Tr. 1005; § 268.35(a)). Ms. Sophianopoulos maintained, however, that a landfill or surface impoundment in which such wastes were disposed of prior to August 8, 1990, would have to comply with the minimum technology requirements of 40 CFR Part 264, Subparts F and N, i.e., a double liner, a leachate collection system, and a groundwater monitoring system (Tr. 1006; 40 CFR § 268.5(h)).

46. Based on having listened to the testimony in this proceeding and having viewed photos and the video, Ms. Sophianopoulos classified the "containment unit" at the Everwood plant as a "landfill" within the definition in 40 CFR § 260.10 (Tr. 1011-12). She testified that the "containment unit" could not be regarded as a RCRA "storage container," because the LDR regulations do not allow storage in land-based units (Tr. 1012-13). See 40 CFR § 268.50. Moreover, a "device" must be portable in order to

be a container under RCRA (40 CFR § 260.10). She opined that the "containment unit" was a violation of LDR, because it did not comply with the minimum technology requirements (Tr. 1014-15).

47. In further testimony, Ms. Sophianopoulos opined that Everwood's actions in diking the spill, applying lime to the spill and moving contaminated soil to the drip pad were part of an "immediate response," within the permitting exceptions in 40 CFR §§ 264.1(g)(8), 265.(c)(11) and 270.1(c)(3) (Tr. 1026-28). She testified, however, that Everwood's subsequent actions in moving the contaminated soil to the southwest corner of the property and placing it in the ground were not part of an immediate response, because the preamble to the rule, which promulgated the mentioned permitting exceptions, stated that "disposal" was not part of an immediate response (Tr. 1028-29, 1032-33). Ms. Dixie Beatty of ADEM adopted a more expansive view, indicating that the "immediate response" would be over once drums [assuming drums were ordered] in which to place the contaminated soil had been obtained.^{22/}
48. Explaining the relationship between CERCLA and LDR, Ms. Sophianopoulos stated that, if a CERCLA response action generates an LDR waste and the waste is shipped off site,

^{22/} Tr. 622. In other testimony, Ms. Beatty testified that a person in doubt as to the meaning of "immediate response" could call ADEM or consult a dictionary (Tr. 636, 640, 655).

it must meet all LDR requirements before being land disposed (Tr. 1036). She acknowledged that "landfill" in the regulation (40 CFR § 260.10) was defined with reference to "disposal facility" and that the definition of the latter term required an intentional placement of hazardous waste and included the phrase "at which waste will remain after closure" (Tr. 1105-06). She explained that if the facility were closed as a landfill, waste would remain after closure, but that, if everything were removed and the facility were clean closed it would no longer be a landfill (Tr. 1107-08). She also acknowledged that the definition of "disposal" included the phrase "so that hazardous waste or any constituent thereof may enter the environment. . ." (Tr. 1109). Ms. Sophianopoulos insisted, however, that the latter determination was made automatically, i.e., "you place something in the land, it may enter the environment" (Id.).

49. Mr. Alfred Hitchcock, chief of the Removal Operations Section of the Emergency Response and Removal Branch, EPA Region IV, who was a CERCLA "on-scene coordinator" (OSC) for several years, qualified as an expert in CERCLA removal actions (Tr. 1767-68). He defined an OSC as an individual having direct delegated authority from the President to conduct removal actions pursuant to the NCP (Tr. 1761-62). He has known and worked with and for Mr. Al Smith and testified that there was no doubt that Mr. Smith was one of

the foremost experts on CERCLA and the NCP in the country (Tr. 1803). Mr. Hitchcock testified that, although private parties could do "removals" or cleanups under CERCLA, without an OSC as "lead" or without being under an order, provisions for the waiving of permits were not applicable (Tr. 1774-76). Considering a hypothetical such as the Everwood spill, he opined that the urgency of the situation would be over once the spill was initially contained, further migration was prevented and the site secured (Tr. 1779-80). This testimony is consistent with Complainant's position that the "immediate response" was over once the contaminated material was placed on the drip pad. In further testimony, Mr. Hitchcock indicated that EPA policy was to defer to RCRA for remedial work before considering a site for the NPL and that the same policy applied to "removals" before spending fund money (Tr. 1789-90). He testified that [as an OSC] he could put emergency equipment anywhere in the eight-state area comprising Region IV within a day (Tr. 1798).

C O N C L U S I O N S

1. Contaminated soil resulting from the cleanup of the spill of CCA solution at the Everwood plant was a characteristic hazardous waste within the meaning of 40 CFR § 261.24, because it contained concentrations of arsenic and chromium in excess of 5 mg/l.

2. Even if, as contended by Respondents, CERCLA rather than RCRA governed the spill of CCA solution at issue here, RCRA regulations were ARARs which Everwood was required to follow under the circumstances.
3. Alabama hazardous waste regulations are part of a RCRA Subtitle C program and may be enforced by EPA. Because ADEM's action in revoking its order alleging violations of Alabama hazardous waste regulations did not adjudicate any issues, the doctrines of "res judicata" and "collateral estoppel" are not applicable and the instant EPA action is not barred by ADEM's order.
4. An "immediate response" to the spill within the meaning of 40 CFR § 264.1(g)(8), and its §§ 265.1(c)(11) and 270.1(c)(3) counterparts, was not over until a reasonable time had elapsed in which Everwood could obtain drums or other suitable containers in which to store the contaminated material. Because the evidence establishes that a maximum of two to three weeks would be required to obtain drums and Everwood held the waste in the excavation far beyond this period, Everwood became subject to RCRA standards applicable to owners and operators of hazardous waste treatment, storage and disposal facilities (40 CFR Part 264).

5. Everwood's action in placing the contaminated material in a lined excavation at its plant prima facie constituted "disposal" of hazardous waste (RCRA § 1004(3), 40 CFR § 260.10) and its action in holding the waste in the excavation beyond the time an "immediate response" was over within the meaning of § 264.1(g)(8) constituted operation of a "disposal facility" (40 CFR § 260.10).
6. Because the excavation into which Everwood placed the contaminated soil did not comply with the minimum technological requirements, i.e., a leachate collection and groundwater monitoring systems (40 CFR § 268.5(h); Part 264, Subparts F and N), Everwood violated the LDR regulations (40 CFR Part 268).
7. Mr. Thigpen is the sole active officer of Everwood and he and his wife are the sole stockholders of Everwood. Accordingly, Mr. Thigpen was an "operator" of the facility and because he directed the activities resulting in the violations found, he may be held personally responsible for any penalties.
8. The penalty demanded by Complainant greatly exceeds any actual or potential harm to the environment, makes no allowance for the statutory factor of Respondents' "good faith efforts to comply with applicable requirements" and is designed to punish rather than deter. An appropriate penalty is the sum of \$59,700.

DISCUSSIONI. Contaminated Soil As Characteristic Waste

Soil and leachate tests on samples taken from the excavation or containment unit at the Everwood plant at the time of the site investigation on February 13, 1991, revealed concentrations of arsenic and chromium above 5 mg/l (findings 20 and 21). Accordingly, the contaminated soil was a characteristic hazardous waste (D004) arsenic and (D007) chromium within the meaning of 40 CFR § 261.24.

II. Regardless Of Whether CERCLA Rather Than RCRA Applies To The Spill At Issue, RCRA Regulations Are ARARs Which Everwood Was Required To Follow

A review of CERCLA, 42 U.S.C. § 9601 et seq., reveals that it is primarily concerned with government action in removing or arranging for the removal or remediation of the release or threatened release of hazardous substances into the environment. See, e.g., CERCLA § 104(a) (42 U.S.C. § 9604), entitled "Response Authorities," providing in part ". . . the President is authorized to act, consistent with the national contingency plan. . ."; § 104(a)(2) providing in part that "(a)ny removal action undertaken by the President under this subsection. . ."; § 106, entitled "Abatement actions" providing in part (§ 106(a)) ". . . when the President determines that there may be an imminent and substantial endangerment. . . ."; § 121, entitled "Cleanup standards," providing in part (§ 121(a)) "(t)he

President shall select appropriate remedial actions. . . ." and § 122, entitled "Settlements," providing in part (§ 122(a)) "(t)he President, in his discretion, may enter into an agreement with any person. . . ." ^{23/} In addition, § 121(f) requires the President to promulgate regulations providing for substantial and meaningful involvement by each State in the initiation, development, and selection of remedial actions to be undertaken in that State.

The Act appears to contemplate "response actions" by private persons only in the case of an agreement with the President or his delegatee, which requires a determination that the action will be properly performed (CERCLA § 122(a), 42 U.S.C. § 9622(a)). ^{24/} Mr. Smith opined, however, that CERCLA, considered as a whole, authorized private party response actions (finding 42). CERCLA §§ 104(a)(2) and (4); 105(a)(9); 107(a)(4)(B) and (d)(1); 111(a)(2); 112(c)(2); 113(f)(1); and 122(e)(6), while not expressly authorizing, refer to or imply a

^{23/} CERCLA § 115 (42 U.S.C. § 9615) authorizes the President to delegate and assign any duties or powers imposed upon him [by the Act]. The President has delegated this authority to the Administrator and to other federal agencies. See E.O. No. 12580 (52 Fed. Reg. 2923, January 29, 1987).

^{24/} Legislative history indicates that Congress recognized that voluntary cleanups are essential to a successful program of hazardous substance cleanup and added new section 122 to the Superfund Amendments & Reauthorization Act of 1986 (SARA) to encourage and establish procedures and protections pertaining to negotiated private party cleanups where it is in the public interest (House Report No. 99-253(V), 99th Cong. Second Sess. (1986) at 58; reprinted U.S. Code Cong. & Adm. News (1986) at 3181.

right of private parties to respond to releases or threatened releases of hazardous substances.^{25/} In any event, the NCP (40 CFR § 300.700(a)) settles the matter, providing that "(a)ny person may undertake a response action to reduce or eliminate a release of a hazardous substance, pollutant, or contaminant." The balance of § 300.700 deals with the requirements and procedures for a person, other than governments, undertaking a response action to recover the costs thus incurred either from the "fund" or parties found to be liable.

The preamble to the revised NCP reflects that § 300.700(a) was lifted from former § 300.71(a) (50 Fed. Reg. 47969, November 20, 1985) and that the intent was to combine provisions for the use of volunteers and notification and preauthorization requirements [for reimbursement] of former § 300.25 (50 Fed. Reg. 47951, November 20, 1985) with the "Other party response provisions" of § 300.71 (50 Fed. Reg. 47969). See the preamble to proposed revisions to the NCP, 53 Fed. Reg. 51461 (December 21, 1988). The preamble goes on to provide: "(I)n today's proposed rule, as well as in the current NCP, EPA makes

^{25/} For example, CERCLA § 122(e)(6) provides that where either the President, or a PRP pursuant to an administrative order or consent decree, has undertaken a remedial investigation and feasibility study at a particular facility, no PRP may undertake any remedial action at the facility unless such remedial action is authorized by the President. It is obvious that this prohibition is superfluous, if private party remedial actions without the approval of the President are unauthorized. Moreover, by limiting the circumstances under which the prohibition is applicable, it implies that private party remedial actions are authorized under other circumstances.

it absolutely clear that no Federal approval of any kind is required for a cost recovery action under CERCLA section 107" (Id. 51462). There would seem to be little room for doubt, but that a private party response action, consistent with the NCP and thus eligible for cost recovery in accordance with CERCLA § 107(a)(4)(B), is, or could be a "CERCLA cleanup."

Further support for the above conclusion is found in § 300.700(c)(3)(i) which provides that, for the purposes of cost recovery, a response action will be considered consistent with the NCP, if the action is in substantial compliance with the applicable requirements of paragraphs (c)(5) and (6) of § 300.700 and results in a "CERCLA-quality cleanup."^{26/} It will be

^{26/} Section 300.700(c)(3) provides in pertinent part:

(3) For the purpose of cost recovery under section 107(a)(4)(B) of CERCLA:

(i) A private party response action will be considered "consistent with the NCP" if the action, when evaluated as a whole, is in substantial compliance with the applicable requirements in paragraphs (c)(5) and (6) of this section, and results in a CERCLA-quality cleanup;

* * *

(5) The following provisions of this part are potentially applicable to private party response actions:

(i) Section 300.150 (on worker health and safety);

(ii) Section 300.160 (on documentation and cost recovery);

(iii) Section 300.400(c)(1), (4), (5), and (7) (on determining the need for a Fund-financed action); (e) (on permit requirements) except that

(continued...)

recalled that Mr. Smith opined that Everwood's actions in response to the spill were consistent with the NCP (finding 43). Although the preamble to the revised NCP (infra note 28) supports Complainant's position insofar as eligibility for cost recovery is concerned, the flat assertion that a voluntary cleanup cannot be a CERCLA cleanup (Brief at 52-59; Reply Brief at 6, 8, 37) is rejected.

Respondents argue that the permit exemption for on-site removal activities provided by CERCLA § 121(e)(1) applies without limitation or qualification (Brief at 8-11; Reply Brief at 12). CERCLA § 121(e)(1) provides:

(1) No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial

^{26/}(...continued)

the permit waiver does not apply to private party response actions; and (g) (on identification of ARARs) except that applicable requirements of federal or state law may not be waived by a private party;

(iv) Section 300.405(b), (c), and (d) (on reports of releases to the NRC);

(v) Section 300.410 (on removal site evaluation) except paragraphs (e)(5) and (6);

(vi) Section 300.415 (on removal actions) except paragraphs (a)(2), (b)(2)(vii), (b)(5), and (f); and including § 300.415(i) with regard to meeting ARARs where practicable except that private party removal actions must always comply with the requirements of applicable law;

* * * *

action is selected and carried out in compliance with this section.^{27/}

The NCP (§ 300.400(e)(1)), however, narrows the scope of the exemption, requiring both "removal and remedial actions" to be conducted pursuant to CERCLA §§ 104, 106, 120, 121, or 122 to qualify for the permit exemption. Section 300.400(e)(1) provides:

(e) Permit requirements. (1) No federal, state, or local permits are required for on-site response actions conducted pursuant to CERCLA sections 104, 106, 120, 121, or 122. The term on-site means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action.

(2) Permits, if required, shall be obtained for all response activities conducted off-site.

Concerning cost recovery, the preamble states that the statute makes clear that the waiver provisions (§§ 121(d)(4) and 121(e)(1)) are reserved for actions carried out by the President (or his delegate) or by a state or tribe under CERCLA § 104(d)(1), or by a party pursuant to an order or decree under CERCLA §§ 106 or 122.^{28/} Waivers under CERCLA § 121(d)(4) apply

^{27/} Section 121(e)(1) was added to the Act by the Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499 (October 17, 1986) (SARA).

^{28/} The preamble, 55 Fed. Reg. 8796 (March 8, 1990) provides in pertinent part:

Governmental actions are taken under the authority of CERCLA, and therefore may invoke ARARs waivers under CERCLA section 121(d)(4). However, private party actions are not carried out under CERCLA authority but simply seek to take advantage

(continued...)

only to "remedial actions" and, as noted, the NCP narrows the scope of the permit exemption provided by § 121(e)(1) as to on-site removal actions. Accordingly, the quoted statement from the preamble is inaccurate insofar as it concerns "removal actions."

28/ (...continued)

of a right of cost recovery provided under CERCLA section 107 for certain types of actions; therefore, waivers of applicable requirements of federal or state law are unavailable in such private party cleanups. Similarly, the concept of complying with applicable requirements to the extent practicable for removal actions, applies only to actions taken or secured by the President (or his authorized representative). (In emergency situations where an immediate response action is required by a private party, noncompliance with an applicable requirement should not necessarily bar a claim for cost recovery.)

* * *

Additionally, Id. at 8797:

12. Waivers. As discussed above, certain provisions of the NCP (and of the statute) are not appropriate to private party response actions for which cost recovery may be sought under CERCLA. These include the permit waiver in CERCLA section 121(e)(1) (§ 300.400(e)) and the waiver of applicable federal or state requirements in CERCLA section 121(d)(4) (NCP § 300.430(f)(1)(ii)(B)). The statute makes clear that those waiver provisions are reserved for actions carried out by the President (or his delegate) or by a state or tribe under CERCLA section 104(d)(1), or by a party pursuant to an order or decree under CERCLA section 106 or 122. The final rule has been revised to make clear that private parties that qualify for cost recovery under CERCLA section 107 are not entitled to the permit waiver of CERCLA section 121(e)(1), and may not invoke the waivers in CERCLA section 121(d)(4) for applicable requirements, although "relevant and appropriate" requirements may be waived upon a proper showing under § 300.430(f)(1)(ii)(C) of this rule.

Everwood is correct that neither "response" nor "immediate response" is defined in RCRA or RCRA regulations.^{29/} CERCLA § 101(25) defines "respond" or "response" as meaning "remove, removal, remedy, and remedial action . . ." and § 101(23) defines the terms "remove or removal" as meaning "the cleanup or removal of released hazardous substances from the environment, . . . such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal or removed material, . ." (supra notes 18 and 19). As Everwood contends, these definitions are prima facie broad enough to include its actions in response to the spill at issue here. It is concluded, however, that even if this be regarded as a CERCLA matter, RCRA regulations are "applicable requirements" which Everwood as a private party was bound to follow.

"Applicable and relevant and appropriate requirements" (ARARs) are referred to in CERCLA only in § 121, which primarily concerns "remedial action." Nevertheless, the NCP (§ 300.415(h)(i)) provides that "Fund-financed removal actions under CERCLA § 104 and removal actions pursuant to CERCLA § 106 shall, to the extent practicable considering the exigencies of the situation, attain applicable or relevant and appropriate requirements under federal environmental or state environmental

^{29/} "Response action plans" are required to be submitted to and approved by the Regional Administrator prior to the receipt of waste. See 40 CFR § 264.304 applicable to landfills.

or siting laws." The preamble to the revised NCP reflects that this requirement was adopted, not because it was required by the Act, but because it was believed to be sound policy.^{30/} If attainment of a ARARs is sound policy for "Fund-financed" or lead agency-directed removal actions, a fortiori, should it be sound policy for removal actions undertaken by a private party. Sections 300.700(c)(5)(iii) and (vi) and the preamble to the revised NCP (supra notes 26 and 28) provide that permit waivers are not applicable to private party response actions qualifying for cost recovery under CERCLA § 107 and that removal actions by private parties must always comply with applicable requirements of federal or state law. Although, strictly read, § 300.700(c) applies only to cost recovery actions, the language that response actions by private parties must always comply with applicable law is sufficiently broad to include private parties generally and there is no sound reason why this provision should

^{30/} The preamble (55 Fed. Reg. 8695) provides in pertinent part:

First, as a threshold matter, EPA agrees that Congress did not, in the 1986 amendments to CERCLA, "require" EPA to meet ARARs during removal actions. However, it has been EPA's policy since 1985, established in the NCP, to attain ARARs during removals to the extent practicable, considering the exigencies of the situation. EPA believes that this is still a sound policy. Reference to requirements under other laws (i.e., ARARs) help to guide EPA in determining the appropriate manner in which to take a removal action at many sites.

This supports Mr. Smith's opinion that there is no statutory requirement that private parties comply with ARARs during on-site removal actions (Tr. 1711-14, 1720-21).

not apply to private party response actions in addition to those where cost recovery is sought. Moreover, the preamble language (supra notes 28 and 30) is sufficiently broad to place persons subject to the regulation on notice of the requirement and of EPA's policy in that regard.^{31/} It is concluded that, even if Everwood's actions in response to the spill were removal actions under CERCLA, RCRA, corresponding provisions of the Alabama Hazardous Waste Management and Minimization Act and regulations thereunder are requirements applicable to Everwood under the circumstances present here.

III. Alabama Hazardous Waste Regulations May Be Enforced by EPA

Pursuant to RCRA § 3006, Alabama was granted final authorization to administer its own hazardous waste program in lieu of the federal program effective December 22, 1987 (52 Fed. Reg. 46466, December 8, 1987). That authorization did not include HSWA requirements (supra note 1).

The effect of the authorization is that except for HSWA requirements the Alabama program operates in lieu of the Federal program (RCRA § 3006(b)).

^{31/} The Region IV RCRA Guidance "Management of Contaminated Media" (Rs' Exh 71), which provides, inter alia, that "the user is encouraged to take full advantage of all waivers provided under either RCRA or CERCLA" (Id. at 12), is solely intended for the guidance of EPA employees and cannot be relied upon to create any rights, substantive or procedural, in litigation with the U.S. Accordingly, Everwood's reliance on this guidance to support its argument that ARARs are not applicable is misplaced.

RCRA § 3008, entitled "Federal enforcement," provides in pertinent part "(a) Compliance orders (1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both," Paragraph (2) provides that in case the violation of this subchapter occurs in a State which is authorized to carry out a hazardous program under section 6926, the Administrator shall give notice to the State in which the violation occurred prior to issuing an order.

The question presented by the foregoing statutory language is whether a state program is a requirement of this "subchapter" (Subchapter III, Hazardous Waste Management) and thus enforceable by the Administrator. The Judicial Officer has squarely answered this question in the affirmative, holding that the obvious and natural reading of the phrase "any requirement of this subchapter" in § 3008(a) embraces the requirements of any EPA-approved program, In re CID-Chemical Waste Management of Illinois, Inc., RCRA Appeal No. 85-11 (CJO, August 18, 1988), at 4. Accord In re Gordon Redd Lumber Company, RCRA (3008) Appeal No. 91-4 (EAB June 9, 1994). The CJO pointed out that among aspects of a state program which are subject to approval under RCRA § 3006(b) are regulations adopted to carry out the state's

program, citing 40 CFR § 271.7. He also relied on the fact that the phrase "requirements of this subchapter" appears in RCRA § 3006(b) in a context showing that it includes state programs.

Court decisions frequently cited as supporting CID-Chemical Waste Management, supra, include United States v. Conservation Chemical of Illinois, Inc., 660 F.Supp. 1236 (N.D. Ind. 1987); and Wyckoff v. EPA, 796 F.2d 1197 (9th Cir. 1986). Conservation Chemical involved an action by the government to compel compliance with both RCRA and corresponding state statutes. There is, however, no discussion of whether federal or state regulations were being enforced and the court's opinion is unclear in this regard. Likewise, in Wyckoff, which involved an action by the company to invalidate compliance orders issued by EPA upon the ground enforcement authority was vested in the State of Washington, the court, relying on RCRA § 3008(a), held it was clear that Congress did not intend by authorizing a state program "in lieu of the Federal program" to preempt federal regulation entirely. While the cited decisions clearly hold that EPA retains authority to bring an independent enforcement action in states with approved hazardous waste programs, the decisions are unclear as to whether federal or state regulations are being enforced. Nevertheless, the CJO's decision in CID-Chemical Waste Management, and the EAB decision in Gordon Redd, supra are considered to be sound and, in any event, controlling.

Respondents cite United States v. Goodner Brothers Aircraft, Inc., 966 F.2d 380 (8th Cir. 1992), cert. denied,

sub. nom., Albert S. Goodner, Jr. v. United States, 506 U.S. _____, 122 L.Ed. 2d 123 (1993) for the proposition that federal law does not incorporate state law provisions as to definitions of hazardous waste (Brief at 3-5). Goodner was a criminal case in which defendant was convicted, inter alia, of violating RCRA § 3008(d)(2)(A), i.e., knowingly treating, storing or disposing of hazardous waste listed or identified in the Act without a permit. The court simply held that hazardous waste was defined by federal law, which did not incorporate state definitions of hazardous waste, and that reliance on the state mixture rule, the federal mixture rule having been invalidated on procedural grounds, was inappropriate. Accordingly, Goodner is distinguishable and not controlling on the issue of whether EPA may enforce Alabama hazardous waste regulations herein.

Without specifying or listing any Alabama hazardous waste regulations deemed to be "more stringent" than the federal regulations, Respondents assert that EPA is exceeding its Congressionally mandated jurisdiction by using more stringent state statutes to prosecute alleged federal RCRA violations and to enforce Alabama law (Brief at 3). The Agency's position is that, upon approval, state regulations which are simply "more stringent" than federal regulations become part of the Subchapter III program and are thus enforceable by EPA, while state regulations which have "a greater scope of coverage" are not part of the federal program (40 CFR § 271.1(i)). See In re Hardin County, OH, RCRA (3008) Appeal NO. 93-1 (EAB, April 12,

1994) (invalidation of federal mixture rule meant that identical state mixture rule was "broader in scope" than the federal definition of hazardous waste and thus could not be enforced by EPA).

In approving Alabama's hazardous waste management program, the Agency announced that State requirements which are not part of the RCRA program and are broader in scope than Federal requirements include sections 22-30-5, 22-30-12(C)(1), and 22-30-19 of the Alabama Hazardous Waste Management Act (52 Fed. Reg. 46466, December 8, 1987). These sections are implicated here, if at all, only partially, and it is concluded that EPA may enforce the Alabama hazardous waste regulations at issue.^{32/}

Respondents rely on RCRA § 3006(d) and the suggestion of the court in U.S. EPA v. Environmental Waste Control, Inc., 710 F.Supp. 1192 (N.D. Ind. 1989), affirmed on other grounds, 917 F.2d 327 (7th Cir. 1990), cert. denied, 499 U.S. 975 (1991), that § 3006(d) has the effect of making a state agency instituting an enforcement action in an authorized state an agent of EPA as a matter of law. They therefore argue that

^{32/} Section 22-30-5 was repealed prior to the spill at issue here; the reference to § 22-30-12(C)(1) should be to § 22-30-12(i)(1), which concerns interim status; and § 22-30-19, which substantially tracks RCRA § 3008(a), concerns enforcement by the DEM, and contains, in instances of imminent threats to human health or the environment, authority allowing the DEM to issue an order requiring the suspension of operations until it is determined that adequate steps are being taken to correct the violations.

Complainant is collaterally estopped to pursue this action (Brief at 46-49).

Section 3006(d) provides:

(d) Effect of State permit

Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter.

Additionally, Everwood avers that ADEM dismissed the state action under circumstances in which it was not legally moot, and that, consequently, the dismissal constituted an adjudication of the violations alleged in the ADEM action, which is binding on EPA (Brief at 49, 50; Reply Brief at 14-16).

While there is no doubt that the doctrines of res judicata and collateral estoppel apply to decisions of administrative bodies as well as to those of courts, see, e.g., United States v. Utah Construction and Mining Company, 384 U.S. 394, 16 L.Ed. 2d 642 (1966), ADEM's order, dated June 17, 1992, revoking its prior order was not an adjudication on the merits. This is evident from the reasons for the revocation, i.e., it was unnecessary to duplicate the efforts of EPA in enforcement of alleged RCRA violations. Accordingly, even if ADEM be regarded as an agent of EPA in instituting its action against Everwood, the dismissal not being with prejudice, there would, absent a statute of limitations or some other impediment, be nothing to preclude ADEM from refiling its action. If EPA and ADEM were

acting in concert as Everwood alleges, EPA was nevertheless entitled to file the instant complaint.

Everwood's contentions that EPA is precluded from prosecuting the instant action by the doctrines of res judicata and collateral estoppel are rejected.^{33/}

IV. The "Immediate Response" Exception To RCRA Permit Requirements

Respondents point to the almost identical provisions of the RCRA regulations, 40 CFR §§ 264.1(g)(8), 265.1(c)(11) and 270.1(c)(3), to the effect that the requirements of these parts are not applicable to, and a RCRA permit is not required by, a person engaged in treatment or containment activities during immediate response to a discharge of material which, when discharged, becomes a hazardous waste.^{34/} Although the permit

^{33/} Cf. In re The Beaumont Company, Docket No. RCRA-III-238 (Order Granting In Part Motion For Accelerated Decision, October 20, 1994) (partial dismissal based on adjudication of identical issues by West Virginia WRB), presently on interlocutory appeal to the EAB.

^{34/} Section 264.1 provides in pertinent part: (g) (t)he requirements of this part do not apply to: . . .

- (8)(i) Except as provided in paragraph (g)(8)(ii) of this section, a person engaged in treatment or containment activities during immediate response to any of the following situations:
- (A) A discharge of a hazardous waste;
 - (B) An imminent and substantial threat of a discharge of hazardous waste;
 - (C) A discharge of a material which, when discharged, becomes a hazardous waste.

(continued...)

waiver during "immediate response" in § 270.1(c)(3) is unequivocal, the waivers in §§ 264.1(g) and 265.1(c)(11) are more limited, being conditioned on compliance with subparts C and D. Subparts C and D of Parts 264 and 265 are entitled "Preparedness and Prevention" and "Contingency Plan and Emergency Procedures." Everwood had emergency equipment and a contingency plan (finding 44), and Complainant has not questioned its compliance with subparts C and D so as to qualify for the permit waiver during "immediate response" to the spill.

The cited permit waiver provisions were added to the RCRA regulations in 1980 prior to the passage of CERCLA in recognition of the fact that containment, treatment or storage activities in response to a spill or discharge of a hazardous waste, or a substance which would become a hazardous waste when discharged, should not be delayed by a requirement for obtaining permits. See 45 Fed. Reg. 76627, November 19, 1980. Although the rule was made final and amended in certain respects

³⁴/ (...continued)

- (ii) An owner or operator of a facility otherwise regulated by this part must comply with all applicable requirements of subparts C and D.
- (iii) Any person who is covered by paragraph (g)(8)(i) of this section and who continues or initiates hazardous waste treatment or containment activities after the immediate response is over is subject to all applicable requirements of this part and parts 122 through 124 of this chapter for those activities.

subsequent to the passage of CERCLA (48 Fed. Reg. 2508, January 19, 1983), it is clear that the permit waiver provisions are based on RCRA rather than CERCLA.

Respondents' actions in containing the spill, applying lime to the spill area, excavating contaminated soil and placing it on the drip pad were treatment or containment activities in "immediate response" to a spill of a material which, when discharged, becomes a hazardous waste within the meaning of § 264.1(g)(8)(i) (supra note 34) and no RCRA permit of any kind was required for these activities. Section 264.1(g)(8)(iii) provides, however, that any person who continues or initiates treatment or containment activities after the "immediate response" is over is subject to all applicable requirements of this part and of Parts 122 through 124. Complainant contends that the "immediate response" was over once the contaminated soil was placed on the drip pad and that Everwood's subsequent actions in placing the contaminated soil in a lined excavation or containment unit on the plant property constituted "disposal" of hazardous waste without a permit in violation of RCRA and its regulations (Brief at 50, 52, 59; Reply Brief at 6, 8, 10, 13).

Complainant relies on the testimony of Ms. Sophianopoulos and Mr. Hitchcock (findings 47 and 49) as support for its position that the "immediate response" was over once the contaminated material was placed on the drip pad. Ms. Beatty of ADEM, however, indicated that, in her view, the "immediate response" would be over once drums (assuming drums were ordered)

into which to place the contaminated material had been obtained (finding 47). Complainant acknowledges that "immediate response" envisages a reasonable time frame for responding to a spill (Brief at 15, 16) and recognizes that some storage or holding of the material was necessary by suggesting that the contaminated soil could have been placed on plastic on the ground while attempting to secure drums (Id. at 52, note 12). Because some temporary storage or holding of the contaminated soil was necessary pending the delivery of drums or other suitable containers in which to store the material, Complainant's contention that the immediate response was over once the contaminated soil was placed on the drip pad is rejected.

Although Mr. Hitchcock testified that he could put emergency equipment anyplace within the eight-state area comprising Region IV within a day (finding 49), which presumably would include drums, there is no specific evidence as to the availability of drums in the immediate Mobile area at the time of the spill in June of 1990.^{35/} Inasmuch as Complainant has strenuously argued that CERCLA has nothing to do with this case, it is anomalous that it would rely on the testimony of an OSC, who has access to the resources of the U.S. Government, for

^{35/} Objections to proposed testimony of Mr. Hitchcock concerning information elicited in telephone calls to firms in the Mobile area as to the availability of drums in the summer of 1990 were sustained (Tr. 1795-97). The calls were made by Mr. Hitchcock in preparation for his testimony on the day preceding his appearance as a witness.

actions considered feasible and practicable by a private person in the position of Everwood. Be that as it may, Mr. Thigpen has acknowledged that he made no attempt to order drums on the day of the spill or immediately thereafter. Moreover, even if Mr. Thigpen's testimony that two to three weeks would be required to obtain drums from CSI is considered to be reasonable as to the time when an "immediate response" within the meaning of § 264.1(g)(8)(iii) would be over, it is clear that the "storage" claimed by Everwood continued long after a reasonable time for obtaining drums had elapsed.

Respondents point out that EPA witnesses were not consistent as to when the "immediate response" was over and argue that, without definition, this leaves Everwood and those in similar circumstances subject to EPA's ad hoc determination as to what is reasonable (Reply Brief at 11, 12). Respondents seek to invoke the rule that they may not be penalized where the regulation allegedly violated fails to give fair notice of the conduct prohibited or required.^{36/} See, e.g., Rollins

^{36/} Complainant states broadly and erroneously that the ALJ has no jurisdiction to address constitutional claims (Reply Brief at 56). This assertion stems from the failure to distinguish between the power to declare a statute or regulation unconstitutional, which is reserved for the courts, and constitutional issues such as "due process" which encompass "fair notice," and which may be involved in the interpretation or application of a particular statute or regulation. The notion that an ALJ is powerless to grant relief even though a regulation as interpreted by the Agency fails to give "fair notice" of its requirements ("fair notice" is simply a variation of the "hornbook law" rule that an ambiguous regulation cannot support a penalty) carries its own refutation. See, e.g., Swing-A-Way Manufacturing Co., EPCRA
(continued...)

Environmental Services (N.J.) Inc. v. U.S. EPA, 937 F.2d 649 (D.C. Cir. 1991). See also General Electric Company v. U.S. EPA, No. 93-1807, _____ F.3d _____ (D.C. Cir. May 12, 1995). It is concluded, however, that "immediate response" is sufficiently definite when measured by common understanding and practices that Respondents may fairly be held to be on notice that initiating or continuing treatment or containment activities after a reasonable opportunity to secure drums or other containers in which to store the contaminated materials had elapsed subjected them to RCRA requirements including obtaining a permit.^{37/}

V. Placement As Disposal

Complainant argues that any placement of hazardous waste in or on the land is "per se" a disposal and that the balance of the statutory and regulatory definition "so that hazardous waste or any constituent thereof may enter the environment" is to be assumed from the mere placement of waste in or on the land

^{36/} (...continued)

Appeal No. 94-1 (EAB, March 9, 1995) (EAB disagreement with ALJ that regulation failed to give fair notice of its requirements rather than that the ALJ lacked authority to grant relief). See also CWM Chemical Services, Chemical Waste Management, and Waste Management, Inc., TSCA Appeal No. 93-1 (EAB, May 15, 1995) (decision upholding dismissal of complaint based in part on due process grounds).

^{37/} See, e.g., U.S. v. Petrillo, 332 U.S. 1 (1947) (Constitution requires only that penal statute convey a sufficiently definite warning as to proscribed conduct when measured by common understanding and practices).

(Brief at 5; Reply Brief at 21-27).^{38/} Complainant buttresses this contention by citing the definition of "land disposal" in RCRA § 3004(k)^{39/} and the corresponding definition in the LDR regulation (40 CFR § 268.2).^{40/} Accordingly, even though Complainant avers that there is no credible evidence that

^{38/} The Act (RCRA § 1004(3)) defines "disposal" as follows:

(3) The term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

The regulatory definition is identical (40 CFR § 260.10).

^{39/} RCRA § 3004(k) defines "land disposal" as follows:

(k) Definition of land disposal

For the purposes of this section, the term "land disposal", when used with respect to a specified hazardous waste, shall be deemed to include, but not be limited to, any placement of such hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave.

^{40/} The regulation (40 CFR § 268.2) defines "land disposal" thusly:

(c) Land disposal means placement in or on the land, except in a corrective action management unit, and includes, but is not limited to, placement in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, underground mine or cave, or placement in a concrete vault, or bunker intended for disposal purposes.

Mr. Thigpen ever intended to remove the contaminated soil from the containment unit, its basic position is that his intention in this regard is not relevant.

Respondents, on the other hand, point out that RCRA differentiates between "storage" and disposal, that storage, although temporary, may be for a period of years,^{41/} and aver that mere placement cannot be "disposal," unless such placement is made with the intent that "waste will remain after closure" (Brief at 23-30; Reply Brief at 6). The phrase "at which waste will remain after closure" is not part of the statutory definition of "disposal," but instead is contained in the regulatory definition of "disposal facility."^{42/} The preamble to

^{41/} Section 1004(33) of the Act defines storage as follows:

(33) The term "storage", when used in connection with hazardous waste, means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste.

The regulatory definition (40 CFR § 260.10) differs slightly as follows:

Storage means the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere.

^{42/} Section 260.10 defines "disposal facility" as follows:

Disposal facility means a facility or part of a facility at which hazardous waste is intentionally placed into or on any land or water, and at which waste will remain after closure. The term disposal
(continued...)

the initial RCRA regulation makes it clear that, although it was recognized that the statutory definition of "disposal" did not include any requirement that "waste remain after closure," the inclusion of the phrase was in no sense inadvertent and such a requirement was considered essential to the existence of a "disposal facility."^{43/} It is therefore concluded that, while mere "placement" of hazardous waste in or on the land equals

^{42/} (...continued)

facility does not include a corrective action management unit into which remediation wastes are placed.

^{43/} The preamble (45 Fed. Reg. 33068, May 19, 1980) provides in pertinent part:

However, the Agency agrees that permits logically can only be required for intentional disposal of hazardous waste. Therefore, the definition of "disposal facility" has been modified to indicate the Agency's intent that the term does not apply to activities involving truly accidental discharge of hazardous waste.

In addition, the definition has been further modified to make it clear that only facilities at which hazardous waste is to remain after closure are, for the purposes of these regulations, disposal facilities. Thus, for example, a surface impoundment used for waste treatment from which the emplaced waste and waste residue is to be removed before closure of the impoundment, for purposes of these regulations, is not both a treatment and a disposal facility, but rather, only a treatment facility. That does not mean it might not be "disposing" of waste within the meaning of that term in Section 1004(3) of RCRA. It merely means that EPA, for purposes of reference in these regulations, will call it a "treatment facility."

"disposal,"^{44/} a requirement that "waste remain after closure" is essential to the existence of a "disposal facility."^{45/} Ms. Sophianopoulos classified the Everwood containment unit as a "landfill" (finding 46). "Landfill," however, is defined with reference to a "disposal facility" and thus does not eliminate the provision that waste will remain after closure.^{46/} The requirement to have a permit applies to the owner or operator of a "hazardous waste treatment, storage or disposal facility" (RCRA § 3005(a); 40 CFR § 270.10). Although the preamble (supra

^{44/} This is accepting Ms. Sophianopoulos' view that the determination hazardous waste or any constituent thereof "may enter the environment" was automatic from the placement of the waste in or on the land (finding 48). It should be noted, however, that for LDR purposes placement in a "concrete vault or bunker" is land disposal only if intended for disposal purposes (40 CFR § 268.2).

^{45/} Complainant points out that it is Alabama regulations that are being enforced in this proceeding and that the ADEM definition of "disposal site" (ADEM Adm. Code R.335-14-1.02) does not include the phrase "at which waste will remain after closure" (Reply Brief at 34). This argument overlooks the term "ultimate disposal" in ADEM Adm. Code R.335-14-1.02, which means "final," and it is concluded that both the CFR definition of "disposal facility" and the ADEM definition of "disposal site" contemplate that waste will remain after closure.

^{46/} The regulation (40 CFR § 260.10) defines landfill as follows:

Landfill means a disposal facility or part of a facility where hazardous waste is placed in or on land and which is not a pile, a land treatment facility, a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, an underground mine, a cave, or a corrective action management unit.

note 43) indicates that a facility or unit from which hazardous waste was to be removed prior to closure would be considered a "treatment" facility rather than a "disposal" facility, this affords no assistance to Complainant, because the gravamen of the complaint is that Respondents operated a hazardous waste disposal facility without a permit.

RCRA § 3004(k) (supra note 39) equates "land disposal" with "placement" of hazardous waste in specified land-based units and § 268.2 (supra note 40) broadens this definition to include any "placement in or on the land," except for corrective action management units. Section 3004(k) was added to RCRA by the HSWA of 1984 and there is no doubt that these amendments were intended to restrict the land disposal of hazardous wastes. See § 3004(j), which prohibits even the storage of restricted hazardous waste unless necessary to facilitate proper recovery, treatment or disposal. The definition in § 3004(k), however, is for the purposes of this section, i.e., § 3004, "Standards applicable to owners and operators of hazardous waste treatment, storage and disposal facilities," and is not related to, or conditioned on, the requirement for permits in § 3005. This is the conclusion apparently adopted by the Agency for the definition of "land disposal" in § 268.2 is applicable only to the Part 268 LDR regulation, rather than being in Part 260, which contains definitions applicable to all RCRA regulations. Moreover, although the regulatory definition of "disposal facility" has been modified to exclude corrective action

management units (CAMUs) into which remediation wastes are placed, the phrase "at which waste will remain after closure" was not deleted or changed.^{47/}

In view of the foregoing, the definition of "land disposal" in § 3004(k) is relevant to the LDR violation alleged in Count 13 of the complaint, but is not controlling as to the count for operating a hazardous waste disposal facility without a permit.^{48/} Nevertheless, acceptance of claims such as those presented by Everwood here that it intended to remove and dispose of the contaminated soil in the containment unit at an indefinite future date, as a defense to the charge it was

^{47/} See Part 264, Subpart S Corrective Action regulations, 58 Fed. Reg. 8658, February 16, 1993. Corrective action regulations are applicable to permitted facilities or interim status facilities which have received corrective action orders. A distinction is made between "remediation" wastes and "as generated" wastes resulting from ongoing production processes, CAMU regulations being applicable only to the former.

^{48/} In U.S. v. Allegan Metal Finishing Co., 696 F.Supp. 275 (W.D. Mich. 1988), cited by Complainant, defendant, which had discharged waste waters from its electroplating operations into two holding ponds for many years, was charged with the operation of a hazardous waste disposal facility without a permit or interim status. The court found that defendant was the owner/operator of a hazardous waste facility and refused to accept defendant's apparent after the fact claim that it did not intend waste to remain in the ponds after closure, reasoning that such a claim would defeat the intent of RCRA § 3005 and the statutory definitions of "disposal" and "land disposal." Allegan is obviously factually distinguishable from the situation here and in U.S. v. T&S Brass and Bronze Works, Inc., 681 F.Supp. 314 (D.C.S.C. 1988), affirmed, vacated in part and remanded, 865 F.2d 1261 (4th Cir. 1988), also cited by Complainant, the court found as a fact that constituents of listed hazardous waste would remain at the site after closure.

operating a hazardous waste disposal facility without a permit, would open a potentially wide avenue for the avoidance of RCRA requirements and the evidence supporting such claims must be closely scrutinized. That evidence consists of Mr. Thigpen's testimony that he intended to remove the contaminated soil when the new plant was constructed and the old plant was "cleaned up" (finding 13). Messrs. Cruit and Lambert testified that Mr. Thigpen informed them of his intention in that respect, Cruit assertedly being informed later on the day the containment unit was constructed and Lambert being informed, most likely in September 1990, when they were at the site of the new plant discussing clearing the property (findings 15 and 16).

I find Mr. Thigpen to have been a credible witness with limited exceptions^{49/} and reject any suggestion or implication that the conservation Mr. Lambert testified having with Mr. Thigpen concerning cleaning up a spill "stored at the old site" (finding 16) was made up "out of whole cloth." The foregoing notwithstanding, I find no necessary relationship between sandblasting and cleaning up the drip pad, tanks, etc., and removal of the contaminated material from the containment unit and do not accept Everwood's contention that delays in

^{49/} The exceptions include Mr. Thigpen's explanation that the reason the bar across the steel door, which was assertedly visible immediately after the door was covered, was not visible at a later time, i.e., the door had settled (finding 12), which is not credible, because, absent the addition of more dirt, gravel, etc., settling would make the excavation, and consequently the door, more, not less, visible.

constructing the new plant were the sole reason for delay in removing the contaminated soil from the excavation. Placement of the contaminated soil in the ground was prima facie disposal and the creation of a hazardous waste disposal management unit or facility without a permit. See Gordon Redd Lumber Company, supra, where respondent was held to have the burden of going forward with evidence to show entitlement to the 90-day storage exemption provided by 40 CFR § 262.34 from regulations otherwise applicable to TSD facilities (slip opinion at 32). The exemption here, if it qualifies as such, is even more tenuous and it is concluded that under all of the circumstances, Everwood's claimed intention to remove the waste from the containment unit when the Irvington plant was closed is too indefinite to relieve Respondents of the obligation to obtain a permit.

Although Respondents contend that they did not "operate" a hazardous waste disposal facility, "operator" simply means the person responsible for the overall operation of a facility (40 CFR § 260.10) and Everwood and Mr. Thigpen clearly satisfy this definition. The length of time the contaminated material was in the containment unit amply supports the conclusion that Respondents were operators of a hazardous waste facility.

VI. The Containment Unit Violated LDR Regulations

The characteristic hazardous wastes at issue here (D004 and D007) were prohibited from land disposal by the so-called "Third

Third Final Rule," 55 Fed. Reg. 22520 (June 1, 1990), 40 CFR § 268.35. Although the rule was purportedly effective May 8, 1990, EPA granted a national capacity variance from the treatment standards in the rule until August 8, 1990 (55 Fed. Reg. 22521). The effect of the variance was that the storage restrictions in § 268.50 did not apply and wastes included in the variance could continue to be disposed of in a landfill or surface impoundment provided these units were in compliance with the minimum technical requirements (40 CFR § 268.5(h)). For landfills, the minimum requirements include a groundwater monitoring program, a double liner and a leachate collection system (40 CFR Part 264, Subparts F & N). There is no dispute, but that the Everwood containment unit did not comply with the requirements for a groundwater monitoring program and a leachate collection system. Moreover, the storage claimed by Everwood continued long after the August 8, 1990, expiration of the variance period from the prohibition on the storage of restricted hazardous waste (40 CFR § 268.50).

VII. Mr. Thigpen's Personal Responsibility

RCRA § 3008(a) provides in pertinent part that ". . . whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation," It is obvious that Mr. Thigpen and Everwood

Treatment Company, Inc. are "persons" as defined in RCRA § 1004(15), which includes individuals and corporations within the meaning of the term. As pointed out by the Judicial Officer, In re Southern Timber Products, Inc., d/b/a Southern Pine Wood Preserving Company and Brax Batson, RCRA (3008) Appeal No. 89-2 (JO, November 13, 1990) liability under § 3008(a) runs to "anyone who violates the RCRA rules" (Id. 18).

Mr. Thigpen and his wife are the sole stockholders of Everwood Treatment Company, Inc. and Mr. Thigpen is the sole active officer of the corporation (finding 1). The requirement to have a permit applies to each person "owning or operating" an existing facility or planning to construct a new facility for the treatment, storage or disposal of hazardous waste (RCRA § 3005(a); 40 CFR § 270.10). "Operator" is defined as the person responsible for the overall operation of a facility (40 CFR § 260.10) and it is concluded that Mr. Thigpen was an operator of Everwood's Irvington plant at all times pertinent to the violations alleged herein. As such, he is personally responsible for any penalties which may be assessed and any compliance order which may be issued affecting the Irvington plant. Cf. Southern Timber Products, supra (ten percent stockholder not personally liable where overall operation of facility was responsibility of corporate officers and plant managers).

The evidence reflects that Mr. Thigpen directed the placement of the contaminated soil in the containment unit and,

accordingly, he is personally responsible for the violations alleged herein for that reason. See, e.g., Southern Timber Products, supra, Motion for Reconsideration (February 28, 1992) and cases cited.

VIII. Penalty

The penalty proposed in this case was calculated using the RCRA Civil Penalty Policy (October 1990) upon the assumption that the volume of contaminated material was approximately nine cubic yards and that the containment unit had impacted the environment (finding 35). The actual volume of contaminated soil in the containment unit was less than one-half that amount or approximately 3.66 cubic yards (findings 6 and 10). According to Ms. Maher, the primary risk posed by exposure to arsenic and chromium is by inhalation. This risk was minimized by placement of the contaminated material in the lined excavation. Although there is no doubt that leachate and soil samples collected from the containment unit at the time of the site investigation on February 13, 1991, showed concentrations of chromium and arsenic in excess of the 5 mg/l regulatory limit (§ 261.24), in some instances by several orders of magnitude (findings 20 and 21), the conclusion that the unit had impacted the environment was based on MCLs (findings 24 and 35). Because of the high background levels of chromium in this area of Alabama--samples collected off site on February 13, 1991, and in January 1993, showed chromium concentrations in excess of the

MCL--and Mr. Smith's un rebutted testimony that if chromium concentrations in the temporary monitoring wells were in any way attributable to the containment unit, arsenic would also be found in some measurable form (findings 40 and 41), the contention that there was an actual impact from the disposal has not been established and is rejected.

It is, of course, true that the potential for harm must be considered as the "seriousness" of the violation should not depend on the happenstance that no actual damage or harm to the environment occurred. It is also true that the "disposal" found herein was accomplished in an area having a high water table which increases the potential for harm. Nevertheless, the quantity was relatively small and less than one-half the volume assumed in calculating the penalty sought by Complainant, the contaminated material was placed in a double layer of polyvinyl sheeting, the excavation was capped by a 7,000-pound steel door, and it is concluded that the lack of an actual impact on the environment may not be attributed to "happenstance." Under all the circumstances, it is at least an open question whether placing the contaminated soil on plastic on the ground while drums were secured as suggested by Complainant, thereby subjecting the material to potential washing by rainwater and dispersion by the wind, would have been more protective of the environment. It is therefore concluded that the potential for harm is minor rather than major and the penalty policy will not be strictly followed. See, e.g., In re James C. Lin and Lin

Cubing, Inc., FIFRA Appeal No. 94-2 (EAB, December 6, 1994) (application of penalty policy rejected, because it overestimated gravity of violation).

The operative event which is the genesis of this proceeding clearly is the spill of CCA solution in June of 1990. Everwood and Mr. Thigpen have not been faulted for their actions in cleaning up the spill, applying lime to the spill area and moving the contaminated soil to the drip pad. Moreover, Everwood not having drums or other suitable containers in which to store the contaminated material, it has been concluded supra that an immediate response within the meaning of § 264.1(g)(8) was not over until a reasonable time in which to obtain drums or other suitable containers had elapsed. The only evidence in the record in this respect is Mr. Thigpen's testimony that it took two to three weeks to obtain drums from CSI (finding 13). It is concluded that the 25 percent upward adjustment calculated by Complainant, because Mr. Thigpen did not immediately manifest the contaminated material off site to a licensed TSD facility, has no proper basis.

RCRA § 3008(a)(3) provides that in assessing a penalty the Administrator shall consider the seriousness of the violation and any good faith attempts to comply with the applicable requirements. The foregoing discussion demonstrates unequivocally that the seriousness of the violation has been vastly overstated and that no consideration has been given to Respondents' "good faith attempts to comply with applicable

requirements." It follows that the penalty proposed is not in compliance with the statute and is grossly excessive. It also follows that the proposed penalty is punitive rather than deterrent and remedial. Having observed Mr. Thigpen on the witness stand and in the court room during the extended hearing on this matter, I have no hesitation in concluding that the penalty assessed herein will be an ample deterrent to future violations.

Permits are central to the RCRA program and Complainant's contention that Everwood's operation of a hazardous waste disposal facility without a permit constituted a "major deviation" from the regulatory requirement is accepted. Having previously concluded that the potential for harm was minor, the penalty for the first day of operating without a permit will be \$3,000 and the 179 following days will be assessed at \$300 a day for a total of \$56,700. There being no monitoring or leachate collection system at the containment unit, I also accept Complainant's characterization of the unit as a major deviation from the LDR requirement (40 CFR § 268.5(h); Part 264, Subparts F and N). Risks from this violation do not differ from the risks from operating the unit without a permit and the potential for harm is determined to be minor. The penalty for the LDR violation is therefore \$3,000. Complainant has determined and

I agree that Respondents did not derive any economic benefit from the violations. The total penalty is therefore \$59,700.^{50/}

Although the evidence demonstrates to a practical certainty that the containment unit has had no impact on the environment, it does not do so with the certitude demanded by the regulation (40 CFR Part 264, Subpart G) and the compliance order will be affirmed to the extent it requires a demonstration of "clean closure."

O R D E R

It having been determined that Everwood Treatment Company, Inc. And Cary W. Thigpen violated the Act and applicable regulations as charged in the complaint, a penalty of \$59,700 is assessed against them in accordance with RCRA § 3008(a)(3) (42 U.S.C. § 6928(a)(3)).^{51/} Payment of the penalty shall be made by

^{50/} The violations alleged in Counts II through XII of the complaint stem from the operation of a disposal facility without a permit and Complainant has not sought a penalty therefor.

^{51/} Although failing to specify the sum sought, Everwood alleges that EPA spread contamination in excavation and regrading activities during the site investigation on February 13, 1991 (note 11, finding 38), and that, accordingly, EPA is liable for a portion of Everwood's response or clean up costs (Brief at 71-74). This claim, if cognizable administratively, is presumably intended as a claim against the "fund" in accordance with CERCLA §§ 111 and 112 and 40 CFR Part 305. If so, it is rejected as it is not for a sum certain and, in any event, is unproven. Everwood also asserts that it is entitled to attorney's fees and costs in accordance with the Equal Access to Justice Act, 5 U.S.C. 504 (Brief at 73). In order to obtain an award under the EAJA, the claimant must be the prevailing party and the government's
(continued...)

mailing a cashier's or certified check in the amount of \$59,700 (payable to the Treasurer of the United States to the following address within 60 days of the date of this order:

Regional Hearing Clerk
U.S. EPA, Region IV
P.O. Box 100142
Atlanta, GA 30384

The compliance order included in the complaint is affirmed to the extent it requires a demonstration of "clean closure" (40 CFR Part 264, Subpart G).^{52/}

Dated this 7th day of July 1995.


Spencer T. Nissen
Administrative Law Judge

^{51/} (...continued)
action must not have been "substantially justified." See 40 CFR Part 17, which sets forth procedures for submitting and adjudicating such claims. Because Everwood is not the prevailing party in whole or in part, it is not eligible for an award under the EAJA.

^{52/} Unless this decision is appealed to the EAB in accordance with Rule 22.30 (40 CFR Part 22) or unless the EAB elects to review the same sua sponte, this order will become the final order of the EAB in accordance with Rule 22.27(c)).


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
)
Everwood Treatment Co., Inc.) Docket No. RCRA-IV-92-15-R
and Cary W. Thigpen,)
)
Respondents)

E R R A T U M

In footnote 36, p. 65 of INITIAL DECISION, dated July 7, 1995, delete Swing-A-Way Manufacturing Co., EPCRA Appeal No. 94-1 (EAB, March 9, 1995), and insert In re K.O. Manufacturing, Inc., EPCRA Appeal No. 93-1 (EAB, April 13, 1995).

Dated this 25th day of July 1995.


Spencer T. Nissen
Administrative Law Judge