UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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IN RE)
) RCRA No. VIII-81-10
REMELT METALS, INC.)
)
Respondent)

1. Resource Conservation and Recovery Act - Duty of Owner - The burden of determining whether or not a facility is engaged in activities regulated by the Act is upon the owner/operator of such facility and if he is in error in his determination, he must accept the consequences of such mistake.

2. Resource Conservation and Recovery Act - Burden of Proof - Where the owner or operator of a facility claims that his activities are exempt from the provisions of the Act, he bears the burden of proof on this issue.

3. Resource Conservation and Recovery Act - Penalty Determination - Where an owner/operator of a facility, subject to the Act, makes changes in his activities or methods of doing business in response to requirements mandated by other government agencies which incidently result in the curing of certain violations under the Act, he may not later plead these actions as constituting mitigation so as to entitle him to a reduction in a proposed penalty.

4. Resource Conservation and Recovery Act - Determination of Penalty - The use by the Agency of a penalty policy, widely distributed but not formally adopted by the Agency, in determining the amount of the proposed penalty is proper where the rationale of the document accurately reflects the intent of the Act and is in accord with expressed Agency policy.

Appearances:

On Brief

Susan E. Manganiello
U.S. Environmental Protection Agency
Denver, Colorado
For the Complainant

Daniel T. Goodwin
Aurora, Colorado
For the Respondent

INITIAL DECISION

This matter is before me on a Complaint issued by the U.S. Environmental Protection Agency on December 18, 1981. Following a series of pre-trial exchanges, the question of the Respondent's liability under the Act for the violations alleged in the Complaint was decided by the undersigned in an Accelerated Decision issued November 8, 1982. In that Decision, the Court found that the Respondent was subject to the provisions of the Act and that it was guilty of the various violations set forth in the Complaint.

By agreement of the parties, the question of the amount of the civil penalty to be assessed was bifurcated from the basic determinations as to liability and culpability. This decision will deal solely with the remaining issue of the amount of the appropriate civil penalty to be assessed in this case. Since this issue is the only outstanding issue to be decided, this Decision, which is to be read in conjunction with the Accelerated Decision heretofore referred to, shall be treated as an Initial Decision for the purposes of appeal.

Background

The Respondent, has for some period of time, and was on November 19, 1980 operating a battery splitting operation in Colorado. The primary function of this operation was to recover the lead from the batteries for ultimate re-sale and in the process of that operation the battery acid had to be disposed of in some manner. The Respondent apparently placed

the recovered battery acid in a concrete pit which it initially indicated was to be subjected to neutralization and then disposed of in the city's sewer system. However, the record later discloses that the Respondent did not so treat this battery acid and it was left to evaporate into the atmosphere untreated. A brief chronological summary would be helpful at this point.

On November 19, 1980, pursuant to the requirements of the statutes and the promulgated regulations, Respondent filed a notification of its activities and sought interim status under the regulations. On June 5, 1981, the Respondent withdrew its notification and request, alleging that further investigation convinced it that it was not subject to the provisions of the Act or the regulations. On August 21, 1981, the Environmental Protection Agency inspected the facility and determined that the concrete pit used to store the battery acid was, in fact, in use and that no apparent treatment or neutralization of this material was taking place. The Respondent alleges that shortly thereafter in September 1981, it ceased using the concrete pit. This allegation was corroborated by inspection by EPA personnel on November 5, 1981. The Complaint was issued on December 18, 1981 and the Accelerated Decision, referred to above, was issued on November 8, 1982.

Discussion

The Accelerated Decision held that the Respondent is a generator and treator of hazardous wastes and is therefore subject to the requirements of Subtitle C of RCRA and it failed to file a Notification Form and Part A

of the permit application as required by the Act and its regulations. Secondly, inasmuch as the Respondent was generating, treating, and disposing of hazardous wastes without a Notification Form on file with EPA it has violated §3010 of RCRA, 42 U.S.C. 6930. The Respondent was also held to have violated the §3005(e) of RCRA in that they had failed to apply for and receive a Part A Permit for continued operation of its facility inasmuch as they were in existence on November 19, 1980 and were treating and disposing of hazardous wastes. The Respondent was also held to have violated 40 C.F.R. 264.14(b) in that they did not employ suitable means to prevent the unauthorized entry of persons or livestock on to its facility in that the disposal pit was freely accessible to all employees of the Respondent as well as to the employees of other facilities located on the same site.

The Complaint issued by EPA proposed to assess a penalty of $9,000.00 for the violations set forth therein. Specifically, EPA proposed a penalty of: $2500.00 for the alleged violation of 42 U.S.C. 6930; $2500.00 for the alleged violation of 42 U.S.C. 6925; and $4000.00 for the violation of 40 C.F.R. 265.14(a). EPA states that the two statutory violations were determined to be Class 2 violations, and the security violation was determined to be a Class 1 violation based upon the policy guidance contained in a memorandum written by Douglas McMillan and issued on July 7, 1981, a copy of which was attached to the brief as Exhibit B.

With regard to all three violations, the Agency took the position that the conduct was within the major category, and the damage was in a minor category. Using these determinations and applying them to the

appropriate matrices, the Agency determined that a penalty in the amount of $9000.00 was appropriate under the circumstances. In its initial brief on this question, the Agency also made reference to the report entitled, "Framework for the Development of a Penalty Policy for RCRA" prepared for the Agency by an outside contractor dated December 8, 1980. This draft policy, while not officially adopted by EPA, provides a rational uniform approach to the evaluation of penalties which accord with the statutory authority and mandate. The use by EPA of this policy document was cited with approval in the case of Cellofilm Corporation, Docket No. II, RCRA-81-0114, and Fisher-Calo Chemicals and Solvents Corporation, Docket No. V-W-81-R-002. Inasmuch as the undersigned was the author of the decision in regard to Fisher-Calo, it is obvious that I agree with the use of this draft policy in determining the amount of an appropriate civil penalty to be assessed under RCRA.

Using this draft document, the Agency examined the factors applicable to this situation and applied them to the categories set forth in the penalty document. For the factor labeled conduct, the draft policy advises one to determine how much the violator has deviated from the standard of the statute or regulation alleged to have been violated. In this instance, the Agency took the position that the Respondent had not complied with the violated security standards in any way whatsoever. As for the first two counts, EPA takes the position that initially filing the required forms and then withdrawing them while still operating a hazardous waste facility was a major deviation from what was intended by these statutory requirements.

Total noncompliance with the statutory requirements is, in the judgement of EPA, a major deviation in terms of conduct.

In regard to the damage aspects of the Respondent's conduct, the Agency felt that there was little potential for harm resulting from the failure to file the forms. In assessing the security violation, the Agency considered the size of the pit and the apparent short period of time that the pit was actually used by the Respondent and inasmuch as there was little information available as to the nature of the soil in and around the pit, the Agency chose to place this violation in the minor category as far as damage is concerned.

The Respondent, in its brief, essentially re-argues the same points it made in its initial brief on the question of liability and attempts to argue that the violations were of little or no significance. Respondent attempts to explain away its withdrawing the Notification Form and the Permit request, previously filed, on the basis of an industry document which it interpreted as indicating that its facility was not covered by RCRA. A review of this document does not appear to sustain Respondent's argument and even if it did it still does not provide a viable defense to its actions inasmuch as the statute places the burden upon the owner/operator of a facility to determine whether or not the materials he handles are covered by the statute and regulations. If an owner of a facility is in error concerning this fact then he must accept the responsibility for the improper decision.

The Respondent also places a great deal of emphasis on the fact that shortly after the inspection at its facility by EPA personnel in 1981, it

ceased operations and suspended any further use of the concrete pit for the purposes of containing battery acid. The Respondent argues that it obtained a $2 million SBA loan and along with its own capital has constructed a totally enclosed battery splitting operation at the cost of approximately $2 1/2 million. An affidavit provided by the Complainant indicates however that this action on the part of the Respondent was prompted primarily by Complaints filed against it by the Office of Safety and Health Administration, which action by that agency pre-dated EPA's involvement in its facility. The Complainant thus takes the position that although it is commendable that the Respondent spent $2 1/2 million to upgrade its facility, this action was taken primarily in an effort to solve a problem unrelated to the elements alleged in the Complaint issued by the EPA in this matter. It is also argued by the Complainant that the Respondent's discontinuation of the use of the concrete pit was prompted by its desire to build a new facility on the site of the concrete pit and that this effort was later abandoned when it was determined that the pit was situated on a filled-in gully and was thus unsuitable for the construction of a large building. Although the Respondent now argues that its construction of a $2 1/2 million enclosed facility should be viewed as a mitigative action in response to EPA's Complaint, nothing in the record indicates just what this enclosed facility consists of and whether or not the re-arranging of Respondent's business activities removes it from the purview of the statute in question. It may well be that the Respondent is still subject to the provisions of RCRA in its a new operation. No mention is made as to how the Respondent proposes to deal with the battery acid which is an

inevitable by-product of its battery splitting operation. I am therefore of the opinion that although it is lauditory and commendable that the Respondent spent $2 1/2 million to upgrade his facility, I can not view this action as being one taken in response to EPA's Complaint or in mitigation of the individual violations cited in the Complaint.

The Respondent also takes issue with the factors surrounding its failure to provide adequate security for the premises and argues that no one had been injured nor had the environment been damaged in any way by the operation of its battery acid pit and that therefore it is improper for EPA to attempt to assess a penalty for the failure to provide proper security for its facility. As I mentioned in my Accelerated Decision, the intention clearly expressed in the draft penalty policy states that a violator is not to be rewarded for luck where no actual harm can be proven to have occurred as a result of the violation. The potential for harm is the measure of damage, absent a showing of actual harm.

The Respondent also reiterates, both in its initial brief and its reply brief on this question, that cognizance should be taken of its immediate cessation of operations, done so allegedly at EPA's request. The Complainant argues that at no time did EPA advise the Respondent to cease its operations and, in fact, wished to return to the premises and conduct additional sampling and that the choice of shutting down the facility was solely that of Respondent and was not made at the bequest of the Agency. Therefore no mitigative weight should be given to this action on the part of the Respondent.

The Appropriate Penalty

Based upon the document entitled, "Framework for the Development of a Penalty Policy for RCRA" prepared for the Agency by a private contractor as well as other written Agency policy, the Complainant places the two statutory violations; that being, the failure to notify and apply for a Part A Permit and the operation of a facility without having such a permit, as Class 2 violations. Utilizing the penalty matrix set forth in the document described above, the Agency classified the security violation as a Class 1 violation. With regard to all three violations, the Agency took the position that the conduct was within a major category and the damage was in a minor category. Applying these determinations to the penalty matrix, one would come up with a penalty for the Class 2 violations of from $2800.00 to $2300.00. The Agency in this instance had assessed a penalty of $2500.00 for these two violations which appears to be well within the dollar amounts suggested by the policy. As to the security violation which the Agency classifies as a Class 1 violation, the matrix would suggest a penalty of from $3800.00 to $4800.00. The $4000.00 penalty proposed by the Agency rests in the lower portion of this suggested dollar amount and is, thus, within the limits suggested by the policy.

The McMillan document, referred to by the Complainant and also by the Respondent in his brief, suggests that a Class 1 violation is one that poses direct and immediate harm or threats of harm to public health and the environment. Class 2 violations involves noncompliance with specific requirements mandated by the statute itself and for which implementing

regulations are not required, as in this case the failure to notify the Agency of its facility and failure to request and obtain an interim permit. Class 3 violations are those procedural or reporting violations which in themselves do not pose direct short term threats to the public health or the environment.

The security violation in this case which the Agency classified as a Class 1 violation involves the failure of the Respondent to properly secure its facilities so as to prevent unauthorized entry upon its premises by persons or livestock. The Respondent argues that its entire facility is fenced with the exception of a small portion bounded by a railroad and a river and inasmuch as his employees are on the premises at all times during working hours and the facility is patrolled by guards and dogs during non-working hours, it is highly unlikely that any unauthorized persons or livestock would wander into the active part of the facility. As indicated above, the Complainant places this violation in the major category as far as conduct is concerned, and in the minor category as far as damage is concerned. My review of the entire matter would lead me to place the conduct in the moderate to minor portion of the penalty matrix and agreeing with the Complainant that the damage aspect is minor, it occurs to me that a fine in the amount of $2000.00 would be more appropriate for this violation, rather than the $4000.00 proposed by the Agency.

Conclusion

It is concluded on the basis of the record that ReMelt Metals, Inc. violated the Act as set forth in my Accelerated Decision, which is hereby

made a part of and incorporated into this Initial Decision. It is further concluded, for the reasons stated, that $7000.00 is an appropraite penalty for said violations and that a Compliance Order in the form hereinafter set forth should be issued. In upholding the proposed penalty set forth in the Complaint on Counts 1 and 2, I am of the opinion that the arguments made by the Respondent to support his actions in this matter are not persuasive and that the two $2500.00 penalties assessed therefore are reasonable and appropriate under the circumstances. As to the third violation involving the security deficiences, I am of the opinion that the Agency might have been over-zealous in placing that violation in the major category inasmuch as the magnitude of the violation was relatively minor compared with the security measures put in place by the Respondent at his facility.

ORDER

Pursuant to the Solid Waste Disposal Act, §3008, as amended, 42 U.S.C. 6928, the following Order is entered against Respondent, ReMelt Metals, Inc.:

1. (a) A civil penalty of $7000.00 is assessed against Respondent for violations of the Solid Waste Disposal Act found herein.

   (b) Payment of the full amount of the civil penalty assessed shall be made within sixty days of the service of the Final Order upon Respondent forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America.

2. Immediately upon the service of the final order upon Respondent, Respondent shall:

(a) Within ten days thereof inform EPA of how it intends to handle all hazardous wastes, e.g., acid and lead, from its battery splitting operations;

(b) Within fifteen days thereof file a notification of hazardous wastes handling activities, Form No. 8700-12, with EPA for the generation of hazardous wastes unless an exemption is applicable;

(c) Within fifteen days thereof file a Part A permit application for any storage, treatment, and/or disposal of hazardous wastes not exempt from regulation; and

(d) Submit to EPA within thirty days thereof a closure and post-closure plan pursuant to 40 C.F.R. 265.112 and 265.118 for the concrete pit and the surface empoundment; no closure activities will begin until this plan is approved by EPA in accordance with the procedures outlined in 40 C.F.R. 265.12(d) and 265.18(d).

Thomas B. Yost
Administrative Law Judge

DATED: January 7, 1983

Unless appealed in accordance with 40 C.F.R. 22.30 or unless the Administrator elects, sua sponte, to review the same as therein provided, this Decision shall become the Final Order of the Administrator in accordance with 40 C.F.R. 22.27(c).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VIII
1860 LINCOLN STREET
DENVER, COLORADO 80295-0699

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IN THE MATTER OF)
)
REMELT METALS, INC.) Docket No. RCRA (3008)-81-10
)
Respondent.) CERTIFICATE OF SERVICE

In accordance with §22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties...(45 Fed. Reg., 24360-24373, April 9, 1980), I hereby certify that the original of the foregoing Initial Decision issued by Honorable Thomas B. Yost, along with the entire record of this proceeding was served on the Hearing Clerk (A-110) Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 by Certified Mail, Return Receipt Requested; that a copy was hand-delivered to Counsel for the Complainant, Susan E. Manganiello, Office of Regional Counsel, Environmental Protection Agency, Region VIII, 1860 Lincoln Street, Denver, Colorado 80295; and that a copy was served by Certified Mail, Return Receipt Requested, on Counsel for the Respondent, Daniel T. Goodwin, Dailey, Goodwin and O'Leary, P.C., 10957 E. Bethany Drive, Suite H, Aurora, Colorado 80014.

Dated in Denver, Colorado this 20th day of January, 1983.

Julia N. Mitchell
Julia N. Mitchell
Regional Hearing Clerk

cc: Honorable Thomas B. Yost