UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Omaha Steel Castings Co., Inc.,	)	Docket No. RCRA VII-83-H-051
	)	
Respondent	)	

1. Resource Conservation and Recovery Act - Inspections - Searches and Seizures - Where evidence established that officials of Respondent authorized to consent to an inspection were fully aware of their right to refuse to permit inspection without a search warrant but, nevertheless, consented to the inspection, readily furnishing the inspector copies of pertinent documents, evidence obtained in inspection was properly admitted into the record and was for consideration in proceeding for alleged violations of the Act.

2. Resource Conservation and Recovery Act - Seriousness of Violation - Determination of Penalty - Where evidence showed that proposed penalty for violations of the Act and regulations was doubled based on the premise the violations were "knowing and willful" and a careful evaluation of the record and the credibility of Respondent's principal witness resulted in the determination the violations resulted from ignorance of the law and were unintentional, penalty as calculated prior to doubling would be imposed.

Appearance for Complainant:	Ellen S. Goldman Assistant Regional Counsel EPA, Region VII Kansas City, Missouri
Appearances for Respondent:	John C. Toelle, Esq. Omaha, Nebraska and Michael G. Helms, Esq. Kathleen C. Smith, Esq. Schmid, Ford, Mooney & Frederick Omaha, Nebraska

Initial Decision

This is a proceeding under § 3008(c) of the Solid Waste Disposal Act, as amended (42 U.S.C. 6928).[1/] The proceeding was commenced on September 15, 1983, by the issuance of a complaint and compliance order charging Respondent, Omaha Steel Castings Company (OSC), with the improper disposal of 62 tons of hazardous furnace dust/sludge in 1981 and 15.5 tons of said dust/sludge in 1982.[2/] Count II of the complaint alleged that the mentioned hazardous waste was transported without a manifest. It was proposed to assess OSC a penalty of $25,000 for Count I and $5,000 for Count II.

OSC answered, alleging, inter alia, that the inspection upon which the alleged violations were based was secured through fraud and deception, that OSC had no knowledge of the alleged violations and that the proposed penalties were excessive.

A hearing on this matter was held in Omaha, Nebraska on March 27 and April 24, 1984.

Findings of Fact

Based on the entire record including the proposed findings, conclusions and briefs of the parties, I find that the following facts are established:

1/ Section 3008(c) of the Act provides:

> "(c) Requirements of Compliance Orders--Any order issued under this section may include a suspension or revocation of a permit issued under this subtitle, and shall state with reasonable specificity the nature of the violation and specify a time for compliance and assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements."

2/ The actual charge in Count I was offering hazardous waste to a facility not having a Nebraska DEC/EPA identification number in violation of Rule 19(3)(b) (Nebraska) HWR, which adopts by reference 40 CFR 262.12(c).

1. Omaha Steel Castings Company is a manufacturer of steel castings at a facility located at 4601 Farnam Street, Omaha, Nebraska.

2. Waste generated in the manufacturing process includes a furnace dust or sludge.

3. On or about August 15, 1980, OSC submitted to EPA a Notification of Hazardous Waste Activity (EPA Exh 7). This document indicated that OSC was a generator and transporter of hazardous waste, No. K061.

4. Hazardous Waste No. K061 is described in 40 CFR 261.32 as "(e)mission control dust/sludge from the primary production of steel in electric furnaces."

5. That the foregoing definition was applicable only to primary steel production and not to foundry furnace emission control dust such as that generated by OSC was made clear by a notice finalizing listings of hazardous wastes (45 FR No. 220, November 12, 1980, at 74887).

6. On October 20, 1980, OSC submitted a sample described as "emission control dust direct arc steel furnace" to Lancaster Laboratories for analysis (EPA Exh 2). The results of the test indicated that the material was EP toxic by virtue of having 3.70 ppm cadmium as compared to an allowable concentration of 1.0 ppm and a lead concentration of 67.0 ppm as compared to an allowable concentration of 5.0 ppm (40 CFR 261.24).

7. Mr. Ronald L. Howlett, President of OSC, testified that the sample was obtained by going to the dust collector and scooping up a coffee can full. The can had not been sterilized (Tr. 265-66). His explanation of the reason for having the test performed was that they were not aware of anything hazardous in furnace dust and had no idea what K061 was (Tr. 264).

8. On or about December 10, 1980, OSC submitted to EPA a Part A permit application (EPA Exh 6). The application indicated that processes used at the facility included a landfill, that 0.0188 tons per hour of waste were generated and that an estimated annual quantity of 75 tons of Hazardous Waste No. K061 was produced.

9. A telephone conversation record (EPA Exh 21) reflects that on February 6, 1981, Ms. Betty J. Berry of EPA, position not identified in the record, called Mr. John Henderson, Vice President of Engineering for OSC at the time and the individual who signed the Notification of Hazardous Waste Activity and Part A permit application, referred to the Federal Register of November 12, 1980 (finding 5), and inquired whether EPA toxicity tests on K061 had been conducted. Mr. Henderson is reported to have replied in the affirmative and that the wastes were shown to be toxic. Mr. Howlett denied knowledge of this call, asserting that if it had been anything significant, he was certain Mr. Henderson would have brought it to his attention (Tr. 273-75). He stated that if the call [Henderson's statement] be regarded as an admission that OSC was violating the law, a simple letter or other notice to the effect would have evoked some action on OSC's part.

10. Under date of February 10, 1982, the Director of the Air and Waste Management Divison, EPA Region VII, sent a letter to OSC pointing out that the Part A permit application was submitted after the regulatory deadline of November 19, 1980, and that accordingly, OSC did not qualify for Interim Status (EPA Exh 20). The letter further pointed out that interim status allowed a facility to legally continue to handle hazardous waste until a permit was issued and that in the absence

of Interim Status it was unlawful to treat, store or dispose of hazardous waste at an unpermitted facility. The letter noted, however, that EPA had recognized the need to exercise good judgment and common sense in enforcing these requirements as to well-managed facilities whose continued operation were in the public interest. OSC was informed that EPA was considering what enforcement action, if any, was appropriate and that OSC was being given the opportunity to submit any information it considered might have a bearing on that decision. Although noting that the information requested was strictly voluntary, the letter indicated that the submission should include, but not necessarily be limited to, the nature and approximate amounts of hazardous waste being handled or which will be handled in the near future, including the type of activity involved, e.g., treatment, storage for greater than 90 days or disposal; information demonstrating that continued treatment, storage or disposal of hazardous waste at the facility is in the public interest; reasons for not submitting the Part A permit application in a timely manner and any evidence that OSC was currently in compliance with 40 CFR Part 265. A reply within 30 days was requested.

11. OSC's reply to the above letter, dated February 19, 1982, was submitted by its counsel (Exh 19). The letter stated that the reason the Part A permit application was not submitted at an earlier date was that required forms were not mailed to OSC until November 17, 1980.3/

3/ Mr. Wayne Kaiser, Region VII Compliance Officer for the States of Nebraska and Kansas, testified that postcards by which TSD facilities could request Part A permit application forms were included with information packets provided generators for notification of hazardous waste activity (Tr. 128). Because OSC submitted a Notification of Hazardous Waste Activity, he concluded it must have received the postcard.

Reference was made to the statment in the EPA letter (finding 10) that EPA intended to administer the law with good judgment and common sense and that OSC therefore assumed an exception would be made and its application would be granted. In the event, however, that EPA decided to strictly enforce the letter of the law, OSC requested timely notice of such a decision, indicating that it would then expend the effort to show that its facilities were well managed and operated in the public interest. A package containing Part A of the hazardous waste permit application was mailed to OSC by EPA on November 17, 1980 (EPA Exh 18).

12. On June 24, 1982, EPA sent a second letter pointing out that OSC had failed to furnish information requested in the letter of February 10, 1982 (Exh 17). Inasmuch as OSC operated a landfill, the letter requested documentation that OSC was in compliance with all applicable requirements of 40 CFR Part 265. Enclosed with the letter was a blank form for notification of hazardous waste activity. OSC was requested to submit a revised form which accurately reflected its hazardous waste activities. OSC's response to this letter was a telephone call to Mr. Kaiser from its attorney, Mr. John Toelle, on July 8, 1982, which indicated that OSC did not dispose of hazardous waste on site and that the Part A permit application was incorrect (telephone conversation record, dated July 8, 1982, EPA Exh 16). Because Mr. Toelle was not familiar with RCRA regulations, Mr. Kaiser suggested that the matter be discussed with someone from OSC and Mr. Toelle replied that he would have Mr. Howlett call him (Kaiser) the following day. An addendum to this exhibit reflects that Mr. Toelle called on July 9, 1982, to report

that the plant was closed until August 2, 1982, and that at that time someone from OSC would call prepared to discuss hazardous waste problems.

13. By letter, dated September 9, 1982 (EPA Exh 14), OSC was given a final opportunity to provide information requested in the February 10 and June 24, 1982 letters or to show cause why enforcement action should not be initiated. The letter complained that the writer (Mr. Kaiser) had not been contacted by anyone from OSC. OSC responded by letter from its counsel, John Toelle, dated September 16, 1982 (EPA Exh 13). Mr. Toelle stated that his records reflected and his memory supported that he had placed a call to Mr. Kaiser on September 3, 1982, at which time he was told that he (Kaiser) was not available. He (Toelle) further stated that he had left his name and number with the person with whom he spoke and that he had again placed a call to Mr. Kaiser on September 14, 1982. The letter related that Mr. Kaiser was reported to be out of the office and that the plant was shut down, and would remain so, until at least October 1, 1982. Mr. Howlett testified that he attempted to call Mr. Kaiser many times during the period beginning the first week in August 1982 without success (Tr. 303-05). He stated that he didn't know how frequently he called, but that it would have been approximately once a week during the six-week period ending September 17, 1982 (Tr. 412).

14. In a telephone conversation on September 17, 1982, Mr. Howlett informed Mr. Kaiser that OSC generated a K061 waste, but had never TSD (treated,

stored or disposed) on site.[4/] The TCR states, and Mr. Kaiser testified that as far as he could recall, Mr. Howlett said that the waste was hauled to a private landfill north of Omaha operated by Frank Sillik (Tr. 140). The TCR further states: "The landfill is at Carter Lake, IA [Iowa], although it is on the Nebraska side of the Missouri River. It is not a hazardous waste landfill." Asked whether the latter was a statement Mr. Howlett made, Kaiser responded that he didn't recall, but that it could have been something he determined subsequent to the conversation and prior to writing the TCR. Mr. Howlett denied telling Kaiser the location of the landfill, testifying that it was north of the plant, but that he didn't honestly know whether it was in Iowa or Nebraska (Tr. 312-15, 339). In view of this testimony, and the fact that Kaiser had no previous knowledge of the Sillik landfill (Tr. 139-40), it is concluded that the quoted statements from the TCR are information gleaned subsequent to the telephone conversation.

15. In the referenced telephone conversation, Mr. Kaiser advised Mr. Howlett to send a letter confirming that OSC did not TSD on site and requesting withdrawal of the Part A application (Tr. 90, 312; EPA Exh 12). The TCR reflects that Mr. Kaiser also advised Mr. Howlett that the waste should be going to a hazardous waste landfill. Mr. Howlett denied that Kaiser had offered any advice and denied that he had said the waste should be taken to an approved landfill (Tr. 316-17). He (Howlett) testified

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4/ Telecon Record (TCR), EPA Exhibit 12. Although the TCR is silent on who initiated the telephone call, Mr. Kaiser insisted that he placed the call to Mr. Howlett (Tr. 173, 180-81). According to Mr. Howlett, Mr. Kaiser was returning a call he (Howlett) had placed earlier that day (Tr. 305, 311). He buttressed his recollection that Mr. Kaiser was returning a call he had placed earlier that day by the fact the TCR reflects the conversation occurred at 15:33. It is of some significance that other TCRs in the record written by Mr. Kaiser (EPA Exhs 15 & 16) leave no doubt as to who initiated the call.

that [if] any thing that significant to OSC's operation had occurred, something would have been done about it, that is, some plan would have been put into effect immediately even though the plant was not in operation. This testimony is not entirely credible because Mr. Howlett had previously testified that neither he nor Kaiser knew [at the time of the conversation] whether the Sillik landfill was approved for hazardous waste (Tr. 313). This information (Kaiser's knowledge of the Sillik landfill) could only have been derived from a discussion of whether the landfill was approved or permitted and accordingly, the existence of the requirement that hazardous waste be disposed of only in such facilities could hardly fail to have been mentioned. In view thereof and in view of the fact that a keystone of the RCRA program is that hazardous waste be treated or disposed of only in approved facilities, it is concluded that the TCR accurately reflects advice given by Mr. Kaiser. In the conversation, Mr. Howlett mentioned that a consultant had been testing the waste, that the plant had operated only a few weeks out of the last four months and accordingly, wasn't generating much waste.

16. By letter addressed to Mr. Kaiser, dated September 20, 1982 (EPA Exh 11), Mr. Howlett referred to the telephone conversation on September 17, confirmed that OSC did not store, treat or dispose of hazardous waste on site and requested that its [Part A] application be withdrawn. Mr. Kaiser testified that shortly after receipt of this letter, he determined that there should be an inspection of OSC to verify that there had not been any storage or TSD on site (Tr. 153-54).

17. An inspection of the OSC plant was conducted by Mr. Craig Smith of EPA on March 9, 1983 (inspection report, EPA Exh 2). Mr. Smith, a chemical engineer, arrived at the OSC facility at approximately 1:30 p.m. and spoke first with Mr. James Paar, operations manager (Tr. 10, 11, 35, 218-19). After identifying himself and conversing briefly with Mr. Paar, he was ushered into the office of Mr. Howlett, President of OSC (Tr. 39, 220). Mr. Smith again presented his credentials and explained the purpose and scope of the inspection. Because of some unhappy experiences with OSHA inspections, which resulted in fines OSC considered unfair, Mr. Howlett informed Mr. Smith that OSC had a policy that if fines, citations or litigation were to result, a search warrant would be required to conduct the inspection (Tr. 39, 40, 221-22, 224, 235, 319, 321-22, 324). Mr. Smith's reply was to the effect that it wasn't his decision as to whether enforcement action would be taken, but that his report would be submitted to the Air and Waste Compliance people, who would make the determination as to what action, if any, was appropriate (Tr. 40-46). He denied saying any penalties would be a surprise to him, or words to the effect, asserting instead that he told OSC officials the Agency had been assertive in taking enforcement action where problems [violations] had been found.

18. After being satisfied that Mr. Smith was being cooperative and in Mr. Howlett's words "not there to do us any harm," Mr. Howlett agreed to let Mr. Smith proceed with the inspection and told Mr. Paar to show him (Smith) anything he wanted to see (Tr. 322-325). Although Mr. Smith understood OSC's position that if fines, penalties or

litigation were to result, he was to leave and obtain a search warrant and was familiar with EPA policy in this regard, i.e., if entry for an inspection was denied he was to leave and contact his supervisor for instructions, he proceeded with the inspection, because he did not consider he was being denied entry and OSC officials were providing him with information and documents he requested (Tr. 10, 44, 235, 323). Mr. Howlett considered that OSC had been misled. He testified that Mr. Smith clearly knew what assurance OSC expected in order to allow an inspection of the plant without a search warrant, but that he chose to play games and dance around the questions for an hour in order to be allowed in without a warrant (Tr. 329-30). He (Howlett) acknowledged, however, that the decision as to action, if any, taken as a result of the inspection was that of Smith's superiors (Tr. 322).

19. Mr. Paar accompanied Mr. Smith on a tour of the plant showing him in particular the furnace and dust collection system (Tr. 227-29). While Smith was on the plant tour, Mr. Howlett called OSC's attorney, John Toelle, to obtain his advice on whether he (Howlett) had made the right decision in allowing the inspection (Tr. 325, 399, 400). Notwithstanding that Howlett was well aware that he could terminate the inspection at any time, he allowed it to proceed. Parr also showed and furnished Smith copies of invoices from the Frank Sillik landfill (EPA Exh 3), of the Lancaster Laboratories report referred to earlier (finding 6) and of reports submitted to the Nebraska DEC, which are attached to the inspection report (Tr. 226). The Sillik invoices are dated July 1 and September 2, 1982, and show that a total of 70 loads of unidentified

material were delivered to the landfill. An undetermined amount of this material was molding sand, which is neither toxic nor hazardous (Tr. 15; EPA Exh 2). Although Mr. Smith didn't see trucks used to transport the waste, he testified that he was told the dust was hauled in open-bed dump trucks and that the dust was wetted prior to departure to minimize the amount blowing off enroute to the landfill (Tr. 18, 19; inspection report). He was also told that OSC did not use manifests to ship the wastes (Tr. 20; inspection report). Reports submitted to the Nebraska DEC did not show an ID number for the Sillik landfill and a check of the latest print-out of hazardous waste facility notifiers did not show that Sillik had submitted a notification of hazardous waste activity or a Part A permit application (Tr. 19, 50, 51; inspection report).

20. At the conclusion of the inspection, Mr. Smith wrote and delivered to Mr. Howlett a notification of violation pursuant to RCRA (EPA Exh 2 at 8). Violations noted were of 40 CFR 262 which requires that hazardous waste must be shipped to an interim status TSD facility, under a manifest (262.20), by an approved transporter (40 CFR 263) and that OSC lacked a contingency plan and a personnel training plan as required by 40 CFR 265.53 and 265.16. According to Mr. Howlett, this was the first time he was aware there may have been some violation in the way OSC was disposing of its waste (Tr. 327-28).

21. The Hazardous Waste Generator Annual Report Forms (EPA Exh 2) are undated and reflect that 31,000 pounds of K061 was disposed of at the Frank Sillik landfill in 1982 and 124,000 pounds in 1981. The frequency of shipments is stated to be "(s)everal times per week when plant is

operating." Although the forms indicate that they are due no later than March 1 of the year following the reporting year, Mr. Howlett testified that the forms had been received in late February 1983 and that the reports for both years had been filed approximately two weeks prior to Mr. Smith's inspection on March 9, 1983 (Tr. 254, 324).

22. The inspection report states that OSC had requested a quotation from Chemical Waste Management (CWM) for the disposal of furnace dust waste at an interim status landfill and quotes Mr. Howlett as saying that the cost of disposal through CWM would be much greater than the cost of landfilling the material at the Sillik site. An undated Generator's Waste Material Profile Sheet (EPA Exh 4) is the mentioned CWM quotation. The profile sheet indicates that the waste to be disposed of is K061 in the estimated quantity of 52 tons per year. The profile sheet does not contain prices and answers in the negative the question of whether toxicity studies have been obtained of the waste stream. This is some indication that the quotation may have been obtained prior to the time the sample was sent to Lancaster Laboratories on October 20, 1980 (finding 6). Mr. Howlett acknowledged making the statement that the cost of disposal through CWM would be much higher than sending the waste to the Sillik landfill, but denied that cost was the reason for not having CWM handle the waste (Tr. 337-38). He testified that he discussed with Mr. Smith the alternatives OSC was considering for handling the waste, i.e., pelletizing, recycling or using an outside waste management firm.

23. By letter, dated March 18, 1983 (EPA Exh 10), Mr. Howlett referred to the notice of violation concerning dust collected from its arc

furnace operation delivered to OSC by Mr. Smith at the time of the inspection on March 9, 1983. This letter was written to comply with a requirement in the notice of violation that OSC submit a report of corrective actions taken within ten days. The letter stated that due to depression-level business conditions, the furnace had not been operated since September of 1982. The letter further stated that prior to resuming operation of this furnace, OSC planned to solicit bids from independent waste handlers for the disposal of the dust and would inform EPA when a contractor was selected. EPA was informed that OSC planned to develop a contingency plan for the cleanup of accidental spills and a training plan for employees handling this material. The letter closed by asking for a copy of Mr. Smith's inspection report pursuant to the Freedom of Information Act. Mr. Howlett attributed the low level of operations to the recession and to the fact that Caterpillar Tractor Company, OSC's principal customer, was having a strike (Tr. 288-293). He confirmed that the OSC plant was, for practical purposes, out of operation from the first of September [1982] to the first week in May [1983] (Tr. 293).

24. In a letter to EPA, dated June 28, 1983, signed by Mr. Howlett (EPA Exh 9), OSC asserted that it has been determined that electric furnace dust (K061) can be recycled through the furnace, thereby eliminating the need to dispose of this material. Enclosed with the letter were copies of OSC's contingency and personnel training plans. The letter closed with the statement that it appears these actions resolve the notice of violation resulting from the inspection.

25. By letter, dated April 14, 1983, OSC's request for a copy of Mr. Smith's inspection report was denied on the basis of an exemption in the Freedom of Information Act relating to records whose disclosure might interfere with law enforcement proceedings (Tr. 350). Mr. Howlett testified that this was the first indication OSC had that enforcement action was contemplated as a result of Mr. Smith's inspection. The denial of the request for a copy of the inspection report was appealed and OSC received a copy of the report in early September 1983, shortly before the complaint was issued (Tr. 339, 352). According to Mr. Howlett, this was the first time OSC knew that the furnace dust was not K061 (Tr. 261-62, 339). Because the material is referred to as K061 in the reports to the State of Nebraska (EPA Exh 2) and in the OSC letter of June 28, 1983 (EPA Exh 9), this testimony is considered to be accurate.

26. Mr. Howlett testified that OSC filed the Part A permit application because they answered in the affirmative the question on the application form: "Does or will this facility treat, store or dispose of hazardous waste?" (Tr. 269; EPA Exh 6). He considered that OSC stored hazardous waste, because it was accumulated for a week or two prior to being transported to the landfill (Tr. 388). He stated that OSC understood that the application was for interim status and allowed them to continue disposing of the dust in a landfill as they had been doing since the mid-1970's (Tr. 268-69, 270-71, 283, 332, 395). According to Mr. Howlett, they (OSC officials) further understood that at some point there was going to be a change in the law, the rules would be more strict and adjustments [or changes in handling the furnace dust] would have to be

made (Tr. 264, 267, 356). He indicated that until OSC received the EPA letter of February 10, 1982 (Exh 20), they assumed OSC had interim status (Tr. 277, 282). Because OSC didn't hear from EPA for three and a half months after responding to this letter, Mr. Howlett also assumed they were covered for this period (Tr. 390). He explained that "(w)e thought it was resolved until we heard otherwise" (Tr. 392). Regarding the notice of violations delivered by Mr. Smith, Mr. Howlett, who kept abreast of regulatory developments through industry meetings and reading trade publications and newspapers (Tr. 241-43, 248-49, 380, 400), testified that until the inspection he had no knowledge that a manifest was required for the shipment of hazardous waste or that such waste must be shipped by an approved transporter (Tr. 334-35, 400, 402). He further testified that he had no knowledge until the date of the inspection of the requirement for a contingency plan or even what such a plan was and of the requirement for a personnel training plan (Tr. 335-36).

27. Mr. Kaiser determined that two of the violations listed in the inspection report, i.e., shipping and disposing of hazardous waste at a non-permitted facility and shipping the waste without a manifest, were Class I violations in accordance with EPA guidance on developing compliance orders (memorandum, dated September 24, 1981, EPA Exh 1) (Tr. 94-96, 101-02). The guidance states that the purpose of a penalty is deterrence [of future violations] and to offset any unfair competitive advance that may accrue to the violator. Class I violations are defined as those posing direct or immediate harm or threats thereof to public health or the environment. Specifically listed as Class I violations are failure of

either the generator or transporter to use the manifest system required by 40 CFR 262 or 263 and shipment by the generator to a facility with neither interim status nor a permit as required by 40 CFR 262.

Mr. Kaiser testified that he determined the proposed penalty by use of a matrix (Attachment C) for Class I violations attached to the guidance (Tr. 104). The matrix categorizes a respondent's non-compliance and the actual or threatened damage as major, substantial or moderate and contains cells having penalty ranges up to the statutory maximum of $25,000 per day.

28. Mr. Kaiser determined that the non-compliance category was major based on the length of time the violations existed and the fact that EPA had been attempting for a couple of years to determine the status of the OSC facility (Tr. 106). Concerning Count I, the disposal of sludge or dust in an unpermitted landfill, Mr. Kaiser considered that the penalty should be midway between zero and $25,000 or $12,500. Because the lowest penalty cell category is $100 to $400 (both damage and non-compliance moderate), this determination appears to have been made without regard to the matrix. Moreover, although he testified that he considered the potential for harm to be substantial (Tr. 107), this cell of the matrix shows a range of $15,000 to $19,000, while the penalty selected is within the range of the cell for moderate damage, i.e., $11,000 to $14,000. Concerning Count II, shipping hazardous waste without a manifest, he asserted that the non-compliance factor remained the same, that is major (Tr. 109-10). He testified that damage was considered to be moderate or $2,500. As previously noted, the moderate damage cell under major non-compliance has a penalty range

of $11,000 to $14,000. The moderate damage cell under substantial non-compliance contains a penalty range of $3,000 to $4,000 and again, Mr. Kaiser's testimony is difficult to reconcile with the matrix in the record. The base penalties for each count so determined were doubled based on Mr. Kaiser's conclusion that the violations were knowing and willful (Tr. 106-09, 112-13, 161). He based this conclusion on the fact OSC had submitted a notification of hazardous waste activity thus demonstrating awareness of RCRA, that OSC had the waste tested and acknowledged to Ms. Betty Berry that they knew the waste was toxic, that OSC submitted a Part A permit application and obtained a quotation from a hazardous waste disposal firm, again demonstrating awareness of RCRA and that the waste was hazardous. Mr. Kaiser acknowledged that he knew of no instance of OSC's non-compliance with RCRA regulations after he knew for certain, that is, after the September 17, 1982, telephone conversation with Mr. Howlett, OSC was aware of such requirements (Tr. 163).

Conclusions

1. OSC officials consented to the inspection on March 9, 1983, and the inspection was otherwise lawful. Accordingly, evidence obtained in the inspection was properly admitted into the record and is for consideration in this proceeding.
2. Furnace dust generated by OSC, although not a listed hazardous waste, is, nevertheless, hazardous by virtue of failing EP toxicity tests for lead and cadmium (40 CFR 261.24).

3. OSC's action in transporting said furnace dust to a non-permitted facility and without a manifest constitute violations of 40 CFR. 262.12(c) and 262.20 and §§ 3005 and 3002 of the Act (42 U.S.C. 6925 and 6922).

4. For the mentioned violations, OSC is liable for a reasonable penalty in accordance with § 3008(c) of the Act (note 1, supra).

Discussion

It is, of course, well settled that the prohibition of unreasonable searches and seizures in the Fourth Amendment to the Constitution is applicable to civil as well as to criminal proceedings. United States v. Barlow, 436 U.S. 307 (1978). It is equally well settled that a search conducted pursuant to a valid consent is constitutionally permissible and that whether such consent has been given is a question of fact. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The consent must have been freely and voluntarily given, the essential question being whether the consent was the product of an essentially free and unrestrained choice. Knowledge of the right to refuse is a factor to be considered, but need not be proved by the party invoking consent.

Applying these principles to the facts herein, there can be little doubt, but that the inspection was consented to by officials of OSC authorized to give such consent and was thus legally valid. Although Mr. Howlett's testimony to the effect that the inspector, Mr. Craig Smith, well understood the assurances OSC officials were seeking as a condition to allowing him (Smith) on the premises, i.e., that no fines, penalties or litigation result from the inspection, is considered to be accurate, the record is clear that no such assurances were given (findings 17 & 18).

OSC's version of Smith's conversation with Mr. Howlett is to the effect that he (Smith) said enforcement action and/or penalties were unlikely to result (proposed finding of fact No. 16; Reply Brief at 1). Because Mr. Howlett clearly understood that decisions in this respect were to be made by Smith's superiors (finding 18), such statements, even if made, are insufficient to vitiate the inspection as involuntary or occasioned by fraud and deceit. Moreover, Mr. Howlett knew that he could terminate the inspection at any time and consulted with his attorney while the inspection was in progress (finding 19). Having, nevertheless, allowed the inspection to proceed, the contention that the inspection was not consented to or was otherwise involuntary is rejected. It follows that evidence obtained in the inspection was properly admitted into the record and is for consideration herein.

Evidence that the furnace dust generated by OSC is toxic is based on Lancaster Laboratories test on a sample collected in a coffee can (finding 7). The can had not been sterilized. While this sample was not collected in a manner to assure that it was representative of dust in the collectors, let alone of dust generated by OSC generally, or in a properly cleaned container,[5/] the test results have not been questioned and establish prima facie that the dust contained concentrations of lead and cadmium in excess of those set forth in the table at 40 CFR 261.24. Accordingly, there being no evidence to the contrary, it is concluded that the dust, although not a listed hazardous waste, is hazardous by characteristic in accordance with 40 CFR 261, Subpart C.

5/ See Samplers and Sampling Procedures For Hazardous Waste Streams, EPA-600/2-80-018 (January 1980).

Although OSC argues that the reports submitted to the State of Nebraska showing 124,000 pounds of K061 being delivered to the Sillik landfill in 1981 and 31,000 pounds in 1982 are not evidence of any violation because the material was not K061 (Reply Brief at 2), there is no real dispute that the material referred to is furnace dust. There is also no real dispute that the Sillik landfill is not a permitted or approved RCRA facility for the disposal of hazardous waste and that OSC made the shipments in question without use of a manifest. It is therefore concluded that OSC violated 40 CFR 262.12(c) and 262.20 and §§ 3005 and 3002 of the Act.

This brings us to the proposed penalty. Section 3008(c) of the Act provides that seriousness of the violation and any good faith efforts to comply with the applicable requirements are to be considered in determining a reasonable penalty. The rules of practice (40 CFR 22.27(b)) require that I consider, but am not bound by, any applicable civil penalty guidelines. Although the guidance on developing compliance orders (findings 27 and 28) was apparently used to calculate the base penalties, this guidance was merely a proposed and not a final policy.6/ As indicated (finding 28), it is difficult to reconcile the testimony as to the manner of calculating the penalty with the matrix in the guidance. It appears, however, that any mistakes or inconsistencies in this regard, i.e., whether the violations and the potential for harm are major, substantial or moderate, favor OSC and thus give it no cause to complain.

The EP toxicity test is a test of leachability and the vice of disposing of hazardous waste in an unpermitted landfill is that

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6/ The Final RCRA Civil Penalty Policy issued by the Assistant Administrators for Enforcement and Compliance Monitoring and for Solid Waste and Emergency Response on May 8, 1984 (unpublished), provides that it applies to all administrative actions instituted after the date of the policy and thus is not applicable to this proceeding.

hazardous waste or constituents thereof may leach into and contaminate ground or other water supplies or sources. Shipping hazardous waste without a manifest also has obvious potential for harm to human health and the environment, making it more likely that those engaged in cleanup efforts or other contact with the waste will be unaware of its hazardous nature or the reason why it is hazardous. The fact that no such injury occurred or has been proven is not a factor for consideration inasmuch as "lucky violators" should not be awarded.

Concerning good faith efforts to comply with the applicable requirements, there is ample evidence from which it could be concluded, as Mr. Kaiser determined and Complainant contends, that this is a case of deliberate and flagrant violation of the regulations (finding 28). Upon a careful examination of the record and on a close determination of credibility, I conclude, however, that OSC officials were confused as to the requirements of RCRA and truly unaware of what the regulations required of OSC. Although OSC demonstrated awareness of RCRA by filing a timely Notification of Hazardous Waste Activity, its designation of the furnace dust as K061 was erroneous. That OSC was not alone in overlooking the significance of the word "primary" in the description of K061 is amply demonstrated by the Federal Register notice of November 12, 1980 (finding 5). OSC's lack of understanding of RCRA regulations is further demonstrated by the fact that it filed a Part A permit application, which was not required as long as hazardous waste was accumulated on-site for 90 days or less in accordance with 40 CFR 262.34.

Mr. Howlett testified to the effect that because OSC did not hear from EPA for approximately 14 months after the Part A was filed, they assumed

OSC had qualified for interim status (finding 26). He further testified that OSC understood interim status allowed continued disposal of hazardous waste in a landfill as OSC had been doing since the mid-1970's and that after replying to the EPA letter of February 10, 1982, OSC assumed the matter had been resolved until they heard otherwise. While this may illustrate a certain naivete as to the manner in which the government operates, it is not an inherently incredible or unreasonable position.

Testimony that OSC did not hear from EPA for approximately 14-months after submitting the Part A application ignores the phone call from Betty Berry to Mr. Henderson on February 6, 1981 (finding 9), and thus is not strictly accurate. Mr. Howlett denied knowledge of the call, however, and it is clear that the call did not relate directly to the Part A application. The fact that Mr. Henderson responded forthrightly to the question posed is certainly evidence of good faith and some indication OSC considered it had nothing to hide. Mr. Howlett relied on language in the EPA letter of February 10, 1982, to the effect that interim status allowed a facility to continue to handle hazardous waste until a permit was issued (finding 10) as confirmation of his understanding of the effect of interim status and it is certainly prima facie logical that not having the required form is a valid reason for failing to file the Part A application by the statutory deadline of November 19, 1980.7/ The primary emphasis of the EPA letter, dated June 24, 1982 (finding 12), is on the apparent fact that OSC operated a landfill and if Mr. Howlett's testimony is accepted, the first time he realized that OSC may have broken the law in disposing

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7/ Although Mr. Howlett testified there was a delay in obtaining the form, there is no indication of when the form was ordered. See note 3, supra.

of its waste is when Mr. Smith handed him the notice of violation at the conclusion of the inspection on March 9, 1983 (finding 20).

The sample of furnace dust was submitted for testing on October 20, 1980 (finding 6), prior to the publication of the clarification of the scope of K061 in the Federal Register on November 12, 1980 (finding 5), and there is no reason for doubting Mr. Howlett's explanation of the reason for the test as simply to determine the reason the dust was hazardous (finding 7). That Mr. Howlett did not know the dust was not K061 until receipt of the inspection report in early September 1983, shortly before the complaint was issued, is supported by the fact that it was referred to as K061 in a letter, dated June 24, 1983 (finding 24).

OSC maintains that it promptly and in good faith responded to EPA's requests. In this regard, while it is difficult to fully credit Mr. Howlett's testimony as to the frequency of his attempts to reach Mr. Kaiser during the period August to mid-September 1982 (finding 13), Mr. Toelle also appears to have had some difficulty in this respect and the TCR of the September 17 conversation (note 4, supra) is consistent with Mr. Howlett's version as to initiation of the call.

Mr. Howlett's denial that the rule hazardous waste may be disposed of only in an approved landfill was discussed in the September 17, 1982 telecon with Mr. Kaiser has not been accepted as credible (finding 15). Even if this be regarded as dissembling (which I decline to do), rather than the result of a faulty memory, no basis for disregarding other portions

of Mr. Howlett's testimony, which are consistent with the record, would be presented.8/ It is worthy of emphasis that the EPA letter of February 10, 1982 (finding 10), states that in the absence of interim status, it is unlawful to dispose of hazardous waste in an unpermitted facility. Because OSC did not operate a landfill, interim status would not have allowed it to dispose of hazardous waste in an unpermitted landfill and the statement was incorrect as applied to OSC.

More troubling is the undated quotation from CWM (finding 22), which is persuasive evidence that OSC officials, if not Mr. Howlett, were aware that hazardous waste should not be disposed of in an unpermitted landfill. Moreover, if the quotation was in fact prepared prior to the time the sample was submitted to Lancaster Laboratories, it would permit an inference that OSC officials were aware of RCRA requirements at an earlier date than presently claimed and thus, OSC's good faith defense would be more difficult to credit. The evidence, however, does not permit a determination as to the date of the quotation and it's existence and Mr. Howlett's discussion with Mr. Smith as to the alternatives OSC was considering for handling the waste (finding 22) are consistent with Howlett's testimony to the effect that at some point there was going to be a change in law and other means of disposing of the dust would have to be found (finding 26).

It is, of course, to be expected that an individual relying solely on secondary sources for his knowledge of regulations as complex as RCRA will be confused as to the requirements and under all the circumstances,

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8/ The maxim "falso in uno, falso in omnibus" is considered to be neither good law nor to accord with common experience. Moreover, it is to be expected that the testimony of even a truthful witness may be inaccurate in some respects.

Mr. Howlett's testimony that he assumed interim status allowed OSC to dispose of its waste in accordance with previous practice and that at some point there would be a change in the law, is accepted. This conclusion is buttressed by Mr. Howlett's action in allowing the inspection to proceed and voluntarily furnishing the inspector copies of documents, which can clearly be regarded as incriminating. In short, these are hardly actions expected of individuals having knowledge that they have broken the law.

Nothing herein is or can be, of course, an excuse for clear violations of the Act and regulations. Although OSC is correct that the primary purpose of a penalty is to deter future violations, its argument that no penalty is warranted in this instance, because OSC ceased disposing of hazardous waste in a landfill more than a year before the complaint was issued, is not accepted. The potential for harm, the necessity that the Act and regulations be taken seriously and the clear failure of OSC officials to understand and keep abreast of the firm's RCRA obligations are such as to demand a substantial penalty. OSC also argues that the penalty is excessive, because it does not consider OSC's size and financial strength (proposed conclusions of law at 8, 9). OSC alleges that it has submitted to EPA copies of its income tax returns for the fiscal years 1982 and 1983, showing that it incurred losses during those years. These documents are not in the record and may not be considered. Moreover, there is no other evidence in the record such as financial statements from which a determination of the effect of the proposed penalty on OSC's viability as a going concern could be made. It is concluded that the base penalties of $12,500 for Count I and $2,500 for Count II of the complaint are reasonable and will be imposed.

Having previously concluded that OSC's actions were in good faith, it follows that the proposed doubling of the penalty for knowing and willful violations is not appropriate.9/

Conclusion

Respondent having violated §§ 3002 and 3005 of the Act (42 U.S.C. 6922 and 6925) and regulations (40 CFR 262.12 and 262.20) as charged in the complaint, in accordance with § 3008(c) of the Act, a penalty of $15,000 is hereby assessed against Omaha Steel Castings Co., Inc. Payment of the mentioned sum shall be made by submitting a certified or cashier's check, payable to the Treasurer of the United States, to the Regional Hearing Clerk within 60 days of the date of this order.10/

9/ Although it depends, of course, in part on the language of the statute, there appear to be two lines of cases as to meaning of "knowing and willful" as used in a criminal statute. One holding is that the only intent required is to do something the law forbids [and knowledge that the act is unlawful is immaterial]. See, e.g., United States v. Woodruff, 600 F.2d 174 (8th Cir. 1979) conviction of possessing an unregistered firearm, 26 U.S.C. 5861(d), requires only that defendant knowingly possess an unregistered firearm which is subject to federal registration requirements). The other line of cases is that "willfully" connotes or requires an act done with a bad or evil purpose. See United States v. Patillo, 431 F.2d 293 (4th Cir. 1970) (18 U.S.C. 871(a), punishing knowing and willful threats against President); United States v. Studna, 713 F.2d 416 (8th Cir. 1983) (odometer alterations, 15 U.S.C. 1990c; knowingly and willfully means intentional violation of known legal duty). The 1980 amendments to the Solid Waste Disposal Act (P.L. 96-482, October 21, 1980) clarified and expanded the criminal penalty provisions (§ 3008(d)) of the Act. Legislative history (Senate Report No. 96-172, U.S. Code Congressional and Administrative News (1980) at 5038 makes it clear that, except for "knowing endangerment" for which the state of mind required is set forth in the Act (§ 3008(f)), the definition of knowing has been left to the courts under general principles. This would appear to require an intentional violation of a known legal duty.

10/ Unless appealed in accordance with 40 CFR 22.30 or unless the Administrator elects, sua sponte, to review the same as therein provided, this decision will become the final order of the Administrator in accordance with 40 CFR 22.27(c).

Compliance Order

In addition to paying the assessed penalty, Respondent shall accomplish the following:

(a) Operate in full compliance with the generator requirements of Rule 19 HWR, which adopts by reference 40 CFR 262, to include disposing of any hazardous waste off-site in an approved hazardous waste disposal facility.

(b) Transport all hazardous waste in compliance with the manifest requirements of Rule 19, HWR and Rule 20, HWR which adopts by reference 40 CFR 262 and 40 CFR 263, respectively.

(c) If recycling hazardous waste sludge, fully comply with the requirements of Rule 7(2), HWR which adopts by reference 40 CFR 261.6(b).11/

(d) If disposing of hazardous waste off-site, accumulate such waste on-site for 90 days or less and fully comply with the corresponding HWR rule and 40 CFR 262.34.

11/ The furnace dust appears to be a solid generated from an air pollution control facility and thus meets the definition of a sludge in 40 CFR 260.10.

Notice of compliance with terms of this order and a description of steps taken to achieve compliance shall be provided to the Regional Administrator; the Regional Hearing Clerk, EPA, Region VII; and counsel of record for Complainant within five (5) days of completion.

Dated this 1st day of August 1984.

Spencer T. Nissen
Administrative Law Judge