

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
BLOOMFIELD FOUNDRY, INCORPORATED,) DOCKET NO. RCRA-VII-88-H-0017
RESPONDENT)

INITIAL DECISION

RESOURCE CONSERVATION AND RECOVERY ACT ("RCRA") - Persons Subject to the Act and Regulations

1. A generator who accumulates and stores hazardous waste for periods exceeding 90 days is an operator of a storage facility and as such is subject to the requirements of 40 C.F.R. Parts 265 and 270, even though he has not achieved Interim Status nor obtained a permit pursuant to Section 3005 of the Act, 42 U.S.C. §6925.

RESOURCE CONSERVATION AND RECOVERY ACT - Labeling of Containers

2. A storage facility is required, by the regulations, to label each and all containers of its hazardous waste and to clearly mark on each such container the date upon which accumulation of hazardous waste began.

RESOURCE CONSERVATION AND RECOVERY ACT - Personnel Training

3. A storage facility is required, under the provisions of 40 C.F.R. §265.16, to document and maintain records at said facility evidencing training of its personnel whereby they are familiarized with emergency equipment and procedures and otherwise enabled to perform essential duties relating to management of hazardous waste.

RESOURCE CONSERVATION AND RECOVERY ACT - Civil Penalty Policy

4. The RCRA Civil Penalty Policy provides adjustment factors designed for consideration of facts related to the violator which were not considered in calculating a gravity-based penalty.

RESOURCE CONSERVATION AND RECOVERY ACT - Civil Penalty Policy

5. In calculating a gravity-based penalty, the extent of deviation from regulatory requirements and the potential for harm to public health and the environment as a result of such violations, as shown by the record, are essential considerations.

APPEARANCES

For Complainant:

Sarah Toevs Sullivan, Esquire
Assistant Regional Counsel
United States Environmental Protection Agency
Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101
913/236-2809
FTS 757-2809

For Respondent:

Terry J. Satterlee, Esquire
Sue M. Honegger, Esquire
LATHROP KOONTZ & NORQUIST
2600 Mutual Benefit Life Building
2345 Grand Avenue
Kansas City, Missouri 64108
816/842-0820

INITIAL DECISION

By Complaint, Compliance Order and Notice of Opportunity for Hearing, filed March 31, 1988, Complainant, U.S. Environmental Protection Agency (hereinafter "EPA" or "the Agency") Region VII, charges Respondent, Bloomfield Foundry, Incorporated (hereinafter "Bloomfield" or "Respondent") with violations of the Resource Conservation and Recovery Act (hereinafter "RCRA" or "the Act"), as amended, 42 U.S.C. §6921 et seq. (Subchapter III) and regulations promulgated pursuant thereto, and proposes the assessment of civil penalties pursuant to Section 3008(g) of RCRA, 42 U.S.C. §6928(g).

Count I of said Complaint charges that Bloomfield operated a facility for the storage of hazardous waste without interim status or a RCRA permit in violation of Section 3005 of RCRA, 42 U.S.C. §6925, for the reason that from approximately December 27, 1985, to September 11, 1987, said Respondent regularly accumulated baghouse dust classified as hazardous waste numbers D006 and D008 at 40 C.F.R. §261.24, although 90 days was and is the maximum time provided by 40 C.F.R. §262.34 that a generator of hazardous waste is allowed to store such waste without interim status or a permit, issued pursuant to Section 3005 of RCRA. For such alleged violation, Complainant proposes that a civil penalty in the amount of \$28,125 be assessed against Bloomfield.

Count II charges that Bloomfield violated 40 C.F.R. §262.34 in that it failed to label each and all containers of subject hazardous waste with the words "Hazardous Waste" and further failed to clearly mark on each such container the date upon which said accumulation of hazardous waste began. For the alleged violation, Complainant proposes that a

civil penalty in the amount of \$6,500 be assessed against Bloomfield.

Count III of said pleading charges that Bloomfield violated 40 C.F.R. §265.16(d) for the reason that on at least September 23, 1986, March 11 and 12, 1987, and October 7, 1987, it failed to have written descriptions of the type and amount of personnel training received by each person employed at subject facility. For said alleged failure, it is proposed that a civil penalty in the amount of \$1,250 be assessed against Bloomfield.

Count IV charges that on at least September 23, 1986, and March 12, 1987, Bloomfield failed to have a contingency plan which listed the name, address and phone number of all persons qualified to act as emergency coordinator at subject facility. For such alleged violation of 40 C.F.R. §265.52(d), it is proposed that a civil penalty in the amount of \$1,000 be assessed against Bloomfield.

Count V charges that from September 23, 1986, to October 7, 1987, Bloomfield failed to complete hazardous waste manifests in accordance with the instructions found in the Appendix to 40 C.F.R. Part 262 as required by 40 C.F.R. §262.20(a). For such alleged failure, it is proposed that a civil penalty in the amount of \$300 be assessed against Bloomfield.

Count VI charges that from September 23, 1986, to October 7, 1987, Bloomfield failed to demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of subject facility in violation of 40 C.F.R. §265.147(a). For such alleged failure, it is proposed that a civil penalty in the amount of \$1,000 be assessed against Bloomfield.

Paragraph 31, page 7, orders that Bloomfield pay a penalty in the total sum of \$38,175.

Further, beginning at page 7 of subject pleading of Complainant, the following corrective actions are ORDERED 1/, pursuant to Section 3008(a), 42 U.S. §6928(a), in paragraph 32:

(a) With the exception of complying with the generator accumulation time provisions set forth at 40 C.F.R. §262.34, Respondent shall immediately cease to operate any hazardous waste treatment, storage or disposal unit(s) at the Facility required to have a permit pursuant to Section 3005 of RCRA without first obtaining interim status or a permit pursuant to Section 3005 of RCRA;

(b) Deleted (see Footnote 1);

(c) Within 45 days of receipt of this Order, Respondent shall establish and maintain, until receipt of approval of final closure certification, financial responsibility for sudden accidental occurrences arising from operations of the Facility in the amounts required by 40 C.F.R. §265.147;

(d) Within 40 days of receipt of the Order, Respondent must develop and submit to EPA a plan to inspect its Facility on no less than a weekly basis. This plan, which shall be subject to EPA approval, shall be developed to provide for inspections of the Facility adequate to detect

1/ At the hearing held in Kansas City, Missouri, on March 8, 1989, Paragraph 32(b) of subject Compliance Order was deleted by Complainant (Transcript (hereinafter "TR") 11).

malfunction, deterioration, operator errors and discharges which may be causing or may lead to the release of hazardous waste constituents into the environment or a threat to human health and the environment. The plan shall provide that the Facility be inspected adequately to ensure that the accumulation time requirements of 40 C.F.R. §262.34 are continuously satisfied. In addition, Respondent's plan shall include:

1) A written schedule as described in 40 C.F.R. §265.15(b) through (d);

2) An inspection log which contains a comprehensive listing of all items to be reviewed under this paragraph;

3) A method of determining the number of containers and quantity of hazardous waste located at all times at each storage area; and

4) A method of verifying that each container is checked for leaks, openings and corrosion and a method for ensuring that clearly marked labels with accumulation dates and the words, "Hazardous Waste" or other words which identify the contents of each container are placed on all storage containers in accordance with 40 C.F.R. §262.34;

e. Respondent shall implement said plan immediately upon approval thereof by EPA;

f. Respondent shall inspect the Facility as described in the approved plan until such time as the Facility is certified closed pursuant to 40 C.F.R. §265.115; and

g. Respondent shall retain all logs and records required by the terms of this Order for a minimum of three years from the date of each inspection as required by 40 C.F.R. §265.15.

Paragraph 33 provides that documents to be submitted by subject Compliance Order shall be sent to the Iowa Section, RCRA Branch, Waste Management Division of EPA, Region VII.

Bloomfield timely filed its Answer herein which denies that it is in violation of Subtitle C of RCRA and regulations promulgated thereunder and further denies that the allegations set forth in the Complaint establish any violation of RCRA. It further questions the appropriateness of the civil penalties proposed.

Bloomfield admits in its Answer that it is an Iowa corporation engaged in the business of owning and operating a gray iron foundry engaged in the production of agricultural equipment casting and other products from scrap steel and scrap iron; that it uses a cupola with a baghouse for airborne emissions control; that the collected particulate from the baghouse is containerized in steel drums and stored on-site for shipment to a regulated hazardous waste disposal site. It further admits the allegations in Paragraph 4 of subject Complaint which state that analytical results from sampling of the baghouse dust show EP toxicity concentrations of 1.44 mg/l cadmium and 180 mg/l lead, and also admits that it has not submitted a Part A or Part B permit application.

Answering Count I of the Complaint, Bloomfield states that, if it accumulated hazardous waste for periods of time greater than 90 days, which it specifically denies, such storage for periods in excess of 90 days were caused by circumstances beyond its control and Complainant's own actions and failures to act. With respect to Counts II, III and IV, Bloomfield's Answer characterizes its non-compliance, if any, as technical and states that the assessment of a civil penalty is improper. It

states that the violation, as alleged in Count V, does not warrant the assessment of a civil penalty.

Answering Count VI, Bloomfield states that its efforts to obtain liability insurance for sudden accidental occurrences has been unproductive because "said insurance does not exist", and that any assessment of civil penalties for said cause is improper. In response to Paragraphs 31, 32 and 33 of subject Complaint, Bloomfield denies the appropriateness and accuracy of the penalty assessment and the specified corrective actions.

On March 6, 1989, a prehearing conference was convened in Room 512, 911 Walnut Street, Kansas City, Missouri, at which time and place each party filed with the undersigned a pre-trial brief stating their respective positions. Respondent's brief questioned the propriety of Complainant's action, in June 1987, in rewriting its Closure Plan which it submitted, for EPA approval, in July, 1985, pursuant to the Compliance Order contained in a Consent Agreement and Final Order ("CAFO") entered into by the parties in May, 1985. Complainant, at the prehearing conference, contended (1) that the issues raised by Bloomfield respecting said Closure Plan were not pleaded but first raised in Bloomfield's pre-trial brief and (2) that any such issues are inappropriate in the instant proceeding, having been previously adjudicated by the CAFO.

The requested hearing herein was convened on Wednesday, March 8, 1989, beginning at 9:30 a.m. in Room 2507, 911 Walnut Street, Kansas City, Missouri. Said cause was finally submitted on March 9, 1989.

Joint Exhibit 1, "Stipulated Facts," received in evidence at the hearing (TR 3), provides, in pertinent part, as follows:

1. (Bloomfield) operates a cupola furnace to melt scrap metals, steel and pig iron;

2. Airborne emissions from the cupola are collected in (Bloomfield's) "baghouse";

3. Particulate (baghouse dust) is conveyed from the baghouse hopper directly into 55-gallon steel drums which currently are sent to an off-site disposal facility;

4. (Subject) baghouse dust exceeds EP toxicity levels for lead and cadmium and is a characteristic waste under 40 C.F.R. Part 261, Subpart C;

5. Bloomfield has not submitted a Part A or Part B permit application and . . . has not achieved interim status;

6. Bloomfield is a generator of hazardous waste;

7. (The same parties) executed a Consent Agreement and Consent Order in May, 1985, which the parties agree is admissible in this action;

8. Bloomfield timely submitted a closure plan to EPA for approval for the storage and treatment area pursuant to (said) 1985 Consent Order . . . ;

9. Bloomfield stored baghouse dust on-site between January 9, 1986 and April 14, 1986, and between July 9, 1986 and September 8, 1987. (Both of said periods of on-site storage were greater than 90 days.)

10. On September 23, 1986, and March 11, 1987, some of Bloomfield's storage containers containing hazardous waste were found not marked with "Hazardous Waste" labels.

11. From September 23, 1986 until October 6, 1987, Bloomfield did not have documentation reflecting training received by its personnel dealing with hazardous waste. On October 7, 1987, Bloomfield submitted such documentation to EPA.

12. Bloomfield's hazardous waste manifests dated prior to May of 1988 are identified with the numerals "1" through "16".

13. Manifests dated May, 1988, to November 10, 1988, are identified with the numbers "00017" through "00019". Bloomfield was never cited for failing to have five consecutive unique numbers.

14. One of the two emergency coordinators listed in Bloomfield's contingency plan left the employ of Bloomfield on January 16, 1987, and, until March 11, 1987, Bloomfield did not have an "up-to-date" list of emergency coordinators. On March 12, 1987, Bloomfield added the name of the current employee whose duties include the duties of the alternative emergency coordinator.

15. Subject Notices of Violation and Reports of Inspection (including attachments) are authentic documents of EPA and . . . admissible in evidence. Respondent reserves the right to challenge the accuracy and reliability of portions of (said) Reports of Inspection.

Subsequent to submission of the case, each party prepared and filed its respective Brief and Argument, proposed "Findings of Fact" and "Conclusions of Law."

Upon the basis of the record, including the testimony elicited at said hearing on March 8 - 9, 1989, and the exhibits then and there received in evidence and upon consideration of the findings proposed by the parties, I make the following

FINDINGS OF FACT

1. Respondent Bloomfield Foundry, Inc. ("Bloomfield"), an Iowa corporation in good standing, operates a gray iron foundry in Bloomfield, Iowa, population 2,800 (Transcript [hereinafter "TR"]) 126-129). The foundry is near

an industrial park in a rural area (TR 180).

2. Respondent, Bloomfield, operates a cupola furnace to melt scrap metals, steel and pig iron (Joint [hereinafter "J"] Exhibit [hereinafter "EX"] 1, paragraph 1.

3. Airborne emissions from the cupola are collected in Bloomfield's air pollution control equipment known as a baghouse (J EX 1, paragraph 2).

4. Since August 19, 1980, Respondent has generated at its facility the hazardous waste specified as D008 in the regulations found at 40 C.F.R. §261.24.

5. Particulate collected from the baghouse, known as baghouse dust, is conveyed from the baghouse hopper directly into 55-gallon steel drums which are sent to an off-site disposal facility (J EX 1, paragraph 3).

6. From April 14, 1986, to September 9, 1987, Respondent stored, at its facility, the hazardous waste specified as D008 in the regulations found at 40 C.F.R. §261.24 in excess of 90 days.

7. Respondent entered into a Complaint, Consent Agreement and Consent Order with EPA, Region VII, on or about May 31, 1985, in which Respondent admitted treatment and storing hazardous waste without obtaining a permit or achieving interim status; among other things, said Complaint, Consent Agreement and Consent Order ordered Respondent to pay a penalty of \$9,500 and to immediately cease to treat or store for greater than 90 days any hazardous waste at the facility.

8. On April 7, 1985, Bloomfield submitted its Notification of Hazardous Waste Activity. Bloomfield has not submitted a Part A or Part B permit application and Bloomfield has not achieved interim status (J EX 1, paragraph 5).

9. Pursuant to the 1985 Consent Order, Respondent, in addition to paying

said civil penalty, submitted, in July, 1985, a closure plan for its treatment and temporary storage area (concrete pad) (TR 143-144).

10. After submitting the closure plan, Ben Howard, Respondent's president, continued his interest in actions, initiated in 1984, for the study of reducing or eliminating the generation of hazardous waste, by engaging Hickok & Associates to conduct laboratory waste treatability studies (TR 243-245).

11. Complainant did not respond and approve Bloomfield's closure plan until June, 1987 (TR 242).

12. During storage periods exceeding 90 days, the dust was securely stored in 55-gallon steel drums which were in good condition and some of the drums were labeled "Hazardous Waste" (Complainant [hereinafter "C"] EX 9; TR 134-138 and 154-155).

13. A RCRA compliance inspection was conducted at Bloomfield's facility on September 23, 1986. The September 23, 1986, Notice of Violation cited Bloomfield for storing hazardous waste for longer than 90 days, in violation of 40 C.F.R. §262.34 (C EX 10).

14. On October 3, 1986, Ron Vlieger, of Hickok & Associates, responded to the September 23, 1986, Notice of Violation and advised Complainant of his belief that Respondent had interim status for the storage area (TR 147; 250). No one at Hickok & Associates received any response from Mr. Vlieger's letter, dated October 3, 1986. After the March 11, 1987, RCRA compliance inspection, when Respondent was cited again for storing waste on-site for more than 90 days, Mr. Vlieger assisted Bloomfield in arranging for off-site disposal of the accumulated baghouse dust (TR 272). Said waste could not reasonably be disposed off-site until September, 1987,

because of difficulties encountered in renewing Respondent's disposal permit (TR 272-273). Baghouse dust generated after June 5, 1987, has not been stored on-site for over 90 days (TR 274).

15. On September 23, 1986, Respondent was cited for failing to have a contingency plan and training plan; it submitted a training and contingency plan to Complainant on October 10, 1986, and Bloomfield completed training documentation on October 7, 1987 (R EX. 9, 10).

16. On September 23, 1986, Respondent was cited for insufficient labeling of hazardous waste storage containers. Prior to that time, it affixed "Hazardous Waste" labels on its containers prior to transporting them to an off-site disposal facility (TR 153). After September 23, 1986, Bloomfield affixed hazardous waste labels to all drums at the time they accumulated waste on-site (TR 132, 155).

17. On September 23, 1986, and on March 11, 1987, Respondent did not label all of its hazardous waste satellite accumulation containers with the words, "Hazardous Waste", or other words which identify the contents thereof, pursuant to 40 C.F.R. §262.34(c)(1).

18. On September 23, 1986, and March 11, 1987, Respondent did not label all of its containers of hazardous waste in its storage area with the words, "Hazardous Waste", or other words which identify the contents thereof as required by 40 C.F.R. §262.34(a)(3).

19. On September 23, 1986, and March 11, 1987, Respondent did not label its containers of hazardous waste in its storage area with the "date upon which each period of accumulation began", pursuant to 40 C.F.R. §262.34(a)(2).

20. On September 26, 1986, Respondent failed to have personnel training records for the facility which satisfied the requirements of 40 C.F.R. §265.15(d)(1-3).

21. On September 26, 1986, March 11-12, 1987, and October 7, 1987, Respondent failed to have written descriptions of the type and amount of personnel training received by employees at the facility pursuant to 40 C.F.R. §265.16(d)(4).

22. On September 23, 1986, Respondent did not have a contingency plan for the facility pursuant to 40 C.F.R. §265.51, and on March 11, 1987, Respondent's contingency plan was incomplete in that it did not have an up-to-date list of names, addresses and phone numbers of all persons qualified to act as emergency coordinator pursuant to 40 C.F.R. §265.52(d).

23. Respondent has always maintained a current listing of one emergency coordinator in its contingency plan (TR 59). On March 12, 1987, Bloomfield was cited for not having an up-to-date listing of an alternative emergency coordinator on the contingency plan. Bloomfield updated its listing of the alternative emergency coordinator on March 12, 1987, in the presence of the inspector as reflected on the Notice of Violation (C EX 12).

24. Respondent's hazardous waste manifests dated prior to May, 1988, are identified with numerals "1" through "16" (J EX 1, paragraph 12). Its hazardous waste manifests dated May 8, 1988, through and including November 10, 1988, are identified with the numerals "00017" through "00019" (R EX 12).

25. From November 19, 1980, to the present, Respondent has not demonstrated financial responsibility for sudden accidental occurrences pursuant to 40 C.F.R. §265.147.

26. Since January, 1986, Respondent has attempted to obtain environmental impairment liability insurance and has been advised that this insurance is not available (R EX 13).

27. Beginning in August, 1987, Respondent has participated in a technological research project with Iowa State University to reduce or eliminate the generation of hazardous waste at its foundry (R EX 14).

28. On September 13, 1985, Respondent requested by letter a 90-day extension of the normal 90-day storage period for its "baghouse dust," explaining that there was no longer a hazardous waste disposal site in Iowa since Landfill Service Corporation of Reinbeck, Iowa, ceased accepting hazardous waste on July 1, 1985; that, since May 29, 1985, when Respondent was advised that Landfill no longer would accept its said hazardous waste, it had searched for a licensed facility to accept its waste. It contacted an Illinois company, Peoria Disposal Companies, who was licensed as a hazardous waste landfill and also provided licensed transportation. Respondent's application process to Peoria Disposal was completed on August 22, 1985, but at that time Peoria Disposal was awaiting approval by the State of Illinois before accepting waste. Respondent had provided Peoria disposal with results of requested EP toxicity tests and, as its last disposal of waste at Landfill's site was June 27, 1985, its 90-day limit for storage was "rapidly approaching" (C EX 3). EPA's Waste Management Director ("WMD") replied on September 26, 1985, granting Respondent a 30-day extension, extending the date to which it could store its hazardous waste at its facility to October 25, 1985, and advising that one such extension would be granted to Respondent and that it must provide, within 30 days of shipment, a copy of the completed hazardous waste manifest (C EX 4).

29. On November 26, 1985, EPA's said WMD wrote Respondent that it was then apparent it had exceeded the deadline of October 25, 1985, and was, therefore, in violation of generator storage requirements and directed

that Respondent document, by letter, justification for enforcement discretion by EPA (C EX 5).

30. By letter dated December 13, 1985, Respondent responded to the WMD's letter, dated November 26, 1985, and stated that, although it had then exceeded the extension, it had used "utmost diligence in storing the material (safely)"; that it had received the necessary disposal permit from Illinois EPA; that, due to Peoria Disposal's scheduled bookings, they were unable to obtain removal of subject hazardous waste sooner than December 20, 1985; that it would arrange for future disposal dates no less than 30 days ahead of the desired pickup date, and act to avoid any possibility of exceeding storage limits (C Prehearing ("PH") EX 6).

31. On March 7, 1986, Respondent, by letter, transmitted to EPA's WMD photocopies of manifests (Nos. 9 and 10) reflecting shipments of subject hazardous waste to Peoria Disposal on December 27, 1985, and on January 9, 1986, and advised that its next disposal would be made before April 9, 1986. (C PH EX 7).

32. By letter, dated April 21, 1986, and manifest therewith, Respondent advised that its most recent disposal occurred on April 14, 1986; that said disposal was four days late as its efforts to schedule said pickup were unsuccessful because Peoria Disposal was overloaded with new urgent disposal business and that future pickups would be scheduled a full two weeks ahead (C EX 6).

33. May Cervera Adams, an environmental engineer for A.T. Kearney and Associates, conducted a RCRA inspection of Respondent's subject facility, in the presence of LeRoy Arndt, Plant Manager, on September 23, 1986, as a duly authorized representative of EPA, to determine if there had been compliance with generator and interim status requirements and if there

had been storage of baghouse dust by Respondent in excess of 90 days duration. The findings of said inspection are documented in Adams' Report of RCRA Compliance Inspection, with attachments (C EX 9).

34. A Notice of Violation ("NOV"), given by Adams to Arndt (TR 47) following said inspection on September 23, 1986, cited Respondent for the following:

(a) More than 90-day storage between June 27, 1985, and December 27, 1985, and between January 4, 1985, to April 15, 1985, indicated by "no manifests";

(b) No training plan or training records for hazardous waste management personnel;

(c) Containers not labeled in storage for accumulation, and

(d) No written agreements with Emergency Response authorities and no contingency plan and emergency procedures.

35. Marilyn Mattione, EPA Region VII environmental engineer currently employed as RCRA Compliance officer, conducted a RCRA Compliance Inspection at Respondent's subject facility on March 11 and 12, 1987. She was accompanied on March 11, 1987, by LeRoy Arndt, said facility's plant manager, and on March 12, 1987, by both Arndt and Ron Vlieger of Hickok and Associates (C EX 8). A Notice of Violation (C X 12) was issued following said inspection and a Summary of the results of said inspection was prepared (C X 11).

36. The storage area, observed by Adams, was a flat asphalt pad located northeast of and outside Respondent's foundry. Drums of baghouse dust and treated dust were stored on the pad (TR 48).

37. Mattione's inspection results cited the following violations (C X 11 and 12):

(a) Some of the (stored) containers were not labeled, i.e., on March 11, 1987, at least two of 121 drums were not labeled "Hazardous Waste" (C EX 8, page 5);

(b) Storage over 90 days without a permit, i.e., on March 11, 1987, approximately 67 drums showed accumulation dates indicative of over 90 days storage (C EX 8) (On March 12, 1987, drums labeled June 28, 1985, were changed to indicate April 16, 1986);

(c) No training documentation. The facility did not have a complete written description of the type and amount of training given to personnel handling hazardous waste. Such documentation was requested but not provided;

(d) Emergency Coordinator list not updated, i.e., the facility's contingency plan did not include addresses of either emergency coordinator nor the telephone number of the alternate coordinator. Mr. Arndt, at the time of the inspection, inserted, with his telephone number, the name of Bob Rosenstangle (TR 59), the current alternate emergency coordinator, in place of Martha Clark, who left her employment with Respondent earlier in 1987; no house number or street address was furnished for Rosenstangle, as he lives on a street with no name and a house with no number (TR 63). (Bloomfield is a small town with a population of 2,800.)

(e) Inadequate security, i.e., said storage area did not have a 24-hour surveillance, controlled access or signs warning of hazardous waste;

(f) No waste Analysis Plan, i.e., when requested, no waste analysis plan, for hazardous waste stored in excess of 90 days, was available (C EX 8, page 6), and

(g) No written inspection schedule or log.

38. Tim J. Curry, an EPA environmental engineer and on-scene coordinator, on October 7, 1987, conducted a RCRA inspection of Respondent's facility and, in particular, the treatment and storage area and Respondent's records. He found that shipments of hazardous waste were manifested on January 9, 1986, April 14, 1986, July 9, 1986, September 8, 1987, and September 9, 1987. He found that the facility did not have a waste analysis plan nor documentation of training for personnel handling hazardous waste. Respondent did not maintain financial assurance for sudden accidental occurrences and he observed that the hazardous waste storage area is not separated from public access by means of artificial or natural barriers (C EX 8). He issued a NOV to Respondent's manager, viz.:

- (a) No waste analysis plan;
- (b) No documentation of personnel training, and
- (c) Failure to demonstrate financial assurance.

Respondent was not cited for storage for over 90 days (TR 72).

39. Mr. Vlieger of Hickok and Associates, representing Respondent, forwarded a response to Curry's NOV which was not seen by Curry (TR 73).

40. On January 5, 1988, EPA Director of Waste Management Division wrote Respondent's president a letter (C EX 15) entitled "Request for Information" which stated that, in response to NOVs issued after inspections, Respondent's consultant (Vlieger; see Finding 41, supra) claimed that Respondent had interim status; that EPA records showed that a Notification of Hazardous Waste Activity was filed with EPA on April 8, 1983, but that a Part A permit application was never filed; that Respondent and EPA executed a Consent Agreement May 20, 1985, which ordered that " . . . Respondent must cease treating or storing for greater than 90 days any

hazardous waste at your facility". Said letter questioned how interim status was achieved as claimed by Respondent's consultant. It further advised that its waste treatment and storage since May 20, 1985, had subjected it to interim status requirements of 40 C.F.R. Part 265.

41. Respondent's counsel, in a letter (C EX 16), dated February 8, 1988, returned a detailed response to EPA's letter, dated January 5, 1988, stating, among other things, page 2, that "(Respondent) has not treated its hazardous waste. All drums of hazardous waste have been manifested and shipped off-site", and that consultants had been contacted to develop a (means) of rendering baghouse dust non-hazardous.

42. James V. (Jim) Callier, EPA Compliance Officer (TR 80), RCRA Iowa Branch, calculated the penalties proposed in subject complaint, using the Final RCRA Penalty Policy, dated May 8, 1984 (C EX 18); he considered the evidence of violations, as elicited at the subject hearing, along with the information contained in correspondence between the parties (C EX 15, 16 and 17).

43. Using the matrix on page 4 of said Penalty Policy (C EX 18), Callier found that Respondent's "extent of deviation" was "major" for the reason that Respondent had stored its waste for an extensive period past 90 days, i.e., from before April 3, 1986, through September of 1987 (TR 84-86), and that Respondent notified EPA that it "generated" and managed hazardous waste but did not notify EPA that it treated, stored and disposed of same and Respondent did not file a Part A or Part B Permit Application. He also found a "Major Potential for Harm" upon consideration of the substantial likelihood of exposure - the drums were in an outside storage area not fenced and there were no signs posted to identify the drums as hazardous waste to unknown persons. Also, the photographs (C EX 23)

showed the drums were stored so that visual inspection for leaks was difficult. Potential for harm was also determined to be substantial because of the impact subject storage "would have on the RCRA program". As EPA relies on a facility to properly identify its activities, subject storage would have been undiscovered but for the EPA inspectors (TR 88). The gravity-based penalty ("GBP") for the violation charged in Count I was determined to be \$22,500, which was increased by 25% because of Respondent's history of non-compliance (TR 89). Callier did not determine that the evidence considered by him warranted any mitigation of the \$28,125 total penalty proposed for the violation charged in Count I of subject complaint (TR 90).

44. Witness Donald E. Sandifer of EPA, Region VII, was, in April, 1985, when a Consent Agreement between the parties for RCRA violations was executed, an EPA Compliance Officer and contributed to the development of said Consent Agreement; said agreement was developed after contact with EPA by Ben Howard, Respondent's president and owner, who desired to resolve the complaint then developing (TR 30). Respondent did not then desire to achieve interim status or a permit for treatment or storage of hazardous waste in excess of 90 days (TR 31), and said agreement did not so provide. On the contrary, said Consent Agreement ordered Respondent to cease all treatment and storage of hazardous waste in excess of 90 days (TR 32). Later in 1985, Howard and Sandifer discussed Respondent's problem in locating the means of disposing of its baghouse dust. The facility where it had disposed of said waste closed down on June 27, 1985, which required Respondent to obtain a permit to go to a different disposal facility. After deciding to use Peoria Disposal Companies, it had to obtain approval from the State of Illinois before Peoria could accept said waste. Respondent was required to submit a sample of bag-house

dust, for testing purposes, before final approval would be granted by the State of Illinois. Howard's letter (C EX 3), setting forth its disposal problem (see Finding 30, supra) and requesting a 90-day extension of the 90-day limit for storage, was forwarded at Sandifer's suggestion (TR 33). A 30-day extension was granted by a letter (C EX 4), dated September 26, 1985, and bearing the signature of Robert Morby (for David A. Wagoner, Director, Waste Management Division).

45. Sandifer testified that when a facility is inspected for interim status requirements, it does not in any way indicate that the facility has interim status but, rather, indicates that the facility is operating or suspected of operating as a treatment, storage and disposal facility, which operation, under 40 C.F.R. §262.34(b), "throws open a whole new realm of violations that they can be violating" (TR 39).

46. Two and a half months prior to issuance of the instant Complaint on March 31, 1988, Ben Howard, president and owner of Respondent, was forwarded a letter (R EX 6), dated January 17, 1988, from Robert L. Morby, Chief, Superfund Branch, EPA Waste Management Division, stating, in pertinent part:

" . . . The EPA has been tasked with developing a program for hazardous waste management under the Resource Conservation and Recovery Act (RCRA) and the various regulations promulgated since May 19, 1980, that implement RCRA. Additionally, EPA is investigating sites where hazardous wastes were disposed of without regard for human health or the environment under the authority of RCRA and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund).

"Each region of EPA has developed a list of potential and/or confirmed sites where improper hazardous waste disposal has occurred. . . . Regardless of the source of information, all sites are independently evaluated by EPA or the state environmental agency.

"As you are probably aware, EPA Region VII has the Bloomfield Foundry . . . listed as a site where wastes may have been disposed or managed prior to their regulation or without regard for human health or the environment. The EPA has now completed its investigation and evaluation of this site.

"Based on all of our currently available information, we do not believe this site poses a public health or environmental hazard. We anticipate no further action on this site. . . ."

A copy of said letter (R EX 6) was sent to Tim O'Conner, Iowa Department of Water and Waste Management (IDWAWM).

CONCLUSIONS OF LAW

1. As provided by 40 C.F.R. §262.34(b), when Respondent accumulated hazardous waste for more than 90 days, he was an operator of a storage facility subject to the requirements of 40 C.F.R. Parts 265 and 270.
2. Respondent Bloomfield Foundry, Incorporated, violated Section 3005 of RCRA, 42 U.S.C. §6925 and regulations promulgated pursuant thereto, 40 C.F.R. Part 265, in accumulating and storing hazardous waste on its facility for periods in excess of 90 days without interim status or a permit issued pursuant to said Section 3005 of RCRA.
3. Respondent violated 40 C.F.R. §262.34 for the reason that it failed to label each and all containers of its hazardous waste with the words "Hazardous Waste" and failed to mark clearly on each such container the date upon which accumulation of hazardous waste began.
4. Respondent violated 40 C.F.R. §265.26(d) for the reason that it failed to document and maintain records at its facility evidencing training of its facility personnel, in accordance with §265.16(a), to perform their duties in a way that ensures subject facility's compliance with 40 C.F.R. Part 265, including training to enable them to respond effectively to emergencies and teaching them hazardous waste management procedures.

5. Respondent violated 40 C.F.R. §265.52(d) in failing to have a contingency plan which listed the names, addresses and telephone numbers of all persons qualified to act as emergency coordinator at its facility.
6. Respondent violated 40 C.F.R. §262.20(a) for the reason that it failed to complete hazardous waste manifests in accordance with instructions found in the Appendix to 40 C.F.R. Part 262.
7. Respondent is subject to Subpart H of 40 C.F.R. Part 265 (40 C.F.R. §262.34(a); §265.1 and §265.140). Respondent violated 40 C.F.R. §265.147 for the reason that it failed to demonstrate financial responsibility for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from the operations of its facility.
8. In accordance with the RCRA Civil Penalty Policy and the Act, adjustment to GBPs are appropriate on this record, upon consideration of the reasons the violation was committed and other factors, related to the violator, which were not considered in calculating a GBP.
9. The Act and regulations provide for the assessment of a civil penalty for subject violations as a means of achieving compliance by the Respondent and other persons similarly situated.
10. The Act and regulations contemplate that Complainant's enforcement efforts shall be exercised as a means of affording discrete direction to and achieving compliance by all persons subject to the Act.
11. Any and all objections and motions which are not otherwise considered in the instant Initial Decision are hereby overruled.

CIVIL PENALTY

Determination of the amount of the civil penalty here recommended is governed by the Act and regulations promulgated pursuant thereto.;

Section 3008(a)(3) of RCRA, as amended, 42 U.S.C. §6928(a)(3), provides, in pertinent part:

Any penalty assessed in the order shall not exceed \$25,000 per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.

40 C.F.R. §22.27(b) provides, in pertinent part, as follows:

Amount of Civil Penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease . . .

As observed in Fair Haven Plastics, Inc. et al. (Docket No. V-W-88-R-005), l.c. 44, citing In re Sandoz, Inc., RCRA (3008) Appeal No. 85-7, l.c. 7-8 (CJO, February 27, 1987):

The Chief Judicial Officer has held that "[a]s a matter of law, therefore, the Presiding Officer has properly assessed a penalty if it is not more than \$25,000.00 per violation per day, if he takes into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements, and if he considers any civil penalty guidelines 'issued' under the Act."

The Chief Judicial Officer has also held that "it is unclear whether the Presiding Officer 'must' consider the Penalty Policy before assessing a civil penalty for a RCRA violation. Nevertheless, a

Presiding Officer may consider the Policy guidelines as a matter within his discretion. By conforming to the guidelines, a Presiding Officer provides a clear, reviewable explanation of the rationale for his penalty assessment. However, if a Presiding Officer adopts the Policy guidelines, and therefore its underlying rationale, he must thoroughly explain any divergences from the guidelines so that his penalty rationale is clear upon review."

* * *

However, if an Administrative Law Judge considers the RCRA Penalty Policy, the Chief Judicial Officer has held that the policy is not binding on the Judge. Even "[a]ssuming arguendo that the RCRA Penalty Policy was 'issued under the Act' . . . the Presiding Officer was obliged only to 'consider it' . . . An ALJ's discretion in assessing a penalty is in no way curtailed by the Penalty Policy so long as he considers it and adequately explains his reasons for departing from it."

The Final RCRA Civil Penalty Policy (May 4, 1984) provides a penalty calculation system consisting of three steps: (1) determining a gravity-based penalty (GBP) for a particular violation; (2) considering the economic benefit of noncompliance where appropriate, and (3) adjusting the penalty for special circumstances.

In the initial step of calculating the GBP, two factors are considered: "potential for harm" and "extent of deviation" from RCRA or its regulatory requirements. These two factors comprise the seriousness of the violation which must be taken into account in assessing a penalty under Section 3008(a)(3) of RCRA. They have been incorporated into a matrix 2/ from which the amount of the GBP is calculated. The "potential

2/ In Bell and Howell Co. (TSCA-V-C-033,-034,-035; Final Decision, December 2, 1983, at 18-19), the Judicial Officer stated: ". . . it is better to view the amounts shown in the matrix as points along a continuum . . . if warranted by the circumstances, points along the continuum may be selected in assessing a penalty." It is there recognized that less tangible factors may exist which an ALJ is in a unique position to evaluate.

for harm" resulting from a violation may be determined by the likelihood of exposure to hazardous waste posed by noncompliance or the adverse effect which noncompliance has on the purposes for the RCRA program. The "extent of deviation" measures the degree to which the violation renders inoperative the requirement violated, i.e., the degree to which the violator is in compliance or not in compliance with the requirement.

Step two of the penalty calculation calls for a determination of the amount of economic benefit from noncompliance where the violator has derived significant savings. The instant Complaint does not allege that Respondent derived any economic benefit from subject violations, thus, no such adjustment will be here considered (C EX 19).

After determining the appropriate GBP and, where appropriate, economic benefit, the penalty may be adjusted upwards or downwards to reflect particular circumstances surrounding the violation, including, but not limited to: good faith efforts to comply/lack of good faith; degree of willfulness and/or negligence; history of noncompliance; ability to pay, and other unique factors.

I thus determine the appropriate civil penalty for each of the violations here found.

The Complaint herein charges, in six counts, six RCRA violations, for which penalties totaling \$38,175 are proposed.

Count I charges that Respondent stored hazardous waste on-site for periods of time greater than 90 days and that during all such times Respondent did not have authority to store such waste under a permit and did not then have interim status. Respondent admits such violation (J EX 1, paragraphs 5 and 9) and does not dispute that "Complainant properly characterized (its) on-site storage as a 'major deviation'" (R Brief,

Page 7, Note 2, and Page 8). Complainant contends that the "potential for harm" from said violation is "major" while Respondent insists that the penalty assessed should consider said factor to be "minor" because of Respondent management of the baghouse dust. The following facts are submitted to support said contention:

(a) It is undisputed that the dust was containerized in steel drums "all closed and in good condition", in that the inspector, Ms. Adams, stated that said drums showed no signs of "leakage, corrosion or any deterioration or deformation" (C EX 9, Attachment 9, page 1);

(b) Respondent's president testified that said drums are secured by a heavy lid clamp tightened by a bolt and that tools are necessary to open the lid (TR 139);

(c) The temporary storage area was inspected at least weekly and no leaks or other problems associated with storage were detected (TR 137-138), and

(d) Respondent's facility was at all pertinent times equipped with an internal alarm and paging system and had adequate fire protection and spill control equipment (C EX 9, page 5).

It is pointed out by Respondent that Mr. Callier, who calculated the proposed penalty, used assumptions rather than actual facts. Contrary to his assumption, the record shows that the closest house to subject facility is 50 yards to the east and no children are seen in the area. An elderly couple (without children) lives on the northeast corner of the block. They have some sheep on the rear of their property. The sheep are fenced in. Respondent's eastern border is Railroad Street; on its western boundary is a farm services supply operation; west of the farm services operation is an Amoco farm dealer. Respondent's south boundary is all industrial park,

bordering about one-third of Respondent's frontage. It is further argued that Respondent comes within the exemptions set forth in §265.14(a)(1) and (2) on the premise that entry by livestock or persons onto the active portion of the facility will not cause injury or a violation of 40 C.F.R. Part 265. It should be apparent that Mr. Callier's concern was "potential for harm", including the future existence of subject facility. Without a barrier of some description (e.g., fence) as a means to control entry, there can be no assurance that the possibility of injury does not exist. I have considered the time during which the violation persisted; the quantity and toxicity of the hazardous waste, the management effort practiced by Respondent and the location of subject facility and conclude that the potential for harm from said violation is moderate. Taking the mid-point from the matrix (C EX 18), the appropriate GBP is \$9,500.

Count II of the Complaint charges failure to label each and all containers with the words "Hazardous Waste" and to clearly mark on each such container the date upon which said accumulation of hazardous waste began. On September 23, 1986, Respondent was cited for insufficient labeling in that, prior to that time, Respondent affixed "Hazardous Waste" labels on its containers prior to transporting them to an off-site disposal facility. After September 23, 1986, said labels were affixed to the drums at the time they accumulated waste on-site (Finding 16, supra). On March 11, 1987, at least two of the 121 drums were not labeled "Hazardous Waste". In the last instance, the deficiency was attributed to the labels coming off due to "weathering" during the winter. Respondent used plastic casings over the labels after the inspection on March 11 and 12, 1987 (R EX 3; TR 200).

On this record, I find that "extent of deviation" is moderate and

the "potential for harm" is minor. The matrix provides a penalty range of \$500 to \$1,499. The mid-point of that range, or \$1,000, is an appropriate GBP.

Count III of the Complaint charges violation of 40 C.F.R. §265.16(d); at the time of the three inspections, Respondent failed to furnish written descriptions of the type and amount of personnel training received by each person employed at Respondent's facility (Findings 34, 37 and 38). Respondent's president testified he was under the impression that, as long as employees knew what to do, they were "trained" (TR 158). After the September, 1986, inspection, all persons working near the waste storage area were trained how to handle hazardous waste by Mr. Vlieger of Hickok and Associates (TR 157). Since the October, 1987, inspection, training forms documenting the training of Respondent's employees have been prepared (TR 158; R EX 10). On this record, I conclude that the extent of deviation was moderate, the potential for harm was minor and that a GBP in the sum of \$500 is appropriate.

Count IV is the charge that Respondent failed to have a contingency plan which listed the name, address and telephone number of all persons qualified to act as emergency coordinator at subject facility, in conformity with 40 C.F.R. §265.52(d). I find that information respecting LeRoy Arndt and his alternate Bob Rosenstangle should have been so listed. The information required is to identify and make available such person or persons when an emergency arises. The street address is essential only in a community where the location of the person on call cannot be otherwise identified. In the small town of Bloomfield, Iowa, the record indicates that the street address of alternate Rosenstangle was non-existent; the street has no name and his house had no number, and the employees of

Respondent all knew where he lived. I reject Respondent's contention that under §265.55 only one emergency coordinator is required to be named in the contingency plan. Said section provides that there must be at least one employee . . . available to respond to an emergency by reaching the facility within a short period of time. It will be noted that, on this record, Respondent's practice was to use an emergency coordinator and a designee. The original designee left her employment with Respondent facility and was replaced by Bob Rosenstangle, who also is a volunteer fireman in Bloomfield, Iowa. The fact that Martha Clark had been so replaced was known to the employees (TR 204). Before her departure in January, 1987, Martha Clark briefed Rosenstangle on personnel safety and other matters for which she had been responsible (TR 160). Such deficiency in the contingency plan was corrected at the time of the inspection on March 12, 1987 (C EX 12).

On this record, I find that the extent of deviation was minor, the potential for harm was minor and that an appropriate penalty to be here assessed for said violation is \$300.

Count V of the Complaint charges that Respondent's hazardous waste manifests were not completed pursuant to instructions in the appendix to 40 C.F.R. Part 262 in that Respondent used numerals "1" through "16" to identify manifests. After being advised by his consultant, Respondent used five-digit numerals to identify his hazardous waste manifests (R EX 12; TR 164). I find that a penalty in the sum of \$100 is appropriate for said violation.

Count VI charges that Respondent failed to demonstrate financial responsibility for sudden accidental occurrences in violation of 40 C.F.R. §265.147(a). Since January, 1986, he has been unable to obtain insurance

coverage (TR 166). Respondent has documented his unsuccessful efforts to obtain such coverage (TR 166). 40 C.F.R. §262.34(b) expressly provides that a generator who accumulates hazardous waste for more than 90 days . . . is subject to 40 C.F.R. Part 265. Respondent would be exempt (40 C.F.R. §262.34(a)(1)) from §265.147 (Subpart H) but for its failure to qualify as a generator who stores waste on-site for 90 days or less described under 40 C.F.R. §262.34(a). I find that an appropriate GBP for said violation is the sum of \$200.

In summation, my proposed Order shall reflect the following GBPs:

Count I:	\$9,500
Count II:	\$1,000
Count III:	\$ 500
Count IV:	\$ 300
Count V	\$ 100
Count VI	\$ 200

TOTAL: \$11,600

Section 3008(c) of RCRA states that good faith efforts to comply with applicable requirements must be taken into account. The Civil Penalty Policy sets forth other adjustment factors which may be considered, viz.:

- (1) Willfulness and/or negligence;
- (2) History of compliance;
- (3) Ability to pay, and
- (4) Other unique factors.

I have concluded that the GBP should and will be adjusted by adding 25% to the Count I GBP of \$9,500 because of Respondent's history of compliance, i.e., a Consent Agreement in 1985 evidences that Respondent then had stored its hazardous waste (baghouse dust) in excess of 90 days when it did not have a permit to do so and had not obtained interim status by the

filing of a notification and Part A application.

I have further concluded that a 25% reduction of said GBPs is warranted because of the good faith efforts demonstrated by Respondent and other unique factors shown by the record.

Contrary to testimony that subject violations would not have been discovered but for the inspections in 1986 and 1987, the record reflects that Ben Howard, Respondent's president and owner, came forward in 1985 in an effort to get his facility in compliance with EPA regulations and entered into a Consent Agreement pursuant to which he paid \$9,500 and agreed, among other things, to cease storing his hazardous waste for periods exceeding 90 days. When Landfill Service Company of Reinbeck, Iowa, announced it was closing and would not accept Respondent's waste after June 27, 1985, Howard contacted EPA Compliance Officer Sandifer advising he was having difficulty finding a disposal company which would accept his waste; that he desired to use Peoria Disposal Company; however, approval from the State of Illinois had to be obtained for Peoria to accept his waste and a sample of baghouse dust had to be submitted for testing before such approval could be forthcoming. A request for a 90-day extension was requested, from WMD of EPA, Region VII, at Sandifer's suggestion. WMD granted a 30-day extension, to October 25, 1985, by a letter which bore the signature of Robert Morby, for the Director of WMD, EPA, Region VII. In November, 1985, the Director of WMD, EPA, Region VII, wrote Howard (C EX 5) stating he had exceeded the 30-day extension and requested his comments justifying the granting of enforcement discretion. Howard promptly advised that he was exerting every effort to use the disposal services at Peoria, but pointed out that their services were in great demand by new sources and he would be serviced in turn. Disposal

was accomplished on December 27, 1985, and January 9, 1986, and manifests for these shipments were furnished to EPA. Howard also advised that he intended to make subsequent disposals in less than 90 days, i.e., by April 9, 1986. On April 21, 1986, he advised EPA that he was four or five days late, as his waste was transported to Peoria on April 14, 1986; Peoria was still overloaded due to new demands for its services. 3/ One of the charges in Count I was the storing of hazardous waste for a period exceeding 90 days, referring to January 9, 1986, to April 14, 1986. The other period of on-site storage occurred between July 9, 1986, and September 8, 1987. It was during this period that Respondent's consultant, Rod Vlieger of Hickok and Associates, advised Respondent that he had interim status authority (see Vlieger letter to EPA, dated October 3, 1986, identified as C EX 7 and R EX 17). EPA did not respond in writing to Vlieger or Hickok refuting Vlieger's claim of Respondent's interim status (TR 258). EPA's Sandifer claimed he told Vlieger in a telephone conversation that Respondent did not have interim status (TR 40). Vlieger denied receiving any written or telephonic response and stated that, as there was no response, he logically assumed his contention was accepted (TR 267-8).

I have further taken note of and considered that a letter from the Waste Management - signed by Robert Morby, the same individual who had signed the letter, dated October 25, 1985, which granted Respondent a 30-day (storage) extension - was sent to Respondent on January 17, 1988, as set out in Finding 46, supra.

3/ At that time (April, 1986), there was no disposal facility in the State of Iowa. Peoria, Illinois, is a distance of 200 miles from Bloomfield, Iowa, and most of the Iowa facilities then used either the Peoria facility or one located in Louisville, Kentucky (TR 140).

The closing paragraph of said letter advised Respondent that "based on all of our currently available information we do not believe that this site poses a public health or environmental hazard. We anticipate no further action on this site . . . "

Ben Howard, Respondent's president, testified (TR 145) that he took the communication to mean "(he) had a clean bill of health".

I have recounted the above instances for the sole purpose of demonstrating that EPA did not at all times field Respondent's inquiries "cleanly" but on more than one occasion "dropped the ball." It is apparent that Respondent expected - and was justly entitled to expect - that EPA speak with one voice. Mr. Morby's letter aptly demonstrates EPA's failure in this respect. EPA's WMD could have interpolated in Mr. Morby's letter that Mr. Morby referred only to "Superfund" - a fact well known "in house" but little known elsewhere.

A further instance demonstrating a failure to afford discrete direction to Respondent was WMD's letter, dated November 1985, requesting Respondent's comments justifying EPA's granting of "enforcement discretion." Respondent's credible response was to the effect that he was "exerting every effort" to dispose of its baghouse dust responsibly and expeditiously. On this record, I question whether "enforcement discretion" should have been mentioned if it was not to be granted under the circumstances then appearing.

It is also apparent that WMD should have been quick to advise Respondent that its consultant was incorrect in advising Respondent that it had "interim status." Its reaction was clearly more adversarial than informative. This is an example of discrete direction that Complainant failed to exercise which is clearly contemplated by the Act.

In the premises, I find that Respondent's good faith efforts were at least hampered; the record indicates the possibility that compliance by Respondent could have been achieved by proper enforcement efforts which, of necessity, entail attention to detail, unusual patience and a dearth of arrogance.

In summary, the penalty on Count I (increased by 25% to \$11,875) added to GBP penalties on Counts II through VI, totaling \$2100, indicate total penalties, before the downward adjustment of 25%, noted supra, of \$13,975. After said downward adjustment, the total penalties properly to be assessed herein are \$10,481.25, and I hereby recommend entry of the following ORDER:

ORDER 4/

1. A civil penalty in the total amount of \$10,481.25 is assessed against Respondent Bloomfield Foundry, Incorporated, for the violations of the Act and regulations found herein.

2. Payment of the full amount of the civil penalty assessed shall be made, within 60 days of the Service of the Final Order upon Respondent, by forwarding a cashier's check or certified check payable to "Treasurer of the United States" to:

Mellon Bank
EPA - Region VII
(Regional Hearing Clerk)
Post Office Box 360748M
Pittsburgh, Pennsylvania 15251.

SO ORDERED.

DATED: July 14, 1989



Marvin E. Jones
Administrative Law Judge

4/ Pursuant to 40 C.F.R. §22.27(c), this Initial Decision shall become the Final Order of the Administrator within forty-five (45) days after the Service upon the parties unless an appeal to the Administrator is taken by a party or the Administrator elects to review the Initial Decision upon his own motion. 40 C.F.R. §22.30 sets forth the procedures for appeal from this Initial Decision.

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded, via hand delivery, the Original of the foregoing INITIAL DECISION of Marvin E. Jones, Administrative Law Judge, to Ms. Linda McKenzie, Regional Hearing Clerk, Office of Regional Counsel, United States Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said INITIAL DECISION to all parties, she shall forward the Original, along with the record of the proceeding, to:

Hearing Clerk (A-110)
EPA Headquarters
Washington, D.C.,

who shall forward a copy of said INITIAL DECISION to the Administrator.

DATE: July 14, 1989



Mary Lou Clifton
Secretary to Marvin E. Jones, ALJ