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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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In the Matter of	)	
	)	
F & K Plating Company,	)	Docket No. RCRA-VI-427-H
	)	
Respondent	)	

Resource Conservation and Recovery Act - Rules of Practice - Burden of Proof - Characteristic Wastes - Methods of conducting EP toxicity tests in 40 CFR 261.24 and Part 261, Appendix II, held normally to be mandatory. However, where conflicting evidence supported conclusion tests on water samples were conducted in accordance with the cited methods and, in any event, total metals tests revealed concentrations several times EP toxicity limits, Complainant was held to have satisfied its burden of proof (40 CFR 22.24) that the wastes were hazardous.

Resource Conservation and Recovery Act - Rules of Practice - Determination of Penalty - Where evidence failed to establish that sediments in lagoon contained metals in excess of EP toxicity limits, and Respondent was a very small company, having very limited assets, penalty for violations of Act was canceled, contingent on Respondent closing the lagoon in accordance with applicable regulations and otherwise complying with an accompanying compliance order.

Appearance for Complainant: David Cohen, Esq.
Assistant Regional Counsel
Dallas, Texas

Appearance for Respondent: David S. Eldridge, Esq.
Oklahoma City, Oklahoma

Initial Decision

This is a proceeding under § 3008(a) of the Solid Waste Disposal Act, as amended, RCRA (42 U.S.C. 6928).1/ The proceeding was commenced on June 26, 1984, by the issuance of a Compliance Order and Notice of Opportunity for Hearing charging Respondent, F & K Plating Company, with violations of the

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1/ Section 3008 of the Act provides in pertinent part:

Sec. 3008(a) Compliance Orders.

(1) Except as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person is in violation of any requirement of this subtitle, the Administrator may issue an order requiring compliance immediately or within a specified time period or the Administrator may commence a civil action in the United States district court in the district in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

* * * *

(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.

* * * *

(g) Civil Penalty -- Any person who violates any requirement of this subtitle shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

Act and applicable regulations.2/ Specifically, Respondent was charged with treating, storing or disposing of hazardous waste without having filed a Notification of Hazardous Waste Activity pursuant to § 3010 of the Act and without having filed a Part A permit application as required by § 3005 of the Act and 40 CFR 270.10(e), shipping hazardous waste off-site via a transporter not having an EPA identification number and thus not authorized to transport such wastes in violation of 40 CFR 262.12, failure to maintain proper manifests as required by 40 CFR 262.40, failure to file quarterly reports of hazardous waste activity containing information specified by 40 CFR 262.41 as required by OCIWDA Rule 3 and failure to comply with numerous requirements of Interim Status Standards, 40 CFR Part 265 and equivalent OCIWDA rules. For these violations, it was proposed to assess Respondent a penalty of $50,000.

Respondent answered, denying the alleged violations, attacking the proposed penalty as unreasonable and requesting a hearing.

A hearing on this matter was held in Oklahoma City, Oklahoma on November 21 and 22, 1985.

Based on the entire record, including a stipulation executed by counsel for the parties on November 20, 1985, the briefs and proposed findings of the parties, I make the following:

2/ Because Oklahoma has been authorized to carry out its own hazardous waste program in lieu of the Federal program pursuant to § 3006 (49 FR 50362, December 24, 1984), save for the Hazardous and Solid Waste Amendments of 1984 (P.L. 98-616), applicable regulations include those under the Oklahoma Controlled Industrial Waste Disposal Act of 1976 (OCIWDA). The Oklahoma rules thus are the "equivalent" of the Federal rules. The record reflects that the notification to the State required by § 3008(a)(2) of the Act has been given. (Telecon record, dated May 1, 1984, Complainant's Exh 12).

Findings of Fact

1. Respondent, F & K Plating Company, has, prior and since November 19, 1980, operated a facility at 4420 N. Sewell Road, Oklahoma City, Oklahoma (Stipulation, ¶ 3).

2. Operations at the mentioned facility include zinc and chrome electroplating of hot and cold rolled steel (Compliance Monitoring Inspection Report, dated May 9, 1984, Complainant's Exh 1).

3. Water from running rinse tanks is collected in a sump inside the building and periodically pumped to a surface impoundment (Complainant's Exh 1).

4. The mentioned Compliance Inspection Report was written by Ms. Holly Anderson, an EPA RCRA hazardous waste inspector at the time, who, accompanied by Ms. Teressa M. Robinson (Teresa M. Jackson at the time of the hearing), at that time an environmental specialist for the the Oklahoma State Department of Health (OSDH), conducted an inspection of the F & K Plating Company facility on May 8, 1984 (Tr. 46, 47, 153, 155).

5. F & K's facility had previously been inspected on May 3, 1984, by Ms. Teresa Jackson (identified finding 4), who collected samples from the surface impoundment (Tr. 42-44; memo, dated May 8, 1984, Complainant's Exh 2). Ms. Jackson collected three water samples (Nos. 110867, from the discharge pipe into impoundment; 110870, from the north one-half of the impoundment and 110871, from the south one-half of the impoundment) and four sediment samples. Ms. Jackson described the liquid samples as having a yellowish tinge, but clear enough to "see through." She

delivered the samples to the Oklahoma State Department of Health Laboratory immediately after the inspection.3/

6. Analyses of the liquid samples, reported as total metals, indicated that Sample No. 110867 contained 16.7 mg/l chromium, Sample No. 110870 contained 28.1 mg/l chromium and Sample No. 110871 contained 28.7 mg/l chromium (EPA Exh 2). All of the sediment samples tested less than the 5 mg/l chromium specified for EP toxicity in 40 CFR 261.24. One sediment sample, No. 110869, however, contained 1.4 mg/l cadmium, which is above the 1 mg/l specified for EP toxicity in § 261.24.

7. A sample collected from the "dead tank" at F & K Plating on May 24, 1984 by Ms. Sherrie Williamson, an environmental specialist with OSDH (Tr. 54), tested 1100 mg/l hexavalent chromium and 1115 mg/l total chromium. (Complainant's Exh 23).

8. On July 2, 1982, Mr. Joe F. Heitman, an environmental specialist with the Oklahoma Water Resources Board (OWRB), conducted an inspection of the premises at 4408 N. Sewell, Oklahoma City occupied by a firm known as Major Labs in response to a citizen complaint of a possible unpermitted discharge (Tr. 177; Complaint Investigation Report, Complainant's Exh 20). The relationship between F & K Plating and Major Labs is discussed, infra (finding 17). Mr. Heitman observed the lagoon and what he referred to as an unpermitted discharge, apparently from a pipe from the building to the lagoon.4/ He took samples of the discharge,

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3/ The analysis for Sample No. 110866, bears a receipt date of May 3, 1984, one sample, No. 110867, bears a receipt date of May 4, 1984, and the balance of the analyses show receipt on May 7, 1984. These apparently are internal laboratory dates and do not, save for the sample noted, reflect actual receipt in the laboratory.

4/ Tr. 178. Mr. Jerry Black, identified infra, finding 9, estimated the distance between the end of the pipe and the lagoon at 20 to 25 feet (Tr. 37).

of the water in the lagoon (Sample Site No. 2) and the sediments in the area of discharge (Sample Site No. 1). He added acid to the samples, apparently as a preservative (Tr. 185). Analyses of the samples by the OSDH Laboratory, reported as total metals, revealed 15.2 mg/l chromium and 34 mg/l cadmium in the discharge water sample (Sample No. 09136) and 2.69 mg/l chromium and 1.6 mg/l cadmium in the lagoon water sample (Sample No. 091635). The two sediment samples tested below the EP toxicity limit for chromium and cadmium.

9. Mr. Jerry J. Black, a senior environmental specialist for OWRB, visited the F & K Plating Company facility in Oklahoma City on October 12, 1983 (Tr. 20). His visit was occasioned by F & K's application for renewal of its OWRB water discharge permit (Tr. 21). Mr. Black drew samples from the south impoundment, the purpose of which was to contain contaminated runoff from the surrounding area, and from the north pond, the main purpose of which was to contain waste water (Tr. 22). These samples were analyzed by the OSDH Laboratory on October 14, 1983, with the result that a sample taken from the northeast corner of the north lagoon (Sample No. 106174), reported as total metal, tested 5.3 mg/l chromium and a sample described as waste water that was discharged into the lagoon (Sample No. 106176) tested 5.96 mg/l chromium (Complainant's Exh 22). The sample from the south lagoon tested below the EP toxicity levels for chromium and cadmium. Mr. Black testified that he took four samples from each site, with two of the sample bottles from each site having nitric acid added as a preservative of the sample and two bottles being iced (Tr. 34).

10. As indicated (finding 6), analyses of the water samples collected by Ms. Jackson on May 3, 1984, were reported as total metals. Mr. Joe Brown, Director of the Environmental Toxics Analysis Laboratory for OSDH, testified that one of the first steps in analyzing a liquid sample was to determine the percent of solids (Tr. 84). He stated that EPA procedure (SWA-846) allowed this to be done visually, if the analyst was experienced, and that if the solids were less than one-half percent, the liquid portion of the sample could be analyzed for total metals and the results would be equivalent to the EP toxicity test (Tr. 84, 85). In further testimony, he indicated that the results might not be exactly accurate, but that for chromium they would be in the same ballpark.

11. Referring to the analyses of the samples collected by Mr. Heitman on July 2, 1982 (finding 8), the reports of which bear his signature, Mr. Brown acknowledged that the procedures, i.e., preserving the samples in acid, were not in accord with EP toxicity methods, but considering the nature of the samples, opined that the results did not vary from EP toxicity values by more than 15 or 20 percent (Tr. 87, 88). He further stated that he did not believe the results would be inconsistent with EP toxicity values. He explained that where the samples were clear, containing very low concentrations of solids, the EP toxicity test did not require analysis of particulates and that the results of total metals tests and EP toxicity tests would be very close in most cases (Tr. 89). In other testimony, he placed the difference between total metals and EP toxicity tests as

within the normal variability of the EP toxicity test, which he estimated at plus or minus 20 to 30 percent (Tr. 90).

12. The OSDH Laboratory reports for the samples collected by Mr. Black on October 12, 1983 (finding 9) also bear Mr. Brown's signature (Complainant's Exh 22). Although the analyses reports reflect total metals, Mr. Brown acknowledged that he did not personally perform the tests and estimated that his laboratory performed 10,000 tests a year during the period 1983 to the date of hearing in 1985, he testified that the samples collected on October 12, 1983, were tested in accordance with EP toxicity procedures (Tr. 92, 102-05). He stated that the reason he remembered this particular test was that they were trying to perform a gas chromatograph/mass spectrometry (GCMS) analysis and it resulted in $30,000 in damage to one of the spectrometers owned by the laboratory (Tr. 107). He pointed out that the analyses reports (Sample Nos. 106174 and 106175) reflected that suspended solids tests were run (179 mg/l [.0179%] and 61 mg/l [.0061%], respectively) were far below one-half of one percent and thus the fact acid was added to the samples should have little or no effect on the results (Tr. 92, 108, 136).

13. Referring to samples collected by Ms. Teressa Jackson on May 3, 1984 (finding 5), Mr. Brown again testified that these tests were for EP toxicity, notwithstanding the results were reported as total metals (Tr. 117-18, 120). He explained that at this time, they were anticipating litigation and that he gave instructions for EP toxicity tests to be performed. A hand printed notation above Mr. Brown's signature

at the bottom of the test reports for sediment samples, which Mr. Brown said he wrote (Tr. 119), states that "All parameters reported in ug/l are 'EP' tox results. All parameters reported in mg/kg are total metals in sediment." While he acknowledged that each time the results were reported as EP toxicity, concentrations were below EP toxicity levels (all sediment samples were in this category), he insisted that EP toxicity tests were performed on the water samples which tested above EP toxicity levels for chrome (finding 6), even though the reports show results for nickel and zinc, which are not listed for toxicity levels in 40 CFR 261.24.5/ His explanation for the tests being reported as total metals was that the computer was not programmed to print results in that fashion (Tr. 131-33).

14. Mr. Roy Ward is the plant or shop manager for F & K Plating and occupied that position during the period 1980 to 1984 (Tr. 421-22). He testified that he had periodically had the water in the pond tested and that the levels of chromium and cadmium were satisfactory to his knowledge (Tr. 43; Complainant's Exh 21; Respondent's Exh 18). Complainant's Exh 21 is a report from National Analytical Laboratories (NAL), dated September 28, 1982, reflecting total metals tests on a sample submitted by Mr. Ward, identified as "plating discharge" from F & K Plating and reporting 2.44 mg/l for cadmium and 17.69 mg/l chromium (13.59 chromium VI). These concentrations are, of course, above EP toxicity levels for the mentioned metals in

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5/ Tr. 120-22. A record of a telephone conversation on May 3, 1984 (Respondent's Exh 23) between Mr. Ken Raymond of OSDH and Holly Anderson refers to the samples collected by Ms. Robinson on that date and states "Sediments will be sampled (sic) for EP toxic characteristics, water samples for total metals."

40 CFR 261.24. A letter from the Oklahoma City Department of Public Works to F & K, dated June 25, 1971 (Complainant's Exh 21), reporting results of tests on rinse samples submitted by F & K reports total chromium of 32 mg/l and cadmium of 23.38 mg/l.

15. Respondent's Exhibit 18 shows that samples identified as waste water, bearing written notations "north and south [ponds]," were tested for total metals by NAL for Major Labs Manufacturing, report, dated September 8, 1983, with results well below EP toxicity levels for chromium and cadmium. Similar results were recorded from a sample identified as water tested by NAL, report, dated July 31, 1984.

16. A sample identified as water was tested for total metals by NAL, report, dated August 29, 1984 (Complainant's Exh 25) with reported results of 303 mg/l chromium and 282 mg/l cadmium. A sample identified as "water" was tested for EP toxicity by NAL, report dated December 5, 1984, with results reported as including, inter alia, 0.03 mg/l for cadmium and 0.07 mg/l for chromium. A sample identified as "liquid tank" was also tested for EP toxicity by NAL, test report dated December 5, 1984 (Complainant's Exh 26), with a reported result of 7700 mg/l chromium. The samples referred to herein and in the preceding finding were collected by Mr. Ward.

17. F & K Plating Company has occupied the premises at 4420 N. Sewell, Oklahoma City, since at least 1971. Occupying essentially the same property, but with an address of 4408 N. Sewell is Major Labs Manufacturing Company.6/ Mr. Ward testified that he worked for

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6/ Documents and correspondence in the record also show F & K Plating being addressed at 4408 N. Sewell. See, e.g., OSDH letter to F & K, dated June 9, 1978, Complainant's Exh 3; Controlled Industrial Waste Disposal Plan, Complainant's Exh 4; EPA letter, dated February 18, 1971, Respondent's Exh 3, and OWRB letter, dated December 28, 1983, Respondent's Exh 4(b).

Major Labs prior to being employed by F & K Plating in 1978 or 1979, that Major Labs and F & K Plating shared the same building, occupying separate parts thereof, and that F & K Plating and Major Labs were separate companies with separate billings (Tr. 422-24). The inspection report prepared by Ms. Anderson (Complainant's Exh 1) reports Mr. Ward as describing Major Labs as the manufacturing arm and parent of F & K. On cross-examination, Mr. Ward stated that he believed F & K was a division of Major Labs in May of 1984, but that he did not know whether the two companies had separated after this action was instituted (Tr. 473-74). He indicated that he "ran" both companies, and at another point said he did the ordering or buying for Major Labs. The F & K balance sheet (Respondent's Exh 1) refers to stockholder's equity and it is probable that F & K and Major Labs are corporations. The controlling stockholders or owners, however, have not been identified.

18. F & K Plating was issued a "total retention" waste discharge permit (No. CW-71-069) by the OWRB, which authorizes the discharge of plating rinse water to the pond (OWRB letter, dated December 28, 1983; Attachment A, Complainant's Exh 1). The permit stipulates that used plating bath solutions must be handled by a State certified waste hauler and disposed of at a State approved site. There is evidence that F & K has had a similar OWRB permit since 1972,[7/] and Mr. Ward testified that it was his understanding F & K had such a permit when he was first employed by the firm in 1978 or 1979 (Tr. 427).

7/ Dr. Ron Jarman, Chief of the Water Quality Division of the OWRB testified that F & K received its first permit from that agency in 1972 (Tr. 214-15). A Hazardous Waste Identification Report, dated May 14, 1981, (Respondent's Exh 6) indicates that the permit expired in 1977.

19. By letter from EPA, Region VI, dated January 30, 1981 (Complainant's Exh 6), F & K was informed that it has been identified as a firm which probably handles hazardous waste and the requirements of RCRA concerning notificaton of hazardous waste activity explained. F & K was requested to furnish within ten days information as to its business activity, raw materials used and waste disposal and handling practices. F & K's reply, dated February 6, 1981, signed by Mr. Ward, was to the effect that F & K did not have any waste materials leaving its property.

20. Ms. Anderson's report of the EPA inspection (Complainant's Exh 1) states that plating bath solutions and water from the dead tanks are shipped off-site. Mr. Ward, however, denied shipping plating solutions off-site, maintaining that such solutions were not disposed of because they were too valuable (Tr. 471-72). He described the materials disposed of off-site as rinse water from soap and acid tanks (Tr. 424-25). Mr. Ward is quoted as telling Ms. Jackson that waste from the dead tank is hauled off by McCorkle Transportation for disposal in the W. White Hemmer injection well (memo, dated May 8, 1984, Complainant's Exh 2).

21. McCorkle Truck Line shipping tickets (Complainant's Exh 14), reflect shipments of 36 barrels of rinse tank water on April 12, 1984, 70 barrels described as "water from tanks" on February 10, 1984 and 21 barrels described as "plating chemical" on September 9, 1982. A fourth McCorkle shipping ticket, dated September 6, 1983, is illegible, save for the mentioned date and the notation sold to "Major." All the other

shipping tickets indicated Major Labs as the shipper, bear Mr. Ward's signature as customer and indicate either W. White Hemmer or Testco Rather No. 1, Okarche, Oklahoma as the destination. These apparently are wells used for the disposal of brine generated in oil production.

22. Mr. Ward testified that when he needed material hauled off-site, he called Don Brownlee, a truck operator for McCorkle, rather than McCorkle, because he knew Mr. Brownlee[8/] and he (Brownlee) could use the work (Tr. 425). Although Mr. Ward knew that he needed a licensed transporter to haul hazardous waste, he stated that he didn't consider these wastes to be hazardous (Tr. 426). Moreover, he pointed out that the McCorkle shipping tickets bore a license number.[9/] Mr. Brownlee described the material hauled for F & K Plating (Major Labs) as "acid rinse water and some detergent" (Tr. 416). He stated "(t)his we haul in the oil field every day." For this reason, he considered that he was authorized to transport the material.[10/] Although Mr. Brownlee denied being the truck operator

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8/ Mr. Ward's wife is a cousin of Mr. Brownlee's (Tr. 413).

9/ The McCorkle shipping tickets contain the printed notation "Deleterious Substance Disposal License No. 183." By statute (OCIWDA § 1-2005(a)(2)), exclusive jurisdiction over regulation of the handling, hauling, storage and disposition of salt water, mineral brines, waste oil and other deleterious substances, produced from, obtained or used in connection with the production of oil and gas is vested in the Oklahoma Corporation Commission. Jurisdiction to regulate "controlled industrial waste" is vested in OSDH. The jurisdiction of the Corporation Commission is not always clear and has resulted in litigation. State ex rel. Pollution Control Coordinating Board v. Oklahoma Corporation Commission, 660 P.2d 1042 (Okla. 1983). McCorkle has a deleterious substance disposal license issued by the Corporation Commission (Journal entries, Complainant's Exh 14).

10/ These unauthorized shipments were the subject of an enforcement proceeding against McCorkle (Compliance Order and Notice of Opportunity For Hearing, dated June 21, 1984, Complainant's Exh 16). McCorkle was charged with transportation of rinse water from the dead rinse tanks at F & K's facility. This proceeding has been settled.

on the shipment described as "plating chemical" (Tr. 417), his signature as driver is on the ticket.

23. By letter to F & K, dated January 24, 1984 (Complainant's Exh 5), OSDH referred to a 1977 industrial waste survey which indicated that F & K disposed of electroplating wastes in an on-site surface impoundment. A 1978 Controlled Industrial Waste Disposal Plan (Complainant's Exh 4) reflected the same information.11/ The letter pointed out that F & K had not received an EPA identification number and had not submitted a Part A permit application to treat, store, or dispose of controlled industrial (hazardous) waste in a surface impoundment. F & K was further informed that there was evidence of ground water pollution emanating from its property and that it was in serious violation of OCIWDA. Mr. Ward testified that when he received the letter, he thought they needed a permit from the OWRB (Tr. 443), which, of course, F & K already had.

24. After receipt of the compliance order, F & K engaged an environmental consultant, Stanley Engineering, Inc. and installed what Mr. Ward referred to as a closed system whereby the only way water leaves the system is through evaporation (Tr. 447-50). Mr. Ward estimated the cost of installing the closed system in 1980 or 1981 at $10,000 (Tr. 460, 462). This estimate was confirmed by Dr. Marshall, identified in finding 25 (Tr. 493). Under a cover letter, dated September 4, 1984 (Complainant's Exh 7), Stanley filed with EPA, a Notification of Hazardous Waste Activity and a Part A permit application, both of

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11/ A letter from OSDH, dated June 9, 1978 (Complainant's Exh 3), informed F & K that the mentioned plan was incomplete. Although the letter states that the plan was being resubmitted [for completion by F & K], the record does not disclose what, if any, action was taken in that regard by F & K.

which were signed on behalf of F & K Plating by Mr. Ward.12/ These documents refer to listed waste F006, waste water treatment sludges from electroplating operations (40 CFR 261.31).

25. Dr. Charles Marshall, an environmental engineer employed by Stanley Engineering qualified as an expert in sampling and testing procedures and in RCRA regulations (Tr. 488-91, 496-97). He testified that Stanley's purpose after it had been retained by F & K was to evaluate the firm's needs, respond to as many items in the compliance order as possible in order to show good faith and place F & K on a compliance schedule (Tr. 492). He expressed the belief that everything possible in the compliance order had been addressed to date. He stated that from his knowledge of F & K's present operation, that is, a closed system, it would generate less than 220 pounds of solid (hazardous) waste per month and thus qualify as a small quantity generator under the Hazardous and Solid Waste Amendments of 1984 (Tr. 493-94).

26. Referring to various tests on samples conducted by the OSDH laboratory, Dr. Marshall testified that it was not evident that these tests had been conducted in accordance with EPA requirements for EP toxicity (Tr. 494). This testimony was based on the view that the method prescribed for EP toxicity tests in 40 CFR Part 261, Appendix II is

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12/ The regulation (40 CFR 270.10(b)) requires that permit applications be signed by the owner as well as the operator. Because the ownership of F & K has not been established (finding 17), it is not clear that the application complies with this requirement.

mandatory and allows for no deviations.13/ Referring to test methods for Evaluating Solid Waste, Physical/Chemical Methods, EPA Publication SW-846," incorporated in Parts 260 through 265 by reference (40 CFR 260.11), Dr. Marshall pointed out that Method 1310 of the cited publication (Extraction Procedure [EP] Toxicity Test Method and Structural Integrity Test, Respondent's Exh 26) specifically provides that "(p)reservatives must not be added to samples." (Id. at 8). He further testified that the mentioned test method required filtration and a determination of percent solids and did not allow that determination to be made visually (Tr. 501-04).

27. Method 1310, referred to in the preceding finding, provides § 6.1 that "(a)ll samples must be collected using a sampling plan that addresses the considerations discussed in Section One of this manual." Section One, "Sampling of Solid Waste" (Respondent's Exh 27), discusses the requirement for representative samples of waste, i.e., samples exhibiting average properties of the whole waste, and sampling variability or precision, i.e., the closeness of repeated sample values, points out that sampling accuracy is usually achieved by some form of random sampling and discusses the statistical concepts involved in the calculation of

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13/ (Tr. 499, 500, 517-18). Dr. Marshall's opinion in this respect is supported by § 261.24(a) providing:

> (a) A solid waste exhibits the characteristic of EP toxicity if, using the test methods described in Appendix II or equivalent methods approved by the Administrator under the procedures set forth in §§ 260.20 and 260.21, the extract from a representative sample of the waste contains any of the contaminants listed in Table I at a concentration equal to or greater than the respective value given in that Table. Where the waste contains less than 0.5 percent filterable solids, the waste itself, after filtering, is considered to be the extract for the purposes of this section.

confidence intervals. Dr. Marshall, relying on the above quote from Method 1310, testified that use of Section One was required by inference and that conclusions as to whether a waste was at or above the regulatory threshold must be drawn on the basis of the sampling plan and not individual samples (Tr. 509-11). Referring to the four sediment samples drawn on May 3, 1984, only one of which was above the threshold for cadmium, he expressed the belief that additional sampling would have skewed the mean below the regulatory limit and verified that the sediments were not in excess of the limits (Tr. 513). He described four as a very small number of samples and stated that six or more samples were necessary to be statistically meaningful using the equation in Section One.14/ He disagreed with the practice of taking samples from the discharge pipe into the lagoon, pointing out that the treatment unit was the lagoon and that characterization of that unit must take place in the pond proper (Tr. 516). Regarding the fact lab reports showed total metals when EP toxicity tests were assertedly performed, he testified that good laboratory practice required that tests conducted and methods utilized be documented (Tr. 522-24).

28. Asked whether the addition of acid would always render EP toxicity tests invalid, Dr. Marshall explained that all samples, regardless of how clear, contained particulate matter, that the procedure called for filtration and that the addition of acid prior to filtering might dissolve metals attached to particulate matter into liquid

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14/ Tr. 515. Mr. Michael Michaud, a hazardous waste inspector for EPA, who qualified as an expert in sampling procedures (Tr. 14) testified that EPA was looking for a worst case situation and that a single test above the threshold was sufficient in his opinion to make a waste hazardous (Tr. 69-71, 77).

phases and because this matter would otherwise be discarded in filtration, the result would be to bias upward the EP toxicity test.15/ He acknowledged that the test results [with the addition of acid] might be accurate (Tr. 552).

29. Asked what regulations he believed F & K was subject to, Dr. Marshall answered storage, because of the dead tank at the rear of the building, which contained hazardous waste (Tr. 564-65, 570-71, 573-74). He had no knowledge of how long the material had been there or the disposition of F & K's waste in the past.

30. Although it is not in the record, Dr. Marshall prepared portions of a closure plan for F & K (Tr. 561-63). He stated that his primary involvement concerned sampling the pond bottoms to determine the extent of toxicity, how the material might be encapsulated or stabilized and matters of that nature. He testified that Stanley sampled the sediments after F & K installed the closed system and that the results verified those of OSDH in that one sample tested slightly above the regulatory limit for cadmium.16/ He nevertheless expressed the belief or hope that our (Stanley's) statistical evaluation would conclude that the unit was not hazardous. He explained that Stanley recommended that F & K go through with a closure of the pond whether it was required or not because of its

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15/ Tr. 549-51, 586-87. While this result may seem peculiar as to the actual metal content of the sample, it should be noted that the EP toxicity test is designed to simulate the leaching a waste will undergo if deposited in an improperly designed sanitary landfill.

16/ Tr. 580-81. A sample described as water collected by Stanley tested 0.10 mg/l chromium (Standard Testing and Engineering Co. report, dated January 25, 1985, Respondent's Exh 18).

location in the city, because of the potential risk[17/] and because the status of the pond had to be resolved if the property was ever to be sold (Tr. 581-83). He estimated the cost of closure at $24,000, $30,000 if monitoring wells were required (Tr. 582).

31. On May 8, 1984, the date of the EPA inspection, F & K:

a. had not filed a Notification of Hazardous Waste Activity and Part A permit application with EPA,

b. had not received an EPA identification number as a treatment, storage or disposal facility,

c. had not determined if its waste was hazardous as required by 40 CFR 262.11.

d. had not submitted any quarterly reports required of industrial waste generators by OCIWDA § 1-200.47,

e. did not have manifests properly completed and signed in the manner required by 40 CFR 262.23 and Rule 3.9 for shipping hazardous waste off-site,

f. did not have a waste analysis plan as required by 40 CFR 265.13,

g. did not have adequate fencing to prevent entry into the area of the surface impoundment as required by 40 CFR 265.14,

h. did not have any warning signs posted around its facility,

i. did not have at its facility an inspection schedule or log, as required by 40 CFR 265.15,

j. did not have a personnel training program or documentation of personnel training as required by 40 CFR 265.16,

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17/ There is an indication that F & K's impoundment may have been the source of high levels of chromium found in wells in the vicinity (Tr. 536-37; telecon record, April 26, 1984, Complainant's Exh 11).

k. had not made arrangements with police and fire departments, emergency response teams, etc., as required by 40 CFR 265.37,

l. did not have a contingency plan as required by 40 CFR 265.51,

m. did not have a written operating record as required by 40 CFR 265.73,

n. did not have any groundwater monitoring wells or any groundwater monitoring program for its surface impoundments as required by 40 CFR 265.90,

o. did not have a closure plan as required by 40 CFR 265.112,

p. had not submitted to the Executive Director of the Oklahoma State Department of Health ("OSDH") documentation of financial assurance for closure of its facility as required by 40 CFR 265.143, and

q. had not submitted to the Executive Director of OSDH documentation of liability coverage for sudden and nonsudden accidental releases as required by 40 CFR 265.147.

32. Mr. Steve Chatelain, an environmental enginer for EPA, recommended that a compliance order imposing penalties be issued to F & K after reviewing State and EPA files and the report of the May 8, 1984, inspection (Tr. 191, 230, 358). He testified that proposed penalties were calculated in accordance with the RCRA Civil Penalty Policy, dated May 8, 1984 (Complainant's Exh 8). Under the mentioned policy, penalties are calculated in accordance with a matrix having horizontal (extent of deviation from requirement, classified as major, moderate and minor) and vertical axes (potential for harm also classified as major, moderate

and minor). The matrix has nine cells having various penalty ranges with the highest at the statutory maximum of $25,000 per day. Mr. Chatelain explained that potential for harm was determined by the likelihood of exposure to the waste and extent of deviation by the extent of noncompliance (Tr. 201, 201-03). Regarding F & K's failure to file a Notification of Hazardous Waste Activity, the extent of potential for harm was regarded as minor and the extent of deviation from the requirement as major and the penalty proposed was $2,500, which is above the midpoint in a cell having a range of from $1,500 to $2,999 (Penalty Computation Worksheet, Complainant's Exh 9). An identical computation was made regarding F & K's failure to submit a Part A permit application. The penalty for F & K's failure to determine if its waste was hazardous (40 CFR 262.11) and using an unpermitted transporter (§ 262.12) was determined to be $8,000, the low point in the cell for a major deviation from the requirement and moderate potential for harm. Failure to utilize proper manifests and to follow proper manifest procedures (§ 262.21) was regarded as having a moderate potential for harm and being a moderate deviation from the requirements, because F & K had shipping tickets with much of the required information. The penalty proposed was $5,000, the low point of the matrix cell range of from $5,000 to $7,999.

33. Failure to file quarterly reports as required by OCIWDA Rule 3.12 was determined to be a major deviation, having a minor potential for harm with a penalty of $2,000 (Complainant's Exh 9). An identical computation was made for failure to have a waste analysis plan (§ 265.13),

failure to post warning signs (§ 265.14), failure to maintain an inspection plan and log (§ 265.15), failure to have a personnel training program or plan (§ 265.16), failure to make arrangements with police, fire departments and other local authorities (§ 265.37), failure to maintain a contingency plan (§ 265.52), failure to have an operating record (§ 265.73), failure to develop a closure plan (§ 265.112) and failure to inspect the surface impoundment (§ 265.226). Failure to have a fence completely enclosing the facility was regarded as a moderate deviation having a minor potential for harm and the penalty proposed was $1,000. Failure to have a groundwater monitoring system or program (§ 265.90) was determined to be a major deviation having a moderate potential for harm and the penalty proposed was $8,000. Failure to have financial assurance for closure (§ 265.143) and liability coverage for sudden and nonsudden accidential occurrences (§ 265.147) were determined to be major deviations, having a minor potential for harm and a penalty of $3,000 proposed.

34. After receipt of the OSDH letter, dated January 24, 1984 (finding 22), counsel for F & K replied by letter, dated February 7, 1984 (Respondent's Exh 9), stating that F & K thought it had complied with applicable regulations, enclosing a copy of the permit issued by the OWRB and asking for a copy of applicable OSDH regulations.18/ There followed further correspondence in which counsel for F & K attempted to obtain advice

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18/ A record of a telecon between Ken Raymond of OSDH and Steve Chatelain, dated April 26, 1984 (Respondent's Exh 21) reports Mr. Raymond as stating F & K had not responded to the letter, dated January 24, 1984 from OSDH. The likely reason is that the February 7 letter from counsel for F & K referred to a telecon with an attorney for OSDH who signed the January 24 letter, rather than the letter itself.

as to precisely what was necessary to comply with EPA and OSDH regulations and to obtain the necessary forms (letters dated May 31, July 20 and July 27, 1984, Respondent's Exhs 11, 12 and 13). On cross-examination, Mr. Chatelain stated that if he had known of these requests, he would have sent F & K the forms (Notification of Hazardous Waste Activity and Part A permit application) and deferred filing the compliance order until F & K had an opportunity to respond (Tr. 248-49, 251). Upon redirect examination, he retracted this testimony, maintaining that F & K could have complied with the regulations, except for the two exceptions noted, without the forms and that F & K was still in violation of the regulations (Tr. 345-46). Mr. Chatelain testified that in calculating base penalties, good faith and ability to pay were not considered (Tr. 263). The former because it was considered in settlement (Tr. 264) and the latter, because it was F & K's responsibility to submit such information to EPA (Tr. 210-11). He considered that the univerified balance sheet (Respondent's Exh 1) was totally inadequate, stating that EPA usually required tax returns or Dunn & Bradstreet reports (Tr. 212). He indicated that F & K was asked a number of times for additional financial information, but did not supply it.

35. The F & K balance sheet mentioned in the preceding finding is for the year ending December 31, 1984 (Tr. 486). Mr. Ward, who is not an accountant, gathered the material, from which the balance sheet was prepared, out of F & K's files. The balance sheet shows total assets including equipment of $45,841, a sole liability, accounts payable, of

$6,509 (rounded off) and a net worth of approximately $39,332. There is no evidence of F & K's sales or other revenues.19/ F & K is clearly a very small company, however, having only two employees. Mr. Ward testified that F & K could not pay the $50,000 fine and would have to "shut down," if it were imposed (Tr. 458-59). Mr. Ward estimated the assets of Major Labs at $100,000 or a little over (Tr. 424). There is no evidence of the sales, revenues and liabilities of Major Labs.

Conclusions

1. The procedures for conducting tests for EP toxicity in 40 CFR 261, Appendix II and "Test Methods for Evaluating Solid Waste, Physical/ Chemical Methods," SW-846, 2d Ed. (1982) (40 CFR 260.11) are normally mandatory, unless alternate methods have been approved as "equivalent" by the Administrator (40 CFR 261.24(a)).
2. Water samples taken from the pond or retention lagoon at F & K Plating establish that the water contains chromium at concentrations above the 5 mg/l specified in 40 CFR 261.24.
3. Testing of samples taken from the "dead" tank at F & K Plating on May 24 (1100 mg/l hexavalent chromium) and December 5, 1984 (7700 mg/l chromium) establish that the contents of the tank contained chromium in excess of EPA toxicity limit.
4. Sediments in the mentioned lagoon have not been shown to exceed concentrations for EP toxicity in 40 CFR 261.24.

19/ Because of savings in water and chemical usage (Tr. 450-53), F & K contends that it costs less to operate with the closed system and consequently, that there was no cost benefit from noncompliance. It appears that these savings may be understated, because Mr. Ward estimated water usage prior to installation of the closed system at 588,000 gallons a year and the 1971 letter from the Department of Public Works places F & K's water consumption at 100,000 gallons a month.

5. F & K Plating having been found to generate and store hazardous waste is subject to the requirements for generators of hazardous waste in 40 CFR Part 262, and Interim Status Standards in 40 CFR Part 265 and equivalent OCIWDA rules. As indicated (finding 31), F & K was not in compliance with these regulations on May 8, 1984.

6. Shipments transported by McCorkle Trucking Line on September 9, 1982, February 10 and April 12, 1984, were of hazardous waste.

7. For the violations referred to in conclusions 5 and 6 above, F & K is, in accordance with § 3008(a) of the Act (42 U.S.C. 6928), liable for a civil penalty in the sum of $31,875. Because of F & K's small size and limited assets, however, the penalty will be canceled, provided F & K closes the lagoons on its property in accordance with 40 CFR Subparts G & F, equivalent OCIWDA rules and as approved by OSDH and complies with the attached order.

Discussion

F & K argues that Complainant has not sustained its burden of proof that the water in the lagoon contained hazardous waste, i.e., chromium, in excess of EP toxicity levels (40 CFR 261.24), because SW-846, "Test Methods for the Evaluation of Solid Waste, Physical/Chemical Methods" is mandatory and was not followed by the OSDH laboratory in conducting the tests.20/ Regarding cadmium in the sediments, one sample out of four of which tested above the 1 mg/l level in 40 CFR 261.24, F & K asserts that use of the statistical

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20/ Proposed Findings of Fact and Conclusions of Law, dated February 19, 1986, at 1-4. F & K cites the preface of SW-846 which states in pertinent part "This document has been developed to * * * b. describe methods that will be used by the Agency in conducting investigations under Sections 3001, 3007, and 3008."

methods required by Section One, Sampling of Solid Wastes, of SW-846 would establish that the concentration was below the regulatory limit. F & K relies upon the well established principle that a government agency must comply with its own regulations (Post-Hearing Brief at 3).

F & K's position is accepted as to the sediments, but rejected as to the water in the lagoon and the contents of the dead tank. The burden of proof is on Complainant (Rule 22.24) and the record will not support a finding that sediment samples analyzed in accordance with SW-846, and in particular Section One, are in excess of EP toxicity limits set forth in 40 CFR 261.24

Because there is credible evidence that tests on water samples collected from the F & K lagoon on May 3, 1984, were conducted in accordance with EP toxicity procedures (finding 13), it is concluded that the water in the lagoon contained chromium in excess of the 5 mg/l specified in 40 CFR 261.24. Even if the telecon record (note 5, supra) be regarded as controlling or conclusive evidence that these tests were for total metals, the results, over three times the applicable standard in one instance (16.7 mg/l) and over five times the toxicity limit for chromium in the other two instances (28.1 and 28.7 mg) lead compelling to the conclusion water in the lagoon exceeded EP toxicity limits.21/ Mr. Brown, Director of the OSDH laboratory, testified variously

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21/ See Section One of SW-846, Sampling of Solid Wastes, Paragraph 1.1.1, Regulatory and Scientific Objectives of which provides in pertinent part:

> * * * Generally, high accuracy and high precision are required if one or more chemical contaminants of a solid waste is present at a concentration that is close to the applicable regulatory threshold. Alternatively, relatively low accuracy and low precision can be tolerated if the contaminants of concern occur at levels far below or far above their applicable thresholds. * * * (Id. at 5)

that total metals and EP toxicity tests for chromium were equivalent, that the results would be very close in most instances, and would not vary by more than plus or minus 20 to 30 percent (findings 10 and 11). Respondent's expert, Dr. Marshall, did not dispute this testimony, merely contending correctly that the procedures for EP toxicity were mandatory and could not be altered. Mr. Brown's testimony is accepted as reasonable. As in the case of the sediments, the result would be otherwise, if the tests showed concentrations in close proximity to the regulatory threshold.

If the above analysis is appropriate for samples collected from the lagoon, a fortiori is it appropriate for samples collected from the dead tank which were many orders of magnitude above the regulatory limit, notwithstanding tests conducted were for total metals.

F & K further argues that even if its waste is determined to exceed the regulatory limit, Complainant has not proved a violation, because it has not established that F & K generated in excess of 1,000 kilograms of hazardous waste a month as specified in 40 CFR 261.5 or that it stored the waste for periods in excess of the 90 days allowed by 40 CFR 262.34. Complainant argues that the cited sections are not elements of violation which it has the burden of establishing, and that the small quantity generator exemption (§ 261.5) and the accumulation time exception (§ 262.34) are in the nature of affirmative defenses which were not raised as defenses in F & K's answer and accordingly, should not be allowed as defenses herein (Letter Reply Brief, dated, March 5, 1986). Complainant's arguments are persuasive, but need not be here decided, because the small quantity generator exemption and the accumulation time exception are subject to conditions precedent, which the record reflects

F & K has not met. Conditions for application of the former (§ 261.5(g)) include the hazardous waste determination required by § 262.11 and, either treatment on site in compliance with RCRA or delivery to a permitted off-site disposal facility. Conditions for application of the latter (§ 262.34) include marking containers of hazardous waste with the date accumulation time begins, labeling the containers and complying with Subparts C (Preparedness and Prevention) and D (Contingency Plan and Emergency Procedures) of Part 265. Because it does not appear that F & K complied with these conditions, it was not entitled to the small quantity generator exemption in § 261.5 or the accumulation time exception at the time of the inspection on May 8, 1984.

F & K alternatively argues that even if it is found to have violated the law, the penalty, if any, should be minimal, because of F & K's good faith efforts to comply, the negative benefits of noncompliance (note 19, supra), the minimum potential for harm and its small size and limited assets (Brief at 10).

Regarding good faith, F & K emphasizes that it has had an OWRB discharge permit since 1972, that it was inspected by OSDH in June of 1981, resulting in a "no action" recommendation,22/ that F & K had the water in its lagoon tested in 1983 and the results indicated hazardous waste was not present, and upon the fact that it promptly replied to the OSDH letter,

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22/ F & K points out that it submitted a Controlled Industrial Waste Disposal Plan to OSDH in 1978 and alleges that notwithstanding the fact EPA informed OSDH in August of 1981 that the plan was inadequate (letter to OSDH, dated August 12, 1981, Respondent's Exh 7), F & K was not informed of this fact until the letter from OSDH, dated January 24, 1984. This allegation is erroneous, however, because as we have seen (note 11, supra) F & K was informed in June of 1978 that its waste disposal plan was incomplete. The mentioned letter from EPA is actually a reference to the June 1981 Hazardous Waste Survey (Respondent's Exh 6), which was apparently performed under CERCLA (Superfund) (42 U.S.C. 9601 et seq.), rather than RCRA.

dated January 24, 1984, requesting the necessary forms, which it did not receive for several months.

These arguments are plausible, but overlook or ignore other facts in the record. For example, the record is silent as to what action, if any, F & K took in response to the June 1978 letter from OSDH informing F & K that its waste disposal plan was incomplete. In addition, the letter from EPA, dated January 30, 1981, informed F & K of its obligation under RCRA to notify EPA as to its hazardous waste activities and requested information from which a determination could be made as to whether F & K's failure to notify was proper. F & K's one sentence reply to the effect that it did not have any waste material leaving its property was incomplete, in that the letter was silent as to treatment or storage of wastes on its property. Moreover, while this reply may have been accurate when made, it certainly was inaccurate when F & K began shipping rinseates for disposal off-site in 1982 and thereafter. It should also be noted that a September 1982 sampling by F & K of its plating discharge showed concentrations for cadmium and chromium well above EP toxicity limits (finding 14). On this record, F & K is hardly entitled to any kudos for good faith efforts to comply. As indicated, infra at 30, a different conclusion is reached concerning the use of McCorkle Trucking Line, Inc. to transport hazardous wastes off-site.

F & K's arguments as to the negative benefits of noncompliance ignore the benefit (estimated at $6,000, finding 30) enjoyed by not installing a groundwater monitoring system. Moreover, F & K saved the interest or opportunity costs on $10,000 expended for the installation of a closed system for the period 1981 through November or December 1984, when the system was installed. Although F & K is correct that the potential for harm from its

activities was not great, there is at least a suspicion that its lagoon may have been the source of high concentrations of chromium found in wells in the vicinity (note 17, supra). The potential for contamination of groundwater posed by the treatment or storage of hazardous wastes in lagoons is, of course, a prime concern. As indicated, hereinafter, however, the evidence as to F & K's small size and limited assets warrants cancellation of the penalty, provided it closes the lagoon in accordance with applicable regulations as approved by OSDH and complies with the attached compliance order.

A penalty calculated in accordance with the Final RCRA Civil Penalty Policy is prima facie appropriate.[23/] There are, however, certain adjustments thereto warranted by the evidence. Because of confusion over the extent of authority to transport hazardous waste conferred by a deleterious substance disposal license" (note 9, supra), it is concluded that F & K is entitled to a 50% "good-faith" reduction in the $8,000 penalty assessed for use of an unpermitted transporter to dispose of hazardous waste. The other warranted penalty adjustment is in the $5,000 for failure to maintain proper manifests. Oklahoma does not appear to supply manifests (see 40 CFR 262.21) and there is no required format for manifests. The shipping tickets maintained by F & K contained the signatures of the shipper, of the truck driver, a description of the waste and the destination. This seems to comport substantially with the information required on a manifest and under the circumstances is considered to warrant a 50% reduction in the $5,000 penalty assessed for improper manifests.

23/ Lissner Corporation, Docket No. RCRA-V-W-84-R-065 (Initial Decision, July 30, 1985).

Complainant is correct that the financial data submitted by F & K is inadequate. Nevertheless, there is no reason to doubt that F & K, having but two employees, is a very small company having very limited assets. See, e.g., Lissner Corporation (note 23, supra), where a similar unverified balance sheet and official notice that business in which Respondent was engaged was depressed were held to warrant 25% downward adjustment in gravity based penalty because of Respondent's ability to pay. Moreover, it is well settled that stockholders and parent corporations are not ordinarily liable for a corporation's debts.24/ Accordingly, on this record the assets of Major Labs Manufacturing Company are not available for the payment of penalties and may not be considered in determining F & K's ability to pay.25/

Application of the principles of Lissner, supra, would warrant a 25% reduction in the $42,500 penalty, producing a figure ($31,875) in close proximity to the estimated $30,000 cost of closure, including monitoring wells (finding 30). While there may well be a serious question as to whether this sum is within F & K's ability,26/ it may have sources of of credit for closure of the lagoon and as a continuing operation which it would not have for payment of penalties.

Under these circumstances, it is considered that the public interest would be better served if F & K's limited assets were applied to the proper closure of the lagoon rather than the payment of penalties.27/ Accordingly,

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24/ Selser v. Pacific Motor Trucking, Inc., 770 F.2d 551 (5th Cir. 1985).

25/ The result may well be otherwise as to closure and cleanup costs if Major Labs is the owner of the property.

26/ F & K alleges that the result of this action is likely to put it out of business. Letter reply brief, dated March 18, 1986.

27/ See, e.g., O'Leary v. Moyer's Landfill, Inc. 523 F.Supp. 642 (D.C. Pa. 1981) (request for imposition of civil penalties under Clean Water Act and RCRA denied, the court holding the money would be better spent on remedial measures).

while the penalty of $31,875 will be recorded, its collection will be held in abeyance and canceled in its entirety provided F & K closes the lagoon in accordance with 40 CFR 265, Subparts G & H, corresponding OSDH regulations as approved by OSDH and complies with the attached compliance order.28/

O R D E R

Respondent, F & K Plating Company, having violated the Resource Conservation and Recovery Act and regulations as charged in the complaint is liable for a penalty of $31,875 in accordance with Section 3008(a)(3) of the Act (42 U.S.C. 6928). Collection of this penalty will, however, be held in abeyance and canceled in its entirety, provided F & K Plating Company closes the lagoon in accordance with 40 CFR 265, Subparts G & H, comparable OSDH regulations as approved by OSDH and complies with the attached compliance order.29/

Dated this 14th day of April 1986.

Spencer T. Nissen
Administrative Law Judge

Attachment:
Compliance Order

28/ Although the record is not clear, the testimony of Dr. Marshall (finding 25) is taken as signifying that appropriate disposition has been made of materials in the dead tank and water in the lagoon.

29/ Unless appealed in accordance with 40 CFR 22.30 or unless the Administrator sua sponte elects 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).

ATTACHMENT

Docket No. RCRA-VI-427-H

Compliance Order

Evidence submitted by F & K Plating Company is to the effect that it would qualify as a small quantity generator under the Hazardous Solid Waste Amendments of 1984 (P.L. 98-616, November 8, 1984). Regulations to implement the mentioned amendments of the Act as applicable to small quantity generators have recently been issued (51 FR No. 56, March 24, 1986, at 10146 et seq.). While these regulations are not effective until September 22, 1986, it would appear to be in F & K's interest to adopt a consistent method of operation and to adhere thereto.

Under the regulation (40 CFR 261.5, 1986), a generator is a conditionally exempt small quantity generator provided it generates no more than 100 kilograms of hazardous waste in a calendar month. A conditionally exempt small quantity generator as thus defined is not subject to regulation under 40 CFR Parts 262 through 266 and Parts 270 and 124 and the notification requirements of RCRA § 3010, provided it complies with 40 CFR 262.11 (determination of hazardous waste), accumulates no more than 1,000 kilograms of hazardous waste onsite at any one time (261.5(g)) and appropriately disposes of its waste to a facility licensed by the State of Oklahoma.* Transportation to the disposal site must, of course, be by a permitted transporter with appropriate manifests.

If F & K exceeds the mentioned accumulation limits and intends to rely on the 90-day accumulation time specified in 40 CFR 262.34, it must label the containers, mark the beginning date of accumulation on the containers

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* It is assumed that the one kilogram limitation for acutely hazardous waste is not applicable to F & K's operations.

and comply with Subparts C (Preparedness and Prevention) and D (Contingency Plan and Emergency Procedures) of Part 265 and 265.16 (Personnel Training).

F & K Plating Company will at all times conduct its operations as to hazardous waste in strict accordance with the cited regulations.