

APPEARANCES:

For Complainant: David L. Kopp, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

For Respondent: Edward B. Harris, Esquire
NAGLE, BLAIR & HARRIS
409 Putnam Building
Davenport, Iowa 52801

INITIAL DECISION

By Complaint, Compliance Order and Notice of Opportunity for Hearing, issued on December 12, 1984, by the Regional Administrator of the United States Environmental Protection Agency (hereinafter "EPA," "Complainant" or "the Agency"), Respondent Russelloy Foundry, Inc., an Iowa Corporation (hereinafter "Respondent" or "Russelloy"), is charged with violation of the Resource Conservation and Recovery Act (hereinafter "RCRA" or "the Act"), and regulations promulgated pursuant to the Act. Count I of said Complaint charges that Respondent is a generator of hazardous waste in that Respondent's acts or processes produce hazardous waste identified by its characteristics at 40 C.F.R 261.24(b) and specified as D008, and that Respondent has generated and stored subject hazardous waste at its facility in Durant, Iowa, for the past seven (7) years and is in violation of 3010(a) of RCRA, 42 U.S.C. 6930(a) in that it generated and stored subject hazardous waste without first filing a Notification of Hazardous Waste Activity on or before August 19, 1980, as by section required. Complainant proposes that a penalty in the amount of \$9500 should be assessed for said violation. Count II charges that Respondent violated Section 3005 of RCRA, 42 U.S.C. 6925, in that it treated, stored and/or disposed of subject hazardous waste at its said facility without a permit or having achieved interim status (Section 3005[e]), and proposes that a civil penalty in the amount of \$9500 be assessed for said violation. Count III of subject Complaint charges that Respondent violated 40 C.F.R. 262.12(c) in that it transported to and disposed of hazardous waste at the Muscatine County Sanitary Landfill, Muscatine, Iowa, which has not received an EPA identification number for the treatment, storage or disposal of hazardous waste as by said regulation required. EPA proposes that a civil penalty in the amount of \$2500 be assessed for said violation. The assessment of civil penalties for

said violations is authorized and governed by Section 3008(a)(1) and (3), 42 U.S.C. 6928(a)(1) and (3), as amended.

Said Compliance Order, issued along with said Complaint, orders, in addition to payment of penalties proposed, i.e., \$21,500, that the following corrective actions be taken within the times specified:

(a) Immediately upon receipt of this ORDER cease all hazardous waste activities until such time as a properly executed Notification of Hazardous Waste Activity has been filed in accordance with Section 3010(a) of RCRA.

(b) Immediately upon receipt of this ORDER cease storing any hazardous waste in excess of 90 days until such time as a proper hazardous waste permit is in effect.

(c) Immediately upon receipt of this ORDER, ensure that all hazardous wastes previously generated are disposed of in accordance with 40 C.F.R. §262.12 (1980).

(d) Within thirty (30) days of receipt of this ORDER submit to EPA, a complete closure plan for the storage site, and, if applicable, a post-closure plan, both developed in accordance with 40 C.F.R. §265, Subpart G (1981).

(e) Upon approval by EPA and IDWAWM, Respondent shall proceed to fully implement the closure and post-closure (if applicable) plans for the hazardous waste disposal site in accordance with the schedules contained therein.

Respondent timely filed its Answer to subject Complaint, denying the violations charged and requested a hearing and an informal conference.

At the requested hearing, convened in Cedar Rapids, Iowa, on June 4, 1985, the parties filed a "Statement of Stipulations" (Complainant's [hereinafter "C"] Exhibit [hereinafter "EX"] 1), executed by Counsel for Complainant and Respondent on April 16, 1985, and April 24, 1985, respectively, whereby Respondent admitted

the charges contained in subject Complaint and both parties admitted the authenticity of Exhibits submitted, including financial data submitted on behalf of Respondent. The only issues to be decided from the record are (1) Respondent's ability to pay, and (2) calculation of an appropriate civil penalty, if any (TR 4).

Respondent's "Post Trial Brief" discusses only the first issue; therefore, issue (2) is waived. It will be observed, however, that the penalties proposed were calculated in accordance with the RCRA penalty policy guidelines, dated May 8, 1984 (C EX 2; Transcript [hereinafter "TR"] 6 through TR 38).

I find that a reasonable total penalty to be assessed for the violations here admitted is that proposed by Complainant, i.e., \$21,500.00. However, Respondent has demonstrated its inability to pay by showing that, in past years, it has sustained substantial losses, has cut its labor force, has cut out raises, bonuses and fringe benefits and has obtained extensions of contractual payment schedules to Liberty Trust & Savings Bank, Durant, Iowa, and its other creditors. Further, this record reflects:

1. Russelloy's liabilities have become much greater than its assets. Russelloy is nearly \$850,000.00 in debt, with accounts payable of approximately \$400,000.00 and outstanding loans of approximately \$441,000.00 (TR 47, lines 9-19; TR 100, lines 5-13; R EX Nos. 1, 2, 7, 8 and 13). Russelloy's accounts receivable total approximately \$195,000.00 (TR 55, lines 2-3; R EX No. 7) and stockholder's equity is approximately \$67,000.00 (TR 69, lines 10-14).
2. Liberty Trust & Savings considers Russelloy to be in substantial risk of foreclosure (TR 60, lines 12-19). Because of Russelloy's inability to repay its existing loans, Liberty Trust & Savings Bank has denied three loan requests made by Russelloy (TR 61, lines 1-14). Also, Liberty Trust &

Savings has formally expressed serious concern over the continued deterioration of Russelloy's credit line (TR 59, lines 18-21; R EX No. 10).

3. Russelloy owes over \$19,000.00 in back property taxes (TR 53, lines 15-20; R EX no. 9), and over \$12,000.00 to the State of Iowa for unemployment taxes (TR 54, lines 12-21).

4. The effect of a \$21,500.00 judgment against Russelloy would be to force Russelloy into bankruptcy (TR 67, lines 17-19). Once Russelloy's unsecured creditors are aware of a substantial judgment levied against Russelloy, the creditors will file claims in court (TR 67, lines 13-20). The "snowball" effect of the exaction of the proposed civil penalty against Russelloy would not aid in the enforcement of the Act but would simply force Russelloy out of business.

5. The closing of Russelloy Foundry would further increase the strain on Durant's agriculturally-based economy and injure the well-being of the community, as Russelloy is the second largest employer in Durant (TR 78, lines 5-12).

6. Russelloy has agreed to submit a closure plan and, if approved, to implement that plan in accordance with 40 C.F.R. Section 265, Subpart G (1981) TR 19-20).

7. Due to its financial condition, Russelloy's ability to pay for the closure of the hazardous waste storage facility could be jeopardized by the imposition of a penalty (TR 104, lines 3-9).

The penalty policy, page 20, points out that the reduction (or suspension) of a penalty is unlikely where a facility refuses to correct serious violations. It provides, as well, that penalties "beyond the means of the violator" are not contemplated but stresses the importance of the principal that the

subject violations not be seen as a way of aiding a troubled business. Nevertheless, it recognizes that, in achieving effective regulation, the violator should not be precluded from achieving compliance or from carrying out remedial measures which are deemed to be more important than the deterrent effect of any civil penalty exacted.

On this record, the violation set forth in Count III of the Complaint has been corrected. Respondent remedied the baghouse dust leakage as rapidly and quickly as possible (TR 126, 130), and has removed all stored hazardous waste in proper containers to a certified landfill. There is now no risk of hazardous waste leakages for the reason that Respondent has replaced the cupola with a rented electrical induction furnace which does not generate hazardous waste (TR 115). Respondent has already taken corrective action, referenced by Count I of subject Complaint, by filing the proper notification of being a hazardous waste generator in conformity with 42 U.S.C. 6930. It has formulated, and submitted for approval, its closure plan as required by subject Compliance Order.

I find it appropriate, on this record, that the civil penalty here assessed be suspended on the condition that Respondent Russelloy submit, receive approval of and fully implement a closure plan in accordance with 40 C.F.R. Part 265, Subpart G, and accomplish the corrective actions provided in the Compliance Order (set forth on page 4, supra.) and such Final Order is proposed hereinbelow. This is consistent with the Act, applicable regulations and the Final Civil Penalty Policy. Further, such finding comports with Complainant's proposed Findings of Fact, to wit:

5. Respondent has corrected many of the violations to the most practical extent.

6. Considering Respondent's financial conditions, payment of all of the proposed penalty may preclude Respondent from carrying out the remedial measures ordered.

Upon the basis of the transcript of the evidence and the exhibits and briefs of the parties comprising the record, and upon consideration of the regulations and the Final Civil Penalty issued by the U.S. EPA, I propose the issuance of the following

ORDER 1/

1. Pursuant to the Resource Conservation and Recovery Act, Section 3008(g), 42 U.S.C.A. 6928(g), a civil penalty in the total amount of \$21,500.00 is assessed against the Respondent, Russelloy Foundry, Inc., of Durant, Iowa, for the violations found herein.
2. Payment of said amount shall be and it is hereby fully suspended on the condition that the corrective actions as set forth in the Compliance Order, page 4, supra., and as set forth in paragraph 21, pages 4 and 5 of subject Complaint, be fully accomplished within the time periods herein specified.
3. Within ten (10) days from and after the receipt hereof, Respondent shall fully report to Complainant's Counsel (1) what actions have already been taken in conformity with said Compliance Order; (2) what actions, if any, have been initiated but require further action (such action and the time involved shall be fully described), and (3) whether a closure plan and, if applicable, a post-closure plan, have been developed in accordance with the regulations and implemented in accordance with schedules contained as a part of said plan.

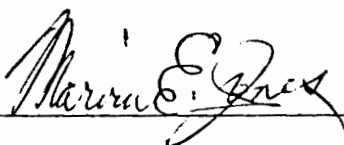
1/ Unless an appeal is taken pursuant to the rules of practice, 40 C.F.R. 22.30, or the Administrator elects to review this decision on his own motion, this Initial Decision shall become the Final Order of the Administrator (see 40 C.F.R. 22.27[c]).

4. Should Respondent fail to take the corrective action herein required, in conformity with subject Compliance Order, payment of the full amount of the civil penalty shall be made within sixty (60) days of the Service of the Final Order upon Respondent by forwarding a Cashiers or Certified Check, payable to the Treasurer, United States of America, to:

EPA - Region 7
(Regional Hearing Clerk)
P.O. Box 360748M
Pittsburgh, PA 15251

It is SO ORDERED.

DATE: September 12, 1985

A handwritten signature in cursive script, appearing to read "Marvin E. Jones", is written over a horizontal line.

Marvin E. Jones
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded to the Regional Hearing Clerk of U.S. Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101, the Original of the foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, 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 the Hearing Clerk, EPA Headquarters, Washington, D.C., who shall forward a copy of said Initial Decision to the Administrator.

DATED: September 12, 1985



Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ