UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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In The Matter of Lissner Corporation, Respondent	)))))	Docket No. RCRA-V-W-84-R-065

Resource Conservation and Recovery Act - Rules of Practice - Determination of Penalty Final RCRA Civil Penalty Policy - Notwithstanding statement in RCRA Civil Penalty Policy to the effect that the procedures in the Policy were intended solely for the guidance of government personnel and could not be relied upon to create procedural or substantive rights enforceable in litigation against the U.S., the Policy was held to be a guideline which the ALJ was obligated to consider in accordance with Rule 22.27(b) (40 CFR Part 22). Penalty determined in accordance with Penalty Policy held to be prima facie appropriate. Ability to pay and other unique factors held to warrant adjustment in penalty so determined.

Appearance for Complainant: Barbara Magel, Esq.
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Chicago, Illinois

Appearance for Respondent: Mark K. Schoenfield, Esq.
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Initial Decision

This is a proceeding under § 3008 of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6928). The action was commenced by the issuance on August 22, 1984, of a complaint and findings of violations by the Director of Waste Management Division, U.S. EPA, Region V, Chicago, Illinois, charging Respondent, Lissner Corporation, with violations of the Act,[1/] regulations promulgated thereunder (40 CFR Parts 262, 265 and 270) and corresponding sections

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

(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.

of the Illinois Administrative Code. It was proposed to assess Respondent a penalty totaling $44,000. Respondent answered, denying certain of the allegations, admitting others, and requested a hearing.

Under date of April 26, 1985, counsel for Complainant filed a document, "Joint Stipulations," whereby the parties stipulated to the facts in this matter and indicated that the only issue for decision is the amount of an appropriate penalty. The parties have submitted briefs and reply briefs on this issue and the matter is now ready for decision.

Findings of Fact

Based on the mentioned stipulation and the briefs of the parties, I find that the following facts[2/] are established:

1. Respondent, Lissner Corporation, owns and operates a hazardous waste management facility located at 1000 North Ogden Avenue, Chicago, Illinois.
2. On November 19, 1980, Respondent filed a Notification of Hazardous Waste Activity pursuant to § 3010 of the Act (42 U.S.C. 6930). This document reflected that Respondent was a generator of hazardous waste, based on the erroneous assumption waste hydraulic oil was such a waste.
3. Respondent filed an annual hazardous waste generators report for 1981.[3/]
4. Respondent did not file an annual hazardous waste generators report for 1982, because it allegedly was led to believe by the Illinois EPA (IEPA) that it qualified for the exemption specified by 40 CFR 261.2(c)(2) for material being burned to recover usable energy.

2/ Findings are based on the stipulation unless otherwise indicated.

3/ This is apparently a report required by the Illinois Administrative Code, as federal regulations (40 CFR 265.75) require a biennial report.

5. In June of 1983, Respondent received a letter from the IEPA, which requested that it file a hazardous waste generators' report. This caused Respondent to investigate the reasons for its previous filings, leading to the conclusion waste hydraulic oil was not hazardous.

6. An inspection of Respondent's facility was conducted by representatives of the IEPA on October 27, 1983. This inspection resulted in the conclusion that Respondent was operating as a hazardous waste generator and storage facility without having filed a § 3010 notice as a storage facility, without having filed a Part A Permit Application as required by 40 CFR 270.10(e) and consequently, without having achieved interim status as required by § 3005(e) of the Act.

7. At the time of the inspection, Respondent was storing a listed hazardous waste, methylene chloride (No. F001, 40 CFR 261.31), in quantities in excess of 1,000 kilograms for periods in excess of 90 days. This waste was a sludge (still-bottoms)[4/] produced by the recovery of methylene chloride solvent used in a degreasing operation. The waste was contained in over 400 30-gallon fiber drums.

8. In addition to the violation noted in Paragraph 6 above, the mentioned inspection resulted in the determination that Respondent had violated the following provisions of the regulations:

   (a) Respondent failed to develop and keep at its facility a written waste analysis plan as required by 35 Ill. Adm. Code § 725.113(b) and 40 CFR 265.13(b).

4/ Although referred to as a sludge, the still-bottoms are not the product of a municipal, commercial or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility and thus do not meet the definition of sludge in 40 CFR 260.10.

(b) Respondent failed to keep schedules and records of inspections for malfunctions, operator errors and deteriorations which may lead to the release of hazardous waste to the environment as required by 35 Ill. Adm. Code § 725.115 and 40 CFR 265.15.

(c) Respondent failed to maintain written job descriptions and records related to training for each position related to hazardous waste management, as required by 35 Ill. Adm. Code § 725.116(d) and (e) and 40 CFR 265.16.

(d) Respondent failed to mark the beginning of the accumulation period on each hazardous waste container, as required by 35 Ill. Adm. Code § 722.134 and 40 CFR 262.34.

(e) Respondent failed to maintain adequate aisle space, as required by 35 Ill. Adm. Code § 725.135 and 40 CFR 265.35.

(f) Respondent failed to transfer hazardous waste from leaking containers to containers in good condition, as required by 35 Ill. Adm. Code § 725.271 and 40 CFR 265.171.

(g) Respondent failed to provide financial assurance for facility closure, as required by 35 Ill. Adm. Code § 725.243 and 40 CFR 265.143.

(h) Respndent failed to familiarize local authorities with the potential need for emergency services as required by 35 Ill. Adm. Code § 725.137 and 40 CFR 265.37.

(i) Respondent failed to keep a written operating record at the facility regarding the quantity, location, dates, etc. of hazardous waste stored at the facility as required by 35 Ill. Adm. Code § 725.173 and 40 CFR 265.73.

(j) Respondent failed to have a written closure plan and to keep a copy of the plan at the facility, as required by 35 Ill. Adm. Code § 725.212 and 40 CFR 265.118.

9. During the mentioned inspection, Respondent informed IEPA representatives that prior to July 1983, F001 hazardous waste was disposed of as general refuse. Accordingly, Respondent has violated manifest and pre-transport requirements as follows:

(a) Failed to prepare a manifest prior to the off-site transporation of hazardous waste as required by 35 Ill. Adm. Code § 722.120(a) and 40 CFR 262.20.

(b) Failed to package hazardous waste according to applicable Department of Transportation regulations (49 CFR Parts 173, 178 and 179) prior to transportation off site as required by 35 Ill. Adm. Code § 722.130 and 40 CFR 262.30.

(c) Failed to label each drum of hazardous waste in accordance with applicable Department of Transportaion regulations (49 CFR Part 172) prior to transportation off site as required by 35 Ill. Adm. Code § 722.131 and 40 CFR 262.31.

(d) Failed, prior to shipping hazardous waste off site, to mark each container of 110-gallon capacity or less with the following words as required by 35 Ill. Adm. Code § 722.132(b) and 40 CFR 262.32(b);

"HAZARDOUS WASTE -- Federal Law Prohibits Improper Disposal. If found, contact the nearest police or public safety authority or the U.S. Environmental Protection Agency.

Generator's Name and Address _____.
Manifest Document Number _____."

(e) Failed to placard or offer the transporter placards according to Department of Transportation regulations (49 CFR Part 172, Subpart F) as required by 35 Ill. Adm. Code § 722.133 and 40 CFR 262.33.

10. A laboratory report obtained by Respondent indicates the concentration of methylene chloride in the still-bottoms to be approximately 143 ppm. Complainant has not stipulated that this report is accurate.

11. In March 1984, Respondent stopped the degreasing operation which produced the methylene chloride still-bottom waste.

12. On April 11, 1984, Complainant conducted another site inspection of Respondent's premises finding the same violations as in Paragraphs 6 and 8 above. The fact that the still-bottoms were hazardous waste was confirmed.

13. On June 15, 1984, representatives of Respondent and Complainant discussed procedures Respondent would follow in order to comply with EPA regulations.

14. On June 20, 1984, Respondent submitted a Part A Permit Application.

15. By August 22, 1984, the date the complaint herein was filed, Respondent complied with the following regulations:

(a) Kept schedules and records of inspections for malfunctions, operating errors and deterioration which may lead to the release of hazardous waste pursuant to 35 Ill. Adm. Code § 725.115 and 40 CFR 265.15;

(b) Kept a written operating record at the facility regarding the hazardous waste, pursuant to 35 Ill. Adm. Code § 725. 173 and and 40 CFR 265.73;

(c) Maintained adequate aisle space, pursuant to 35 Ill. Adm. Code § 725.135 and 40 CFR 265.35;

(d) Sought to provide financial assurance for facility closure, pursuant to 35 Ill. Adm. Code § 725.243 and 40 CFR 265.143; and

(e) Enclosed waste storage drums in plastic liners to prevent leaking even though the waste is a wax-like solid when cooled (Exhibit D), pursuant to 35 Ill. Adm. Code § 725.271 and 40 CFR 265.171.

16. By letter, dated September 10, 1984, Respondent notified the Director of the Fire Prevention Bureau of the Chicago Fire Department that it was storing still-bottom wastes at its facility.

17. On November 26, 1984, Respondent submitted an example of a job description and on November 27, 1984, Respondent submitted its waste analysis plan.

18. Respondent has submitted its facility closure plan pursuant to 35 Ill. Adm. Code § 725.212 and 40 CFR 265.112 at a date not established by the record. Complainant has not reviewed this plan.

19. The parties have stipulated that the only issue remaining for determination is the amount of the penalty. Complainant contends that an appropriate penalty is $44,000, while Respondent contends that because of its financial condition, and mitigating circumstances, a reasonable penalty is an amount not in excess of $1,000.

Conclusion

1. Respondent has violated the Act and regulations[5/] in the particulars noted in Paragraphs 6, 8 and 9 above.
2. A reasonable and appropriate penalty for the violations thus found is the sum of $21,500.

Discussion

The penalty proposed in the complaint was calculated in accordance with the Final RCRA Civil Penalty Policy, dated May 8, 1984. Under this policy, penalties up to the statutory maximum of $25,000 a day are determined in accordance with a matrix, having cells reflecting the extent of deviation from the requirements and potential for harm in gradations as major, moderate and minor. After this determination, adjustments to the gravity based penalty may be made based on the economic benefit from noncompliance, good faith efforts to comply, degree of willfulness and/or negligence, history of noncompliance, ability to pay and other unique factors.

Complainant regarded the potential for harm in the shipment of hazardous waste without a manifest as moderate and the extent of the deviation as major which results in a penalty cell of from $8,000 to $10,999.[6/] The

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5/ Official notice is taken of the fact that the provisions of the Illinois Administrative Code regarding hazardous waste, save for the apparent exception, note 3, supra, are identical with the requirements of 40 CFR Parts 262 and 265.

6/ Penalty calculation worksheet attached to Complainant's Memorandum In Support Of Proposed Penalty, filed May 24, 1985. Respondent objects to the consideration of this document, asserting that there is no stipulation supporting any allegation that the waste posed more than a minimal potential for harm (Respondent's Memorandum Regarding Penalty Issue, filed May 24, 1985, at 10, n. 3). The objection is overruled, because, in accordance with Rule 22.27(b) (40 CFR Part 22), I am obligated to consider civil penalty guidelines issued under the Act and the worksheet shows precisely how the penalty sought by Complainant was determined. The effect of the Penalty Policy is discussed further, infra at 18, 19.

midpoint of this range was selected resulting in a penalty for this violation of $9,500. Shipment of hazardous waste without complying with packaging, labeling, marking and placarding requirements was regarded as a single violation, constituting a major deviation from the requirements and having a moderate potential for harm. The midpoint of the cell range again resulted in a penalty determination of $9,500. A third violation resulting in a proposed penalty of $9,500 is the failure to have a closure plan.

Violation of the provision of the regulation concerning accumulation time for hazardous waste, actually marking of the beginning of the accumulation period on each container (Finding 8), was regarded as minor as to the potential for harm and moderate as to the extent of the deviation. The midpoint of the resulting cell range ($500 to $1499) is $1,000, which is the proposed penalty for this violation. A proposed penalty of $1,000 was also determined for the lack of an operating record. Lack of a waste analysis plan, failure to file Part A Permit Application, failure to make arrangements with local authorities and violation of aisle space requirements were each regarded as being a major deviation having a minor potential for harm. This resulted in a cell having a penalty range of $1,500 to $2,999, the midpoint of which was $2,250, and a proposed assessment totaling $9,000 for these four violations.

Lack of records of inspections and of records of personnel training were each regarded as having minor potential for harm and being minor deviations from the requirements, resulting in a proposed penalty of $600 for these two violations. Failure to transfer the waste from leaking containers to containers in good condition was regarded as being a minor violation having a moderate potential for harm, resulting in a proposed penalty of $4,000, the midpoint of the cell range of $3,000 to $4,999.

Complainant asserts that the proposed penalty was determined in accordance with statutory and regulatory guidelines, specifically the Final RCRA Civil Penalty Policy, May 8, 1984, and therefore is appropriate and should be assessed. Complainant cites J. V. Peters & Co., Inc., Docket No. V-W-81-R-075 (Initial Decision, May 15, 1985), for the proposition that absent specific reasons, a penalty so determined will be imposed. Complainant argues that one of the alleged mitigating factors relied upon by Respondent, i.e., the fact that the methylene chloride still-bottoms are solids when cooled and thus are less likely to escape into the environment, was considered in determining the potential for harm and the appropriate cell range in the penalty matrix. Concerning the alleged de minimis quantity of methylene chloride in its still-bottom waste,7/ Complainant argues this is irrelevant to the violation or the determination of penalty. It points out that these still-bottoms were listed as hazardous wastes some years ago, that Respondent has not filed a delisting petition pursuant to 40 CFR 260.22 and that accordingly, the regulatory requirements are not contingent on the concentration of methylene chloride in the waste.

Concerning Respondent's contention that it was misled by the IEPA into believing it was entitled to the exemption in 40 CFR 261.2(c)(2) for material burned to recover usable energy, Complainant says that this argument is based upon a telephone conversation with a Gregory Zak of IEPA and that Mr. Zak never indicated, and Respondent has not contended otherwise, that any storage

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7/ Respondent points out (Memorandum at 15) that the 143 ppm methylene chloride concentration in its waste is well below the 500 ppm eight-hour time weighted average concentration established by OSHA (29 CFR 1910.1000).

of its waste prior to recycling would not be regulated.[8/] Moreover, Complainant says that Respondent was told during the October 1983 inspection to treat the methylene chloride as hazardous waste and that this position was reiterated in the IEPA letter listing RCRA violations, dated March 8, 1984, and in a followup letter, dated June 6, 1984, wherein it was pointed out that Mr. Zak's comments were based on incorrect information supplied by Respondent.[9/] Accordingly, Complainant contends that any misunderstanding on Respondent's part, was corrected by the IEPA long before Respondent took any action to comply with RCRA regulations.

Regarding its alleged poor financial condition, Complainant argues that financial information submitted by Respondent is incomplete and does not demonstrate that it will be unable to pay the proposed penalty. Moreover, Complainant says that this factor has been taken into account by

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8/ Care should be taken to distinguish between materials which are being burned as fuel to recover usable energy, thus are not discarded and not a solid waste as defined in 40 CFR 261.2 and materials which are hazardous wastes being recycled pursuant to § 261.6. Wastes listed in §§ 261.31 or 261.32, which are being transported or stored prior to recycling are subject to RCRA regulation. See 40 CFR 261.6(b) and River Cement Company, RCRA (3008) 83-9 (Final Order, February 4, 1985). It should be noted that amended RCRA regulations, effective July 5, 1985 (50 FR No. 3, January 4, 1985, at 618; § 261.2(b) at 664), provide that materials are solid wastes if they are abandoned by being burned or incinerated.

9/ While copies of these letters were submitted in Complainant's prehearing exchange, the letters are not referred to in the Joint Stipulations and accordingly, are not considered.

Complainant's willingness to have the penalty paid in installments over a period of several years.10/

Respondent argues that a penalty will not aid in the enforcement of the Act where Respondent acted in good faith and fully cooperated with EPA officials (Memorandum at 6). It contends that under the circumstances, it should not be assessed any penalty or at most a penalty not to exceed $1,000. Respondent asserts that inasmuch as the complaint alleges violations of the Illinois Administrative Code, Illinois case law is applicable and cites Illinois appellate decisions to the effect that where the petitioner cooperated fully and acted quickly to remedy the problem once its attention was called thereto and was in substantial compliance with the regulatory requirements, a penalty would not aid in enforcement of the Act and was inappropriate.11/

Respondent further argues that it was led to believe it was exempt from the regulations as long as the waste was incinerated (Memorandum at 11). Respondent points out that it met with representatives of Complainant in June 1984 to discuss compliance with the regulations, that within two months

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10/ Complainant's Memorandum at 8, 10. This characterization is not strictly accurate. The order included with the stipulations requires that hazardous waste presently stored at the facility for periods in excess of 90 days be removed within 90 days, that Respondent shall make payments of $1,000 per month while off-site disposal is underway and $3,000 per month thereafter until the total amount of the civil penalty is paid. The order further provides that if Respondent is allowed to burn the waste at the facility, payment of $3,000 per month shall begin within 15 days of the last approval or permit necessary for that activity.

11/ Respondent also cites O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642 (D.C. Pa. 1981) where plantiff's request for the imposition of civil penalties for violations of the Clean Water Act and RCRA was denied, the court holding that the money would be better spent accomplishing required remedial measures.

and prior to the filing of the complaint herein, it had complied with one-half of the regulations it was found to have violated and that within six-months of the June meeting it had complied with the remaining regulations except for submission of a closure plan and financial assurance therefor.12/

Respondent says that its financial statement (confidential) indicates that its liabilities exceed its assets and that disposal of the waste will be a significant burden on a financially troubled company.13/ It asserts that imposition of the penalty sought by Complainant will impair quick removal of the waste and argues that in view of the minimal potential for harm caused by the waste (note 7, supra), Respondent should not be assessed a penalty exceeding $1,000.

Responding to these arguments, Complainant points out that at the time of the relevant inspections, Respondent was not incinerating its waste, but was storing over 400 drums of methylene chloride still-bottoms for periods in excess of 90 days (Reply Memorandum, filed June 13, 1985, at 2). Moreover, Complainant says that Respondent had not applied for the necessary permits that would enable it to incinerate the wastes. Accordingly, Complainant argues that the exemption from RCRA regulations relied on by Respondent is not applicable. Complainant reiterates its contention that any confusion as to the applicability of the regulations was corrected at the time of the IEPA inspection in October of 1983.14/

12/ Respondent says that incineration of waste ceased on June 15, 1984 and that its closure plan was submitted on March 1, 1985.

13/ Footnote 13A is treated as confidential and will be kept separate from the opinion.

14/ This contention is contrary to the stipulation and is rejected (see note 15, infra).

Complainant says that Respondent continues to store methylene chloride waste at its facility in violation of RCRA and speculates that Respondent may still be intermittently generating such wastes (Reply at 3). The latter assertion is contrary to the stipulation and will not be considered.15/

Complainant does not argue that the Illinois appellate decisions cited by Respondent are inapplicable, but asserts that they are factaully distinguishable from the instant case (Reply 5-8). Complainant says that each of the possible mitigating factors cited by Respondent such as economic hardship and the nature of the waste have already been taken into account in developing the proposed penalty, contends that it is Respondent's burden to demonstrate that the proposed penalty is inappropriate, that Respondent has not done so and that the amount of $44,000 should be assessed.

Because it contains references to financial information which the parties have stipulated is confidential, Respondent maintains that its reply memorandum, filed June 18, 1985, should be treated as confidential in its entirety (letter, dated June 18, 1985). Financial information is discussed

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15/ Complainant also alleges that Respondent disposed of methylene chloride wastes as general refuse sometime after the conversation with Mr. Zak of the IEPA wherein it was informed that as long as it burned the material to recover usable energy in accordance with 40 CFR 261.2(c)(2), the material would not be considered a waste. While the stipulation is silent as to the date of the conversation with Mr. Zak, Respondent's letter to the IEPA, dated March 22, 1984 (Exh. A to the stipulation) reflects the conversation with Mr. Zak took place on January 9, 1984. Inasmuch as disposal of methylene chloride waste as general refuse took place prior to July 1983 (stipulation, Par. 11), Complainant's allegation is inexplicable and clearly erroneous.

in footnote 13A, which is being kept separate and treated as confidential,16/ and it is my conclusion that arguments in the memorandum can be summarized without violating the stipulation.

Respondent quotes the Final RCRA Civil Penalty at 3,17/ providing that the procedures set out in the policy are intended solely for the guidance of government personnel and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States, and argues that the policy cannot be considered by the court because it is merely for internal agency use (Reply Memorandum at 1, 2). Respondent further argues that the policy is merely an interpretative memorandum, which was not promulgated in accordance with the rulemaking requirements of the Administrative Procedure Act and published in the Federal Register and accordingly, is not judicially enforceable.

Assuming, arguendo, that the penalty policy is applicable, Respondent points out that the policy provides for adjustments in the amount of the penalty for enumerated factors (ante at 9) and asserts that the worksheets (note 6, supra) demonstrate that no such adjustments were made. Respondent emphasizes that § 3008(c) of the Act (note 1, supra) requires the Administrator

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16/ Because specific figures are not discussed, I am of the opinion that nothing in footnote 13A is properly confidential. However, in view of the stipulation, the substantive criteria governing confidentiality determinations (40 CFR 2.208) and the special rules governing information obtained under RCRA (40 CFR 2.305), financial information and discussions thereof will be treated as confidential.

17/ The procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this policy and to change it at any time without public notice.

to consider the seriousness of the violation and any good faith efforts to comply and argues that its waste posed a minimal potential for harm, because of the low concentration of methylene chloride (Reply Memorandum at 4-6). Respondent repeats the contention that it was misled by the IEPA into the belief that it qualified for the exemption in 40 CFR 261.2(c)(2), for material burned as fuel to recover usable energy and thus, that the violations were not willful.

Respondent asserts that eight of the twelve penalties assessed against it posed a minor potential for harm and constituted a minor deviation from the regulations. According to Respondent, these include training and job descriptions, inspection requirements, operating records, packaging, labeling, marking, placarding,18/ accumulation time, container condition, arrangements with local authorities and waste analysis plan. Respondent notes that the appropriate cell in the matrix for violations constituting a minor deviation from the requirements and posing a minor potential for harm is a penalty ranging from $100 to $499 and alleges that the lower end of the range should be selected in this instance, resulting in an unadjusted penalty of $800 for these eight violations.

Respondent says that the remaining four violations, that is, shipping without a manifest, maintaining aisle space, filing a Part A Permit Application, closure and financial assurance therefor, have a minor potential for harm and constitute a moderate deviation from the requirements. The appropriate cell for such violations is a penalty ranging from $500 to $1,499 and again, Respondent contends that the lower end of this range is

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18/ Packaging, labeling, marking and placarding are regarded as one violation.

appropriate, resulting in an unadjusted penalty for these violations of $2,000.

Respondent points out that the Penalty Policy calls for a downward adjustment in the penalty based on ability to pay and degree of willfulness (Policy at 17, 18, 20) and argues that the penalty of $2,800 should be reduced by 50% because of these two factors (Reply Memorandum at 8). Moreover, Respondent points to the finding in J.V. Peters & Co., Inc. (ante at 11) to the effect that ALJ awards have been approximately one-third of the base penalty determined by use of the matrix and contends that the $1,400 should therefore be reduced to one-third of that sum or $467.

Section 3008(a)(2) of the Act (42 U.S.C. 6928) provides that in case of a violation of any requirement of this subtitle occurs in a state which has been authorized to carry out a hazardous program pursuant to § 3006, the Administrator shall give notice to the state in which the violation has occurred prior to issuing and/or commencing a civil action under this section. Those follow the pertinent provisions of § 3008 quoted note 1, supra. Accordingly, and notwithstanding the fact that it is provisions of the Illinois Administrative Code that are being enforced here, it is my conclusion that a penalty determined in accordance with EPA, rather than state policy, is appropriate.19/

The next question is the effect, if any, on this proceeding of the Final RCRA Civil Penalty Policy. As Respondent has pointed out, and as

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19/ See Humko Products, an operation of Kraft, Inc., Docket No. V-W-84-R-014 (Initial Decision, March 7, 1985), presently on appeal.

the policy makes clear (note 17, supra) the policy is for guidance of EPA personnel, is not intended to and cannot be relied upon to create procedural or substantive rights enforceable against the United States in litigation.20/ Notwithstanding the mentioned caveat, the instant proceeding is not strictly speaking litigation and it is my conclusion that the Penalty Policy is a civil penalty guideline which I am obligated to consider, but am not bound by, in accordance with Rule 22.27(b) (40 CFR Part 22). Even if this conclusion is of dubious validity, the Penalty Policy is relevant to the penalty determined by Complainant (note 6, supra) and is a reasonable guide by which to measure its appropriateness.

In arguing over the burden of proof in this matter, the parties have cited Rule 22.27 concerning initial decisions and the amount of the civil penalty.21/ The applicable rule, however, is § 22.24 providing in essence that the Complainant has the burden of proving that the violation occurred as set forth in the complaint and the appropriateness of the civil penalty. Following the establishment of a prima facie case, Respondent has the burden of presenting and going forward with any defense to the allegations in the complaint. This logically includes reasons for reducing the penalty from the amount sought in the complaint.

20/ The rule that the government is bound by its own regulations is not dependent upon whether the regulation was published in the Federal Register. See United States v. Heffner, 420 F.2d 809 (4th Cir. 1970), and Gulf States Manufacturers, Inc. v. N.R.L.B., 579 F.2d 1298 (5th Cir. 1978).

21/ Complainant may have intended to refer to the Penalty Policy, which provides at 21 that the burden is always on the violator to justify any mitigation of the assessed penalty.

Applying the penalty policy as a reasonable guide, it is my conclusion that, except for $1,000 assessed for failure to mark the beginning date of the accumulation period on each container of waste in accordance with 40 CFR 262.34,22/ Complainant has made out a prima facie case that the penalty sought is appropriate. As indicated, ante at 17, Respondent contends that eight of the twelve violations for which penalties were assessed constitute minor deviations from the requirements. Complainant agrees that lack of personnel training and job descriptions, lack of inspection records and condition of containers constitute minor deviations, but has designated shipment without a manifest, packaging, labeling, marking and placarding (treated as one violation); lack of a waste analysis plan, lack of aisle space, failure to have a closure plan and lack of financial assurance for closure, failure to file Part A Permit Application in a timely manner, and failure to make arrangements with local authorities as major deviations from the requirements. Lack of an operating record was treated as a moderate deviation from the requirements. Inasmuch as the record does not reveal that Respondent was in partial compliance with any of the listed requirements, except that the Part A was filed on June 20, 1984, I cannot say that Complainant's determinations in this respect are unreasonable and accordingly, these determinations are accepted as appropriate.

22/ The cited requirement is in the form of a condition precedent to the 90-day accumulation period allowed by § 262.34 without having a permit or interim status. In Humko Products (note 19, supra), it was held that a separate penalty could not be assessed for violation of the mentioned requirement because such noncompliance carried its own penalty, i.e., subjection to the Interim Status Standards of Part 265. While it is recognized that this holding appears contrary to the example in the Penalty Policy at 7, 8, the Policy is merely advisory and the holding in Humko Products is considered to be sound.

Respondent argues that because of the low concentraton of methylene chloride in its waste and the fact that the waste becomes a solid when cooled, the potential for harm should be regarded as minimal. Complainant has determined that the potential for harm for all the violations is minimal, except for shipment without a manifest; packaging, labeling, marking and placarding (treated as one violation), closure plan and financial assurance for closure and container condition, which were regarded as having a moderate potential for harm. Inasmuch as the waste is listed and must be regarded as hazardous as a matter of law,23/ and § 10(g) of the stipulation refers to leaking containers, Complainant's determinations in this respect are accepted as reasonable and appropriate.

Deducting $1,000 for the failure to mark beginning of the accumulation period on each container (note 22, supra), leaves a base penalty of $43,000. Complainant's arguments as to the advice Respondent received from the IEPA concerning its entitlement to the exemption in 40 CFR 261.2(c) for material burned as fuel do not accurately portray the facts (note 15, supra) and this is a unique circumstance warranting a 25% reduction in the base penalty. While Complainant is correct that the financial data submitted by Respondent is incomplete and leaves much to be desired in the way of proof on this issue, there is no reason to doubt that Respondent is in stringent financial circumstances.24/ Respondent's financial condition is considered to warrant a further 25% reduction in the amount of the penalty. Accordingly, a

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23/ See Koppers Company, Inc., RCRA (3008) 83-3 (Final Order, May 14, 1985).

24/ Respondent is in the business of recycling scrap copper communication and power transmission wire (Exh. J to Stipulation at 2) and it is common knowledge that the price of copper is and has been depressed.

penalty of $21,500 will be assessed against Respondent for the violations found.

ORDER

Respondent Lissner Corporation having violated the Resource Conservation and Recovery Act and applicable regulations as charged in the complaint, a penalty of $21,500 is hereby assessed against it in accordance with § 3008 of the Act (42 U.S.C. 6928). Respondent will comply with the Order in the Joint Stipulations and will pay the foregoing penalty on the schedule agreed upon in the Joint Stipulations by sending cashier's or certified checks payable to the Treasurer of the United States to The First National Bank of Chicago, EPA, Region V, Regional Hearing Clerk, P.O. Box 70753, Chicago, IL 60673.25/

Dated this 30th day of July 1985.

Spencer T. Nissen
Administrative Law Judge

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