UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	RCRA DOCKET 84-H-0012
	)	
U.S. NAMEPLATE COMPANY,	)	
	)	
RESPONDENT	)	

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1. RESOURCE CONSERVATION AND RECOVERY ACT:

The failure of Respondent to file a timely notification that it generated and stored hazardous waste, and its further failure to timely file a Part A Permit Application, violated Section 3010, 42 USC 6930, and parallel provisions of Title XI, Chapter 140 of the Iowa Code.

2. RESOURCE CONSERVATION AND RECOVERY ACT:

As a consequence of its failure to file a timely notification on or before August 19, 1980, and a Part A Application for a permit on or before November 19, 1980, Respondent violated Section 3005, 42 USC 6925, for the reason that it stored hazardous waste without a permit or having achieved interim status in accordance with the Act.

3. RESOURCE CONSERVATION AND RECOVERY ACT:

Respondent failed to implement a groundwater monitoring program, which the regulations mandate must be capable of determining subject facility's impact on the quality of groundwater underlying said facility, and did not construct the requisite number of wells at the outer limits of said management area. Such failure violated 40 CFR Part 265, Subpart F, which contemplates that such program will facilitate inspections which will identify problems in time to correct them before they lead to environmental and health hazards.

4. RESOURCE CONSERVATION AND RECOVERY ACT:

Respondent's hazardous waste, listed as such in 40 CFR 261.31, is a hazardous waste as a matter of law and will retain such characterization unless and until excluded from such listing in accordance with and pursuant to 40 CFR 260.22.

5. RESOURCE CONSERVATION AND RECOVERY ACT:

The Final RCRA Penalty Policy, which became effective May 8, 1984, is inapplicable to the instant case and to actions instituted prior such effective date.

Entry of Appearance

For Complainant: Ellen S. Goldman
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For Respondent: Roy M. Harsch, Esquire
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INITIAL DECISION

By Complaint filed March 12, 1984, Respondent, U.S. Nameplate Company of Mount Vernon, Iowa (hereinafter "Respondent"), an Iowa corporation, is charged with (1) violation of Section 3010(a) of the Resource Conservation and Recovery Act (hereinafter "RCRA" or "the Act"), 42 USC 6930(a), for the reason that Respondent generated and stored hazardous wastes, subject to the Act, without timely notification 1/ of such activity; (2) violation of Section 3005, 42 USC 6925, for the reason that Respondent stored substances at its Mount Vernon facility without a permit or having achieved interim status, 2/ and (3) violation of 40 CFR 265.90 and Title XI, Chapter 140, Section 900-141.6(455B) of the Iowa Code (which adopts 40 CFR Part 265 by reference) for the reason that Respondent (a) did not implement a groundwater monitoring program capable of determining subject facility's impact on the quality of groundwater underlying said facility; (b) did not install, operate and maintain a groundwater monitoring system which conforms to the requirements set forth in 40 CFR 265.91, and (c) failed to comply with 40 CFR 265.92 (sampling and analysis), 265.93 (preparation, evaluation and response) and 265.94 (recordkeeping and reporting). Said Complaint proposes that a total civil penalty of $12,000 ($2,500 on each of Counts 1 and 2 and $7,000 on Count 3) be assessed against Respondent for the violations above set forth. At a hearing, requested by Respondent, which began on November 1, 1984, in Kansas City, Missouri, then recessed until November 8, 1984 (at Respondent's request due to illness of its

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1/ It is not controverted that wastewater treatment impoundment (or lagoon) has been in operation since on or about November, 1979, and Complainant admits that said "Notification" was filed on February 4, 1981 (Complaint, paragraph 5).

2/ Respondent's Part A Application for a permit was also filed February 4, 1981 (C Ex. 20).

Counsel), and again in its brief, Complainant urges the assessment of civil penalties totaling $53,500. 3/

Said Complaint further contains a Compliance Order which, in addition to ordering payment of the $12,000 penalty, also ORDERS corrective action, to wit:

(a) that Respondent cease disposing of hazardous waste into a surface impoundment (described also as a hazardous waste storage facility at paragraph 6 of the Complaint and as a wastewater treatment lagoon on page 7 of Respondent's Answer);

(b) that Respondent submit to Complainant, U.S. Environmental Protection Agency (hereinafter "EPA" or "the Agency"), within 30 days, a complete closure plan and, if applicable, a post-closure plan, both developed in accordance with 40 CFR Part 265, Subpart G;

(c) that Respondent submit to Complainant, EPA, within 30 days, a groundwater assessment plan, for subject surface impoundment, developed in accordance with 40 CFR Part 265, Subpart F;

(d) that Respondent immediately cease treating, storing (for periods exceeding 90 days) or disposing of any hazardous waste, and

(e) that Respondent, upon proper approval, shall proceed to fully implement said closure or post-closure plan, as appropriate, in accordance with schedules contained therein.

Said Compliance Order further provides for the assessment of an additional civil penalty for each day that Respondent may fail to take such corrective action as ordered.

In its Answer, Respondent denies (page 3) that it has operated a hazardous waste storage facility and denies that notification was required pursuant to said Section 3010(a) of the Act. It admits (page 2) that on or about November 28, 1979, it put into operation a wastewater treatment lagoon to treat wastewater produced . . . prior to discharge pursuant to its NPDES permit, but denies that subject RCRA regulations are applicable to its said lagoon.

3/ Said amount represents proposed penalties of $6,500, $9,500, $22,500 on Counts I, II and III, respectively, plus $15,000 "benefits" from failure of Respondent to install, repair and maintain required hazardous waste management facilities (TR 123) using Final RCRA Penalty Policy, May 8, 1984.

Respondent further denies (Answer, page 4) that it has stored substances identified or listed as hazardous waste pursuant to RCRA and therefore further denies that it is required to have a permit or to achieve interim status. Said Answer further denies the applicability of cited regulations which require said groundwater monitoring program, a groundwater monitoring system and the hazardous waste management requirements set forth in 40 CFR Part 265, on the premise that subject wastewater sludge is not a hazardous waste, and argues in its brief that, alternatively, EPA has not proved that said waste is an F006 waste and that Respondent's filing, in February, 1981, of a hazardous waste activity notification and Part A permit application, was timely and that, therefore, it has interim status. Said arguments were responded to in Complainant's Reply Brief. Said arguments are discussed and rejected hereinbelow.

As stated, supra, the requested hearing began on November 1, 1984, at 10 a.m. in the U.S. Courthouse, 811 Grand Avenue, in Kansas City, Missouri. Prior to the hearing, Respondent's Counsel, Roy M. Harsch, stated that he had a doctor's appointment on the following day and requested that said hearing be recessed until another date if said hearing evidence could not be fully submitted in one day. Said request was granted and at the conclusion of Complainant's evidence and upon Respondent Counsel's insistence that his evidence would take a full half-day 2/, the hearing was recessed at 4:30 p.m. on November 1, 1984,and scheduled to reconvene on November 8, 1984, at the same location.

On November 6, 1984, Respondent filed its Motion for Continuance and to Allow an Additional Witness, stating therein that Respondent had been unable to retain such "expert witness" until Monday, November 5, 1984. The witness,

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2/ Respondent, when the hearing was recessed on November 1, 1984, requested said recess because the testimony of his one witness, Richard C. Novetzke, would take "a full morning" and the time then was nearly 4:30 p.m. (TR 160).

Dr. Keith Cherryholmes of Iowa City, Iowa, was unable to attend the hearing on November 8, 1984, but was able to attend on Friday, November 9, 1984, and on three later dates. Said Motion further represented (paragraph 6 thereof) that said testimony concerned the following technical issues:

(a) Treatment of subject waste from RCRA hazardous waste list;

(b) Delisting of subject waste from RCRA hazardous waste list;

(c) "Representativeness" of the sludge sample, and

(d) Subsidiary matters related to the above topics.

Said Motion was denied when Respondent's Counsel instituted a conference call, at which time I advised that the purpose of the recess of the hearing from November 1, 1984, to November 8, 1984, was to permit Counsel to attend to his medical problem and not to generate further testimony from sources unrevealed at the start of the hearing.

I advised Counsel then and at the resumed segment of the hearing (Transcript [hereinafter "TR"] 230-231) that to have granted such request would have violated the intent and spirit of 40 CFR 22.19(b), which provides that witnesses whose names have not been exchanged shall not be allowed to testify without permission of the Presiding Officer. Further, it was clear that the expert witness was intended to be the source of new and technical evidence which the other party should have a reasonable opportunity to review. It is now apparent, from Counsel's offer of proof (TR 234-240) that the introduction into this case of the testimony there entailed would have resulted in considerable delay which was unwarranted in view of the fact that two extensions of time had been granted for the preparation and filing of the prehearing data, which included identification of witnesses. Section 22.04(c) mandates, among other things, that delay shall be avoided.

Respondent complained that Complainant had been permitted to use witnesses not identified in its prehearing exchange. However, the names of said witnesses, except one, were forwarded to Respondent as an amended witness list, dated October 22, 1984 (ten days in advance of the hearing), and the nature of the said testimony was advised by the original prehearing document. 4/ The name of the remaining witness (Iowa State Inspector Ron Stellick - Complainant's [hereinafter "C"] Exhibit [hereinafter "Ex." 7]) was forwarded October 30, 1984, to Respondent's Counsel. Although he advised that said mail had arrived at his office on October 31, 1984, after his departure for subject hearing, Counsel was advised of the name of the witness and the nature of his testimony prior to the start of the hearing on November 1, 1984.

On the basis of the evidence in the record and on consideration of the findings, conclusions, briefs and arguments proposed and submitted by the parties, I make the following

FINDINGS OF FACT

1. At all times relevant to this proceeding, Respondent has owned and operated a hazardous waste management facility located at Mount Vernon, Iowa.

2. In Respondent's stainless steel etching process a listed hazardous waste, F006, is generated (40 CFR 261.31) (C Ex 20).

3. Said listed hazardous waste is disposed of in a surface impoundment on site at the facility (C Ex 20).

4. Section 3010(a) of Subtitle C of RCRA, 42 USC §6930(a) requires notification stating the location and description of hazardous waste activities and the identified or listed wastes handled by a generator not later than 90 days after promulgation of the pertinent regulations.

4/ As stated in my Order, dated October 22, 1984, denying Respondent's Motion for Continuance, dated October 19, 1984, the content of the testimony offered by Complainant had been supplied to Respondent by Complainant's letter, dated September 27, 1984, and the names of said witnesses were forwarded (as promised) by expedited mail on October 22, 1984. Said testimony consisted of facts known to Respondent, viz., inspection of Respondent's facility and Respondent's history of Compliance.

5. Respondent filed said notification on or about February 4, 1981, although same should have been filed no later than August 19, 1980.

6. Section 3005(a) of Subtitle C of RCRA, 42 USC §6925(a), requires that an owner or operator of a hazardous waste treatment, storage or disposal facility must have a permit.

7. A permit application by Respondent was required to be made by November 19, 1980. (42 USCA §6930[b].)

8. Respondent did not file said Part A application for a permit until February 4, 1981.

9. Respondent owned and operated a surface impoundment for the management of hazardous waste which has been in continuous operation since November, 1979.

10. Title 40 CFR Part 264 Subpart F requires that on or before November 19, 1981, the owner or operator of a surface impoundment which is used to manage hazardous waste must have implemented a groundwater monitoring program.

11. Respondent has never submitted a groundwater monitoring plan, or implemented a monitoring system.

12. Respondent was required by Compliance Order, filed with subject Complaint and dated March 12, 1984, to cease disposal of hazardous waste into subject surface impoundment. At the time of hearing, such activity had not ceased (TR 227).

13. Respondent was required by Compliance Order, filed with subject Complaint and dated March 12, 1984, to complete a closure plan, and, if applicable, a post-closure plan.

14. Respondent has never submitted to EPA a closure plan or a post-closure plan.

15. Respondent was required by Compliance Order, dated March 12, 1984, to submit a groundwater assessment plan developed in accordance with Title 40 CFR Part 265, Subpart F.

16. Respondent has not submitted a groundwater assessment plan to date.

17. Electroplating operations, as that term is used in 40 CFR §261.31, includes chemical etching of stainless steel but does not include chemical etching and milling of aluminum. (Background Document dated May 2, 1980, referred to in 45 FR §33112, §33113 [VII. Subpart D], May 19, 1980.)

18. Respondent knew of the provisions in subject regulations, e.g., 40 CFR §260.22, in 1981, but made no application for delisting of subject waste until just prior to the instant adjudicatory hearing, which began on November 1, 1984 (TR. 220-221; C Ex. 1).

19. Respondent acknowledged to the Iowa Department of Environmental Quality (hereinafter "DEQ") on August 10, 1982, the possibility that subject lagoon was leaking (C Ex 3) after issuance of an Investigative Report (C Ex 2), dated July 28, 1982, indicating a leak since 1980, because there should have been more water in the lagoon as there has been no discharge since construction of the lagoon and samples from a monitoring well showed high fluoride levels (TR 12; 106).

20. Respondent was advised by letter of February 18, 1981, from the Iowa DEQ, that subject sludge accumulating in its surface impoundment was corrosive, with pH less than 2, and would require it to obtain a RCRA storage permit; that said sludge could be delisted only if a showing was made, in accordance with 40 CFR Parts 260.20 and 260.22, that said waste contained none of the hazardous constituents listed under F006, 40 CFR Part 261, Appendix VII (C Ex 1).

21. The Iowa DEQ found that said leaking problem in Respondent's said lagoon still persisted on February 7, 1983, and that nothing had been done by Respondent to stop the leak since application by Respondent of Bentonite to several areas of the lagoon dikes several months previously (C Ex 6).

22. The Iowa DEQ, by its Executive Director, Stephen W. Ballou, on January 24, 1984, referred the instant case to the U.S. EPA (Complainant) for enforcement, stating that a supporting document (C Ex 18) indicated RCRA violations and that

the Department chose to refer the enforcement of permit and operation requirements 5/ to EPA and recognized that under the Memorandum of Agreement (MOA) the U.S. EPA retained the responsibility for permitting requirements (C Ex 17).

23. By its said Part A Application, signed by its owner and Chief Officer, Richard C. Novetzke, on February 12, 1981, Respondent reported that it discharged 800 gallons per day of treated process water from etchings into its surface impoundment (Process Code 504) and that the EPA Hazardous Wastes Nos. of said waste are F006, D001 and D002, denoting that it is a "listed waste" (40 CFR Part 261.31) having the characteristics of ignitability and corrosiveness (C Ex 20).

24. Wastewater treatment sludges from electroplating operations (F006) are designated hazardous because of the potential hazard presented by the frequent occurrence of metals such as chromium, cadmium, nickel and complexed cyanides (40 CFR Part 261, Appendix VII, page 372). Samples of Respondent's subject sludge show a chromium level eight times greater than the maximum permissible concentration (C Ex 9).

CONCLUSIONS OF LAW

1. Respondent violated §3010(a) of Subtitle C of RCRA, 42 USC §6930(a), failing to file its Notification of Hazardous Waste Activity on or before August 19, 1980.

2. Respondent was in violation of §3005(a) of Subtitle C of RCRA, 42 USC §6925(a), for storing a hazardous waste without a permit or having achieved Interim Status in accordance with 42 USC §6925(e).

3. Respondent is in violation of Title 40 CFR §265.90 and Title IX, Chapter 140, Section 900-141.6 (455 B) of the Iowa Code for failing to meet the groundwater monitoring requirements by November 19, 1981.

5/ With the exception of permitting requirements, it is the Iowa Administrative Code that is being here enforced. As the record shows that applicable provisions are identical, CFR references are used throughout this Decision.

4. Respondent is in violation of 40 CFR §265, Subpart G, for failure to submit a closure plan and, if applicable, a post-closure plan.

5. It was and is Respondent's responsibility, under the requirements of 40 CFR §265.15, to inspect subject facility (surface impoundment) for malfunctions and deterioration, operator errors and discharges which may be causing or lead to (a) release of hazardous waste constituents to the environment or (b) a threat to human health, and such inspections should have been and must be conducted often enough to identify problems in time to correct them before they harm human health or the environment (emphasis supplied). Respondent's failure to remedy a malfunction in the surface impoundment, evidenced by leaking, to ensure that said malfunction did not lead to an environmental or health hazard, was a violation of said regulatory requirement for which an appropriate civil penalty should be assessed (TR 106; C Exs 9 and 21; C Exs 3, 5, 6, 7 [pages 2 and 3], 11 and 18).

6. Respondent, by its failure to implement a groundwater monitoring program under the requirements of 40 CFR Part 265, Subpart F, including failure to construct and maintain a groundwater monitoring system, as required by Section 265.91, capable of immediately detecting any migration of hazardous waste constituents from said surface impoundment to the uppermost aquifer, violated said regulatory requirements, and an appropriate civil penalty should be assessed for said violation.

7. Industrial wastewaters, and sludges generated by industrial wastewater treatment, are hazardous wastes subject to RCRA regulations, except for actual point source discharges subject to regulation under Section 402 of the Clean Water Act (Comment following 40 CFR Part 261.4).

8. Subject sludge generated by Respondent's industrial wastewater treatment, along with industrial wastewater collected, stored or treated before discharge, is a hazardous waste as a matter of law because of its being listed as such

under 40 CFR §261.31, and will retain its characterization as a hazardous waste unless and until it is excluded from such listing in accordance with and pursuant to 40 CFR 260.22 (40 CFR 261.3; 261.4; Part 261, Appendix VII).

9. By its introduction into evidence of Respondent's Part A application, and its further showing that Respondent's manufacturing process includes the etching of stainless steel, Complainant made a submissible case that Respondent was subject to the Act and that a listed hazardous waste F006 was stored in said Respondent's surface impoundment (C Ex 20; Finding 23).

10. Respondent has not sustained its burden of proving that it is not subject to the Act and regulations promulgated pursuant to the Act.

11. The facts stated in Finding 24, supra, are indicative that subject sludge in Respondent's lagoon will not be delisted as a hazaroudous waste (40 CFR 260.22).

12. The Final RCRA Penalty Policy, May 8, 1984 (unpublished), is applicable only to actions instituted after the date thereof and therefore is not applicable to the instant case (see said Final RCRA Penalty Policy, page 2; Humko Products, an operation of Kraft, Inc., Docket No. V-W-84-R-014, March 7, 1985).

DISCUSSION

On this record, it is evident that Respondent, who manufactures industrial nameplates and decorative trim, generates a hazardous waste, in the etching of stainless steel, which is listed as F006 in 40 CFR 261.31 (Finding 2, supra). Said hazardous waste is disposed of into a surface impoundment situated at Respondent's subject facility (C Ex 20). 42 USC §6921 provided for the promulgation of the regulations which are here pertinent. Section 6930 of the Act requires that Respondent, by owning and operating a facility generating a listed hazardous waste, and by storing and disposing of same, shall file with the U.S. EPA a notification, stating the location and description of the stated activity and the identified or listed waste so handled, "not later than 90 days" after (said) promulgation of regulations. Said regulations were promulgated and

became effective May 19, 1980; therefore, said notification by Respondent was required no later than August 19, 1980. Since notification was not filed by Respondent until February, 1981 (C Ex 19), Section 6930 prohibited Respondent's said activity and handling of subject waste "unless notification has been given as required"; also, Respondent was required to file its Part A Application for a permit no later than November 19, 1981 (§6930[b] of the Act). Said application was likewise filed on February 4, 1981 (Finding 8, supra; C Ex 20). Respondent, in an effort to justify said filings in February, 1981, argues that since the exclusion for "waste water treatment sludges from electroplating operations from . . . chemical etching . . . of aluminum" became effective on November 12, 1980, said notification and Part A Application were due from and after November 12, 1980. Contrary to Respondent's argument, such exclusion did not change in any way said listing as it pertained to stainless steel etching. The Respondent was clearly given notice of such fact, and such information was not "secret" but readily available for him, as demonstrated by 45 FR 33112 and 33113 (captioned VII. Subpart D), May 19, 1980, where it is stated:

> "Detailed justification for listing each hazardous waste . . . is contained in specific background documents, and so will not be set forth in this preamble. The general methodology used to support listings will, however, briefly be described." (Emphasis supplied.)

Said publication then proceeds to describe the said documents and the criteria used, including the following specific observations (45 FR 33113):

> "It must be emphasized that in making listing determinations, the Agency's principal focus is on the identity of the waste constituents, and on constituent concentrations in the waste and the nature of the toxicity presented by the constituents. Where a waste contains significant concentrations of hazardous waste constituents, the Agency is likely to list (it) . . . unless it is evident that the waste constituents are incapable of migrating in significant concentrations even if improperly managed . . . " (Emphasis supplied.)

A further observation states:

> " . . . the key focus is on the inherent potential of waste constituents to cause substantial harm . . . ",

citing Section 1004(5)(B) of the Act.

One of the background documents, referred to supra, dated May 2, 1980, provides that "electroplating operations," as used in subject §261.31, includes chemical etching of stainless steel (Finding 17). The constituents of F006, which justify subject listing, are set forth in Appendix VII, 40 CFR Part 261 (see Finding 24).

Respondent further argues that Complainant did not prove subject waste was a hazardous waste. A prima facie case was made by Complainant (see Conclusion 9, supra). I find that Respondent failed to sustain its burden of "presenting and going forward with (its) defense" (see 40 CFR 22.24, Rules of Practice).

Subject sludge and the industrial wastewater collected, stored or treated before discharge is a hazardous waste as a matter of law because of its being listed as such under 40 CFR 261.31 and will retain its said characterization as a hazardous waste unless and until it is excluded from such listing in accordance with and pursuant to 40 CFR 260.22 (Finding 8; see also 40 CFR 261.3[a[[2][ii]; 261.3[c][1]; 261.3[d][2]).

At all times pertinent to this Decision, the subject sludge was and remains a hazardous waste listed as aforesaid.

During and subsequent to the hearing, Respondent has alluded to efforts that have been and will be made to have its said waste "delisted"; however, it was evident at the hearing that stainless steel etching at Respondent's facility has not been discontinued (TR 227); Respondent has been aware of and considered the regulatory provision for delisting since 1981 but did not file an application under 40 CFR 260.22 until just prior to said hearing. On the basis shown by this record, subject hazardous waste is properly listed as F006 and no grounds for delisting same under said Section 260.22 are shown.

Respondent's violation of Groundwater Monitoring Requirements is an extensive and continuing one, and this record reflects conduct on the part of Respondent that can be best characterized as stubborn refusal to comply with regulations in the face of frequent insistence by the Iowa DEQ that subject surface impoundment was leaking and that immediate and effective action by Respondent, to correct the malfunction causing the leak, was required by pertinent regulations.

Respondent was advised, prior to the inspection on August 7, 1981, by the Iowa Department of Water, Air and Waste Management (hereinafter "IDWAWM"), formerly the Iowa Department of Environmental Quality, that the Act was applicable to its subject facility (C Ex 1, quoting letter dated February 18, 1981). It is clear that at the time of said inspection and subsequent inspections of the facility on July 28, 1982, and on February 7, 1983, that, although there had been no discharges from the surface impoundment, there was little, if any, liquid in said facility. The inspector concluded it was leaking. 6/ In each instance, Respondent was informed of said condition and its non-compliance with regulations governing its storage of hazardous waste, but no effective action was or has been taken by Respondent (TR 10 through 20; C Exs 5, 6 and 8). After an exhaustive but unsuccessful effort to get Respondent to take necessary remedial action, said IDWAWM, on January 24, 1984, referred the instant case to EPA for appropriate enforcement action (C Ex 17), whereupon the subject Complaint and Compliance Order, issued pursuant to Section 3008 of RCRA, was issued to Respondent (C Ex 16 and 17).

6/ The leak (and the serious extent of migration of hazarous waste from said lagoon) was further evidenced by an increase dating from 1980, in fluoride concentration in the water taken from one of the NPDES wells (Well #3) (C Ex 7, August 2, 1982, letter from the Iowa Department to Respondent's officer). Said letter also stated: ". . . with all the rain . . . there should be more water in the lagoon considering there has never been a discharge." (Also see C Ex 9 and TR 106.)

It was and is Respondent's clear responsibility to inspect his facility for malfunctions of any description which may be causing or may lead to a release to the environment or a threat to public health, and it is contemplated and required by Section 265.15 that such inspections identify problems in time to correct them before such harm results. Respondent first failed to make such inspections, record their results or notify the Iowa DEQ. Then, after the Iowa DEQ stepped in and made inspections, their insistence that remedial action be taken was ignored by Respondent either on the excuse he was uninformed, or on the premise that he was entitled to study the problem.

After nearly five years, Respondent does not have monitoring wells as required by Section 265.91, which provides that a groundwater monitoring system must be capable of yielding groundwater samples for analysis and must consist of at least one upgradient well and at least three monitoring wells . . . installed hydraulically downgradient. Said wells 7/ should be situated at the limit of the waste management area. Without compliance with said requirements, it is obvious that Respondent cannot effectively comply with Section 265.92 (Sampling and Analysis) and the further requirement of Section 265.93, which requires preparation of an outline of a groundwater quality assessment program which shall determine whether and to what extent subject waste has affected the groundwater.

CIVIL PENALTY

For the violations found, the Complaint proposes the assessment of a civil penalty in the total sum of $12,000: $2,500 on Count I, $2,500 on Count II and $7,000 on Count III. At the hearing, Complainant urged that the total penalty assessed should be increased to $53,000, and as authority therefor cited the Final RCRA Civil Penalty Policy, dated May 8, 1984/ Said Final Policy, page 2, provides:

7/ Two wells, one upgradient and one downgradient of subject lagoon, constructed pursuant to the requirements of a NPDES permit, October 9, 1981 (R Ex 7), obviously do not satisfy the groundwater monitoring requirements of RCRA.

"The RCRA Civil Penalty Policy is immediately applicable and should be used to calculate penalties for all RCRA administrative actions instituted after the date of the policy, regardless of the date of violation."

Since the instant Complaint was instituted on March 12, 1984, I find that said Final Policy, dated May 8, 1984, is not here applicable. For guidance, I will consider the prior proposed policy, dated September 24, 1981, in determining an appropriate penalty to be here assessed (40 CFR 22.27[b]). The Act provides that the seriousness of the violation and any good-faith efforts to comply with applicable requirements shall be taken into account (42 USC 6928[c]).

Counts I and II (failure to timely file notification and failure to timely file the Part A Permit Application) are violations of Section 3010 of the Act. It is apparent that the purpose of the statutory provisions is to identify the location, quantities and character of hazardous wastes generated, transported, stored and disposed of. In this context, it should be apparent that failure to comply with the statute in the particulars provided is not a trivial violation. Failure to enforce said statutory provisions would encourage many other such violations which would frustrate the scheme of regulation enacted by Congress for the protection of public health and the environment.

The Agency's proposed penalty for Counts I and II was premised on a finding of a moderate degree of non-compliance (considering that the said notification and permit application, although late, were eventually filed) and a further finding of a moderate potential for environmental damage (TR 114-116). I find no reason to increase or decrease the said amounts proposed, after consideration of the testimony appearing in the record and the said guidelines and the matrix supplied therewith. Accordingly, I find that a civil penalty of $2,500 is appropriate and said amount should be assessed on each of said Counts I and II.

On Count III, I find that Respondent's failure to properly monitor its said lagoon for malfunctions evidences a potential for environmental damage that is

MAJOR. I also find Respondent's conduct in its continuing refusal to recognize the need to correct - without delay - a problem (i.e., a leak that is clearly indicated on this record) which persisted from no later than 1981 up to the date of the hearing, November 1, 1984, to be a substantial degree of non-compliance. As pointed out, supra, it was Respondent's responsibility to install monitoring wells as provided by 40 CFR 265.91, to inspect the facility, to take samples to determine if any condition or problem existed which might lead to an environmental or human health hazard, and to act immediately to remedy such condition or problem in time to prevent any potential hazard. Such responsibility was not recognized or accepted by Respondent. Even when the Iowa Department stepped in and made inspections and pointed out the problem, Respondent did not take the required action to effectively remedy the problem. Further, it did not develop and follow the mandatory requirements of Part 265, Subpart F, of RCRA, without which it was not possible to determine if said hazardous waste and constituents thereof had entered the groundwater.

It should further be pointed out that intent to violate is not an element of the violation charged, as the civil penalty provision does not use the word "knowingly", as does the criminal penalty provision (cf. 42 USC 6928[d] and [g]). I find that Respondent had actual knowledge of his responsibility under the Act and regulations. He was furnished copies of the regulations, at his request, as early as 1982, and thereafter also received oral and written instructions as to how to comply. Legally, Respondent was charged with knowledge of the regulations from the date they first appeared in the Federal Register, May 19, 1980 (Matter of RIDCO Casting Co., Docket No. TSCA-82-1089 [1983], citing FCIC v. Merrill, 332 US 380, 384-85 [1947]).

In the premises, I find that a civil penalty appropriately to be assessed on Count III for violation of the Groundwater Monitoring regulations is $10,000.

A total civil penalty in the sum of $15,000 is therefore assessed. I have concluded that the amount assessed will provide sufficient deterrence to further violations by Respondent. It will be further Ordered that the Compliance Order shall remain in effect until Respondent has fully complied with the terms thereof.

All objections and Motions, made or submitted prior to, during the course of or subsequent to the hearing, if not expressly ruled by this Decision, are hereby overruled and denied.

Upon consideration of the record, the conclusions reached herein and in accordance with the criteria set forth in the Act, I recommend adoption of the following

PROPOSED FINAL ORDER 8/

1. Pursuant to Section 3008(c) of the Act, 42 USC 6928(c), a civil penalty in the total sum of $15,000 is hereby assessed against the Respondent, U.S. Nameplate, Company, Incorporated.

2. Payment of the full amount of the civil penalty assessed shall be made, within 60 days of the Service of the Final Order upon Respondent, by forwarding to the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region VII, a Cashier's or Certified check payable to the Treasurer, United States of America.

3. Respondent, U.S. Nameplate Company, shall take the following actions within the time specified:

(a) Immediately cease disposing of subject hazardous waste into the lagoon, or surface impoundment, at Respondent's said facility.

8/ 40 CFR 22.27(e) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its Service upon the parties unless (1) an appeal is taken by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision. 40 CFR 22.30(a) provides that such appeal may be taken by filing a Notice of Appeal within 20 days after Service of this Decision.

(b) Within thirty (30) days of receipt of this ORDER, submit to EPA a complete closure plan and, if applicable, a post-closure plan for subject surface impoundment. Said plan shall be developed in accordance with 40 CFR Part 265, Subpart G.

(c) Within thirty (30) days of receipt of this ORDER, submit to EPA, for subject surface impoundment, a groundwater assessment plan developed in accordance with 40 CFR Part 265, Subpart F.

(d) Immediately, upon receipt of this ORDER, cease treating, disposing of or storing (for over 90 days) any hazardous wastes. It is further ORDERED that such activity shall not be initiated or resumed unless and until a proper RCRA permit is in effect for subject facility.

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

4. It is further ORDERED, in accordance with 42 USC 6928(a)(3), that Respondent shall be assessed an additional civil penalty for each day of continued non-compliance for any failure to comply with the time frames established by paragraph 3, hereinabove.

The amount of said additional civil penalty shall be in accordance with the amounts provided in paragraph 17 (page 5 of 7) of subject Complaint, dated March 12, 1984.

5. It is further ORDERED that Respondent shall provide Notice of Compliance, with a description of any and all action taken to achieve compliance, within five (5) days of completion, to the following:

(a) Regional Administrator, U.S. EPA, Region VII;

(b) Regional Hearing Clerk, said Region VII, and

(c) Complainant's Counsel of Record.

In the event any of said actions has already been completed, notice of same shall be provided within five (5) days from and after the effective date hereof.

IT IS SO ORDERED.

DATED: April 19, 1985

Marvin E. Jones

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 Region VII, U.S. Environmental Protection Agency, 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: April 19, 1985

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ