ILLINOIS POLLUTION CONTROL BOARD
April 5, 2001

UNIVERSAL SCRAP METALS, INC.,	)	
	)	
Complainant,	)	
	)	
v.	)	PCB 99-149
	)	(Enforcement – Citizens, UST)
FLEXI-VAN LEASING, INC.,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by E.Z. Kezelis):

This matter is before the Board on a motion for summary judgment filed by respondent Flexi-Van Leasing, Inc. (Flexi-Van) on December 5, 2000. Universal Scrap Metals, Inc. (Universal Scrap) filed its response to the motion on January 12, 2001. Flexi-Van sought leave to file a reply in a motion dated January 26, 2001. On January 31, 2001, Universal Scrap filed an objection to Flexi-Van's motion for leave to file reply with respect to its motion for summary judgment. [1] As discussed more fully below, the Board grants Flexi-Van's motion for leave to file a reply, but only to the extent that its motion is accepted as its reply brief. Because Universal Scrap does not oppose Flexi-Van's motion for summary judgment as to count III, that portion of the motion is granted. Flexi-Van's motion as to counts I and II is denied. The parties are directed to proceed to hearing on the remaining counts.

UNCONTESTED FACTS

For purposes of the summary judgment motion before the Board in this citizen's enforcement action, the following facts are uncontested. The site at issue is located at 2201 West Fulton in Chicago, Cook County, Illinois, and includes one main building of approximately 34,000 square feet (site). Milton A. Gilbert owned the site from August 7, 1962, until he conveyed it to Flexi-Van's predecessor, Gilbert Property Corporation (GPC), on February 14, 1963.[2] GPC then owned the site during the period from February 1963 until July 1985. Resp. Br. at 1-2. GPC's commercial operations on the site consisted of a distribution facility that involved the use of trucks. Resp. Br. at 2.

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[1] The complaint shall be referred to as "Comp. at __." Flexi-Van's motion for summary judgment shall be referred to as "Mot. at __." Universal Scrap's response to the motion for summary judgment shall be referred to as "Resp. Br. at __." Flexi-Van's reply shall be referred to as "Reply Br. at ___."

[2] Flexi-Van does not contest its successor liability with respect to GPC. Flexi-Van Leasing, Inc., Answers to Universal Scrap Metals' First Set of Interrogatories. Q & A No. 21 at 7.

In 1980, GPC entered into an installment agreement for warranty deed with Mutual Scrap Metal Co., Inc., which had possession until 1984, when it returned the property to GPC because it could not make the required payments. Mot. at 2-3. In July 1985, GPC sold the site to William Kritt, who leased it during 1986 to Johnny McClelland. In July 1986, Harbour Development, Inc. (Harbour) purchased the site from Kritt. Mot. at 3. Universal Scrap purchased the property in 1986 and conducted scrap metal processing operations there until late 1996, when it moved its operations to another location. Zeid Aff. at 1.[3]

In 1997, Universal Scrap decided to market the site for sale. Mot. at 3. It arranged for Patrick Engineering, Inc. (PEI) to conduct a Phase I environmental assessment. Mot. at 3; Resp. Br. at 2. During the course of its assessment, PEI reviewed permit records maintained by the City of Chicago Department of Building. Those records revealed that underground storage tanks (USTs) had been installed at the site in the 1960s and 1970s. Resp. Br. at 2. PEI then undertook to locate the tanks, and eventually, clean up the site. Resp. Br. at 3.

Universal Scrap never fueled any vehicles at the site; there were no operational fueling facilities at the site during Universal Scrap's occupation and ownership. Resp. Br. at 3. Universal Scrap never stored diesel oil, gasoline, waste oil, or heating oil at the site during the time it owned or occupied the site. Zeid Aff. at 1. It never operated any USTs at the site. Zeid Aff. at 2. Universal Scrap first became aware of the tanks as the result of the 1997 Phase I assessment conducted by PEI at its request. Zeid Aff. at 2.

The Underground Storage Tanks

PEI's Phase I assessment revealed that during the course of GPC's ownership, a total of five USTs had been installed at the site. Resp. Br. at 2. Only four USTs are at issue in this proceeding, because one of the four original tanks had been removed and was replaced in 1977 with a fifth tank. Resp. Br. at 2. None of the four USTs were readily apparent. Each still contained fluids at the time PEI located their whereabouts at the site in 1997. Resp. Br. at 3.

Tank number one was a 10,000-gallon diesel fuel UST installed outside the southeast corner of the site building pursuant to a permit issued to GPC on October 11, 1977. Tank number one replaced another 10,000-gallon tank that had been installed on September 25, 1974. Resp. Br. at 2. All piping had been removed from this tank, and the area above it had been paved over with asphalt. Resp. Br. at 4. At the time PEI found it, approximately 264 gallons of diesel oil remained in tank number one.

Tank number two was a 10,000-gallon gasoline UST installed pursuant to a permit issued to GPC on November 19, 1962. This tank was also located outside the building, but at the southwest corner. Resp. Br. at 2. According to aerial photographs taken in 1963 and

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[3] The affidavit of Philip Zeid is attached as exhibit C to Universal Scrap's response and shall be referred to as "Zeid Aff. at __."

1975, an outdoor concrete pad and a pump island containing fill pumps and lighting had been connected to this UST. Resp. Br. at 3-4. By the time PEI conducted its work, the fillports, vent piping and pumping equipment had been removed and the ground surface over this tank had been smoothed to an even grade. Resp. Br. at 4. PEI discovered approximately 2,000 gallons of gasoline in this tank.

Tank number three was a 1,000-gallon waste oil UST installed on the site outside the south side of the building. Resp. Br. at 3. Although this tank was located outside the building, access to the tank was through a slanted floor drain located inside the building. The outdoor vertical standpipe and manhole that normally would have been present had been removed and paved over with asphalt. Resp. Br. at 4. PEI discovered approximately 500 gallons of waste oil fluids in tank number three. Resp. Br. at 3.

Finally, tank number four was a 7,600-gallon fuel oil UST that was installed pursuant to a permit issued to GPC in 1963. This UST was located underneath an office inside the building. Resp. Br. at 3. It was concealed under a metal plate, which had been floored over and carpeted. Resp. Br. at 4. Approximately 6,400 gallons of a mixture of heating oil and wash water were removed from this tank. Resp. Br. at 3.

Condition of the USTs and PEI's Remediation

After PEI identified the whereabouts of the USTs, Universal Scrap authorized PEI to address them. PEI found that each of the four USTs identified at the site was in sound, non-leaking condition. The tanks had no cracks or holes, the tanks did not leak, and the tanks could have continued to be used when PEI examined their condition. Reply Br. at 8.

During the course of the work on tank number one, however, PEI found that a release of diesel fuel had contaminated surrounding soil. Resp. Br. at 5. PEI speculated that the release may have occurred because of leakage from the preexisting tank, or because of spillage or overflow during filling. Resp. Br. at 5. A 45-day Leaking Underground Storage Tank Report was submitted to the Illinois Environmental Protection Agency for tank number one. Resp. Br. at 5.

Ultimately, tanks one, two, and three (the three USTs located outside the building), were emptied, evacuated to render them inert, removed from the ground, cleaned, destroyed and disposed of. With respect to the soil surrounding tank number one, approximately 250 cubic yards (350 tons) of contaminated soil was removed, hauled away to a licensed facility, and replaced. Resp. Br. at 5. Universal Scrap received a "No Further Remediation Letter" for the work surrounding tank number one's location in September 1998. Resp. Br. at 5.

Tank number four, which was located underneath an office inside the building, could not be readily removed. Accordingly, it was abandoned in place. Resp. Br. at 5. This process consisted of cutting an access manhole into the UST, emptying it of fuel, cleaning it out, and filling it to the top with cement slurry. Resp. Br. at 5.

ALLEGATIONS OF THE COMPLAINT

Universal Scrap filed its citizen's enforcement action against Flexi-Van on April 19, 1999. Generally, Universal Scrap alleged that contamination of the site had occurred while Flexi-Van owned the property, and that Universal Scrap was entitled to reimbursement for the costs of investigation and remediation. Pursuant to Board practice, a duplicitous/frivolous determination was made, and but for two exceptions, the Board accepted this matter for hearing, finding that it was neither duplicitous nor frivolous. The two exceptions involved an alleged violation of Section 57.1(a) of the Environmental Protection Act (Act) (415 ILCS 5/57.1(a) (1998)), which the Board struck, and a request for an award of attorney fees, which the Board has previously held are only awarded in those cases in which the Attorney General or State's Attorney successfully prosecute a case on behalf of the People. Universal Scrap Metals, Inc. v. Flexi-Van Leasing, Inc. (May 20, 1999), PCB 99-149.

Accordingly, Universal Scrap's complaint was accepted with the following alleged violations: count I, which alleged open dumping in violation of Section 21(a) of the Act (415 ILCS 5/21(a) (1998)); count II, which alleged improper disposal, treatment, storage, or abandonment of waste in violation of Section 21(e) of the Act (415 ILCS 5/21(e) (1998)); and count III, which alleged improper operation of a hazardous waste-storage or disposal operation in violation of Section 21(f)(2) of the Act (415 ILCS 5/21(f)(2) (1998)). After the parties completed discovery, Flexi-Van filed the summary judgment motion now before the Board.

SUMMARY JUDGMENT

Standard for Summary Judgment

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief, "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

In order to grant Flexi-Van's motion for summary judgment, the Board must find that there is no genuine issue of material fact and that the undisputed facts show that Flexi-Van's

right to the relief requested is "clear and free from doubt." See Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill, 111 Ill. 2d at 240, 489 N.E.2d at 871.

Flexi-Van's Motion for Summary Judgment

Flexi-Van argues that it is entitled to summary judgment for the following reasons. First, it suggests that the Board should consider Universal Scrap's motives in remediating the USTs and filing this action before it. According to Flexi-Van, Universal Scrap decided to make the site more marketable in anticipation of selling it, and filed this action in order to recoup expenses incident to the sale. Second, Flexi-Van argues that with respect to count I, there is no evidence that its predecessor, GPC, engaged in open dumping within the purview of Section 21(a) of the Act. 415 ILCS 5/21(a) (1998). With respect to count II, Flexi-Van argues that there is no evidence that GPC released any product into the environment or disposed of or abandoned the USTs at the site. Moreover, Flexi-Van argues, even if the USTs were abandoned, the Board lacks jurisdiction to regulate their abandonment.

Finally, Flexi-Van argues that there is no evidence that GPC conducted a hazardous waste operation, as was alleged in count III of the complaint. Universal Scrap does not challenge this characterization of the record evidence with respect to count III. Indeed, Universal Scrap concedes that no hazardous waste operations took place at the site. See Resp. Br. at 6, fn. 5. There is, accordingly, no genuine issue of material fact. Because count III relied on allegations of improper hazardous waste operations, and because the record demonstrates no such operation was conducted, the Board grants summary judgment in favor of Flexi-Van on this count.

A discussion of Universal Scrap's arguments, Flexi-Van's reply, and the Board's analysis with respect to the remaining counts I and II follows.

Count I: Open Dumping

Flexi-Van relies on the statutory definition of "open dumping" to refute count I. It points to the statutory meaning as the "consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." 415 ILCS 5/3.24 (1998). Because "refuse" means waste (415 ILCS 5/3.31 (1998)), and "waste" means "any garbage . . . or other discarded material" (415 ILCS 5/3.53 (1998)), Flexi-Van argues that the evidence does not satisfy this statutory construction. Mot. at 7. To buttress its argument, Flexi-Van notes that the USTs were not refuse when they were installed at the site and filled, and that there is no evidence of "consolidation" at the site from other sources. Finally, Flexi-Van argues that the only contamination that was discovered by PEI was that surrounding tank number one, and that it should not be made to pay for Universal Scrap's unilateral decision to make the property more marketable by removing all of the USTs. Mot. at 7.

Universal Scrap, however, points to this Board's rulings addressing situations where contaminating substances have leaked from barrels or USTs and been declared to be actionable

"discarded material" or "waste" within the meaning of Section 21(a) of the Act (415 ILCS 5/21(a) (1998)). Resp. Br. at 9. See, *e.g.*, People v. State Oil Co. (August 19, 1999), PCB 97-103; Malina v. Day (February 18, 1999), PCB 98-54; Lake County Forest Preserve District v. Ostro (March 31, 1994), PCB 92-80; Krautsack v. Patel (August 21, 1997), PCB 95-143.

In addition, Universal Scrap argues that the record evidence sufficiently supports its allegations under count I, or at least raises a sufficient issue to warrant denial of summary judgment. Specifically, it notes that: Flexi-Van's predecessor was the owner of the property until 1985; that it had the USTs installed and that it operated them; that it conducted trucking operations on the site; that one UST installed in 1974 was replaced by another in the same hole three years later, in 1977; and, that diesel fuel was released or escaped from one of those two tanks, thereby contaminating the surrounding soil. Resp. Br. at 12.

In reply, Flexi-Van argues again that there is no evidence to support a finding that it was the entity that filled the tanks with any of the fluid discovered by PEI, that it "consolidated" wastes or that it was the entity in the chain of control over the site that disabled, disconnected, partially dismantled, and concealed the USTs. Reply Br. at 3-4. Moreover, it argues, there is no legal authority for the proposition that installing USTs on property or filling them with fluid constitutes "consolidation" for purposes of the Act. Reply Br. at 4.

Analysis

Statutory Definitions

Section 3.24 of the Act defines "open dumping" as: "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill." 415 ILCS 5/3.24 (1998).

Section 3.31 of the Act defines "refuse" as waste. 415 ILCS 5/3.31 (1998).

"Waste" is defined in Section 3.53 of the Act as follows:

> "WASTE" means any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities . . . . 415 ILCS 5/3.53 (1998) (emphasis added).

Finally, Section 3.08 defines "disposal" as:

> [T]he discharge, deposit, injection, dumping, spilling, leaking or placing of any waste or hazardous waste into or on any land or water or into any well so that such waste or

hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

Board and Judicial Interpretations of "Open Dumping" from Leaking USTs

Despite Flexi-Van's mechanistic reading of Section 21(a), the Board has previously held that contamination from leaking underground tanks satisfies the statutory prerequisites of "open dumping" under Section 21(a) of the Act. In People v. State Oil Co. (August 19, 1999), PCB 97-103, the Board denied a motion to dismiss a citizens enforcement UST cross-complaint under Section 21(a) on the grounds that "waste" could include leaking petroleum from USTs. In reaching that conclusion, the Board noted that it had previously relied on federal court interpretations of the definition of "solid waste" under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 *et seq.*, and cited R.R. Donnelley & Sons. Co. v. IEPA (February 23, 1989), PCB 88-79, slip op. at 3-5, as an example. In R.R. Donnelley, the Board was obligated to determine whether oil, chemically similar to fuel oil, which was collected from printing presses and sold as fuel oil substitute was in fact "waste." The Board examined RCRA definitions of "waste" and "discard" to conclude that collected and resold printing oil was not "waste."

Similarly, federal courts have found that once petroleum has leaked from USTs, it becomes a "waste." See, *e.g.*, Agricultural Excess & Surplus Ins. v. A.B.D. Tank & Pump Co., 878 F. Supp. 1091, 1095 (N.D. Ill. 1995) ("[L]eaked gasoline from an underground storage tank is no longer useful and is appropriately defined as discarded material or solid waste.") and Zands v. Nelson, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991) ("[G]asoline is no longer a useful product after it leaks into, and contaminates, the soil."). Both cases were relied on by the Board in People v. State Oil Co., *supra*, and found to be "persuasive." State Oil, PCB 97-103, slip op. at 4.

Non-Leaking USTs

Except for R. R. Donnelley, each of the cases discussed in the immediately preceding section involved leaking USTs. In the instant proceeding, however, the USTs did not "leak;" instead, it is uncontroverted that the USTs were still in good condition when they were removed, and could have continued to be used.

To further complicate matters, both Agricultural Excess and Zands, *supra*, observed in *dictum* that "waste" should not include gasoline that was still useful. Agricultural Excess, 878 F. Supp. at 1094-95; Zands, 779 F. Supp. at 1262. Both cases took pains to narrowly construe the facts before them. *Id.* Zands, however, took the additional important step of qualifying its *dictum*: "[t]he fact, however, that a product may at one time in the past be useful is of no benefit to those trying to avoid this statute once the product's usefulness lapses." 779 F. Supp. at 1262. Thus, Zands implicitly recognized that the "usefulness" of a commodity like gasoline, or the USTs in which it is stored, does not last indefinitely, and that gasoline or the USTs need not in all circumstances leak to constitute "waste."

UST Regulations since the 1970s

Several decades elapsed between the time that the USTs were installed by GPC, Flexi-Van's predecessor, and the time they were discovered and unearthed by Universal Scrap. While this passage of time alone may or may not have rendered the USTs and the petroleum they contained no longer useful, the Board need not resolve this question at this time. Instead, the question is better framed in light of the regulatory framework for USTs that existed during this twenty- or thirty-year time period.

Since at least the mid-1970s, an affirmative regulatory obligation has existed to either remove or fill in place non-leaking, petroleum-containing USTs that have been taken permanently out of use. Over that span of time, the obligation has arisen at the federal, State, or local level. There also have been exceptions to the closure obligation. An overview of the complex statutory and regulatory history of these labyrinthine closure obligations is set forth chronologically in the Appendix to this order.

It is uncontroverted that GPC installed the USTs and used them. It is uncontroverted that someone (perhaps GPC, perhaps not) permanently ceased using them. When that occurred, a specific regulatory closure obligation may have accrued (perhaps to GPC, perhaps not). See Appendix. It is furthermore uncontroverted that only Universal Scrap, which never used the USTs, satisfied any applicable closure obligations. Its satisfaction of any such obligations was at no small expense. Determining whether and when a regulatory obligation to close the USTs was triggered, and to whom it applied, depends largely upon when the USTs were permanently taken out of use. That is unknown. Given that summary judgment is a drastic measure, Flexi-Van's right to such relief upon this record is neither clear nor free from doubt. Accordingly, the Board denies summary judgment on count I.

Count II: Disposing of or Abandoning Waste

In count II of its complaint, Universal Scrap alleges that Flexi-Van violated Section 21(e) of the Act by disposing, treating, storing or abandoning waste at a facility which did not meet the requirements of the Act. In its motion for summary judgment, Flexi-Van argues that there is no evidence that its predecessor released any product into the environment, or that it disposed of or abandoned the USTs at the site. Mot. at 8. In particular, Flexi-Van notes that Universal Scrap has not demonstrated that it was during Flexi-Van's watch that the tanks were last used, or diesel fluid contaminating the soil surrounding tank number one was released. Mot. at 8-9. In addition, Flexi-Van stresses the fact that all four tanks were still in good, operable condition when PEI removed them and remediated the site. Mot. at 9.

Finally, Flexi-Van argues that even if the USTs are deemed to have been abandoned the regulation of out-of-service systems and their closure is within the exclusive purview of the State Fire Marshal under the Gasoline Storage Act. 430 ILCS 15/2(3)(a) (1998). According

to Flexi-Van, non-leaking USTs can not be the basis of an action before the Board. Mot. at 11.

In response, Universal Scrap claims that Flexi-Van's argument misses the mark. First, Universal Scrap argues that the terms "store" and "abandon" within Section 21(e) of the Act have commonly understood meanings, and that the condition of these particular USTs (concealed and left unused in partially full condition) satisfies those terms. Universal Scrap also argues that Ostro and Malina, *supra*, support the proposition that an action for improper "storage" and "disposal" such as Universal Scrap's can be maintained before the Board. Resp. Br. at 14-15.

In reply, Flexi-Van argues that Universal Scrap must show that the USTs at the site were "waste" and that Flexi-Van, and not Harbour, Kritt, or McClelland, abandoned them there. Reply Br. at 5. Flexi-Van argues that Universal Scrap cannot do so. First, because the USTs were intact, non-leaking and still useable, they could not constitute "waste." Second, there is no record evidence concerning whether or not the subsequent occupants of the site used the USTs, filled them, spilled over them or, for that matter, concealed them. Reply Br. at 8.

Finally, Flexi-Van distinguishes both Ostro and Malina on the grounds that both involved leaking containers. Reply Br. at 9-10. Similarly, Flexi-Van distinguishes Krautsack because there, a 55-gallon drum was placed in the floor and filled with different liquid wastes, which then overflowed out of the barrel. In this case, the USTs did not leak.

Analysis

Count II of Universal Scrap's complaint alleges that Flexi-Van abandoned the tanks in violation of Section 21(e) of the Act.

Section 21(e) of the Act provides that no person shall:

> Dispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.

Other relevant definitions appear above.

Board and Judicial Reported Decisions

Very few decisions involving "abandoned," non-leaking UST tanks in an action under Section 21(e) have been reported. See, *e.g.*, Singer v. Bulk Petroleum, 9 F. Supp. 2d 916 (N.D. Ill. 1998). In that case, Bulk leased property owned by Singer. In late 1967, with Singer's consent, Bulk demolished an existing gas station and began to construct a new gas station facility. This included installing three new USTs and taking the three old USTs out of service. Bulk did not remove the old USTs after taking them out of service, however; instead,

unbeknownst to Singer, Bulk left them in place and simply covered over them, much as was alleged to have occurred in this case. The three "new" USTs were eventually registered as required by law.

Bulk continued leasing the property until 1983, when it advised that it would terminate the lease and leave specified equipment in place. The three "newer" USTs were listed in the lease termination notice; the three old "orphan" USTs were not. In June 1994, the owner removed the three newer USTs. Further investigation revealed the existence of the three "orphan" USTs, as well as the fact that each of the six "might have been" leaking. Singer, 9 F. Supp. 2d at 919.

In addition to RCRA allegations against Bulk, Singer also brought a pendent State claim under Section 21(e) of the Act. In ruling on Bulk's motion to dismiss, the court held that Singer's action was based on an implied "private right of action for recovery of clean-up costs under the IEPA" and not on the UST provisions. Singer, 9 F. Supp. 2d at 924-25. The court held that Singer had sufficiently alleged a claim for a private right of recovery by alleging acts of abandoning waste at the property, and denied Bulk's motion to dismiss.

Given the uncontroverted fact that the presence of each of these USTs was carefully and intentionally concealed, it is evident that the concealor purposefully acted to "abandon" them. As with count I, upon this record, the Board is unable to determine when the abandonment occurred. Accordingly, summary judgment on count II must also be denied.

Finally, the parties should be aware that the Board has previously found intentional concealment to be among "the worst kind of corporate behavior." Krautsack, PCB 95-143, slip op. at 7. Once an underground storage tank is installed, there is very little that even a concerned and responsible owner can do to prevent a leak. Township of Harlem v. IEPA, 265 Ill. App. 3d 41, 637 N.E.2d 1252, 1255 (2nd Dist. 1994). The "wanton disregard of environmental safety and regulations, plus a purposeful attempt to conceal the contamination" is no less reprehensible where, as here, significant contamination had not yet occurred. Krautsack, 95-143, slip op. at 7.

CONCLUSION

For the foregoing reasons, the Board finds that genuine issues of material fact still exist in this matter as to counts I and II. Accordingly, the motion for summary judgment as to those two counts is denied, and the parties are directed to proceed to hearing on them. As for count III, the Board finds that no genuine issue of material fact remains, and that movant Flexi-Van is entitled to judgment in its favor as a matter of law.

ORDER

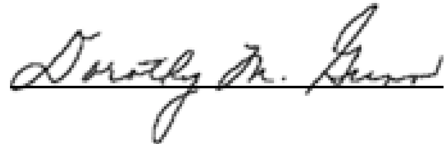
The Board hereby grants summary judgment in favor of Flexi-Van Leasing, Inc., against Universal Scrap Metals, Inc., but only as to count III.

IT IS SO ORDERED.

Board Member R.C. Flemal dissented.

Board Member M. McFawn concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 5th day of April 2001 by a vote of 6-1.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

APPENDIX

OVERVIEW OF CLOSURE REQUIREMENTS
FOR PETROLEUM USTS LOCATED IN CHICAGO

DATE	CITATION	SUMMARY
1) 1975	1) Chicago Municipal Code Section 129.1-22 (recodified as Section 15-24-280)	1) "Underground tanks taken out of service shall be disposed of by any one of the following three means: (a) Being placed in 'temporarily out of service' condition ['not being used for a period of time less than six months;' steps include '[r]emove all flammable liquid that can be pumped out with the service pump;'] (b) Abandoned in place [steps include '[r]emove all flammable liquid from tank and from all connecting lines' and '[t]he tank shall be . . . filled with an inert solid material;'] or (c) Removed."
2) 1977	2) Ill. Rev. Stat. Ch. 127½, par. 154 (recodified as 430 ILCS 15/2) (Pub. Act 80-147)	2) "Except in cities or villages where regulatory ordinances upon the subject are now or may hereafter be adopted," the Illinois Office of the State Fire Marshal (OSFM) has the authority to adopt rules "governing the keeping, storage, transportation, sale or use of gasoline and volatile oils."
3) 1977	3) OSFM Rule 16 (after codification, 41 Ill. Adm. Code 170.160(f))	3) "Underground tanks which . . . are permanently discontinued in service shall be removed promptly or shall be filled with sand."
4) Oct. 1, 1985	4) 41 Ill. Adm. Code 170.75 (9 Ill. Reg. 9514)	4) Deletes closure requirement (item 3 above) and adds new closure provisions. Defines "abandonment" as one year of "non-use." However, if the "owner of the property" states that reuse will occur "within a 12 month period, the facility will not be considered abandoned until the end of a 2 year period." "Temporarily out of service tanks may be left in place up to one year" if several steps are taken, including removal of all product. "Permanent Abandonment (more than one year). Tanks abandoned for more than one year shall be removed from the site."
5) July 2, 1986	5) 41 Ill. Adm. Code 170.75 (10 Ill. Reg. 12324)	5) Emergency rules (effective for no more than 150 days) provide that a UST may be "abandoned in place" if OSFM grants a "variance" from the removal requirement described in item 4 above. OSFM will grant a variance "where it would be infeasible to remove the tank due to loss of adjacent and-or subjacent support of nearby structures, railroad tracks, streets . . . or other tanks." "The tanks shall be filled with sand or pea gravel (not concrete) . . . . All vent, fill, gauge, piping and other lines from the tank shall be filled with a solid, inert impervious material (such as concrete) to render the tank unfillable."
6) Sept. 4, 1986	6) Ill. Rev. Stat. Ch. 127½, par. 154 (Pub. Act 84-1320)	6) Deletes the following language from item 2 above: "Except in cities or villages where regulatory ordinances upon the subject are now or may hereafter be adopted." Adds the following language: "The jurisdiction of [OSFM] under this Act shall be concurrent with that of municipalities and other political subdivisions." Also provides that, "except in municipalities of over 500,000 in population, no municipality or other

		political subdivision shall adopt or enforce any ordinances or regulations regarding such underground tanks and piping other than those which are identical to the rules and regulations of [OSFM]." Pursuant to Article VII, Section 6(h) and (i) of the Illinois Constitution, "the establishment of standards regarding underground storage tanks and associated piping within the jurisdiction of [OSFM] is an exclusive State function which may not be exercised concurrently by a home rule unit except as expressly permitted in this Act."
7) Sept. 24, 1987	7) Ill. Rev. Stat. Ch. 127½, par. 154, 156 (par. 156 recodified as 430 ILCS 15/4) (Pub. Act 85-861)	7) OSFM must adopt rules that are "identical in substance" to the United States Environmental Protection Agency's (USEPA) UST rules under the federal Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6991b). OSFM may adopt additional regulations "that are not inconsistent with and at least as stringent as [RCRA] or regulations adopted thereunder." (USEPA's UST rules are at 40 C.F.R. 280—see item 9 below). Expressly incorporates RCRA definitions of "owner" and "operator." RCRA provides as follows: "The term 'owner' means— (A) in the case of an underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for storage, use, or dispensing of regulated substances, and (B) in the case of any underground storage tank in use before November 8, 1984, but no longer in use on November 8, 1984, any person who owned such tank immediately before the discontinuation of its use." 42 U.S.C. 6991(3). "The term 'operator' means any person in control of, or having responsibility for, the daily operation of the underground storage tank." 42 U.S.C. 6991(4).[1]
8) April 26, 1988	8) 41 Ill. Adm. Code 170.75 (12 Ill. Reg. 8023)	8) Codifies in final rules the "abandonment in place" procedure from the emergency rules (see item 5 above), but refers to a "waiver" of the UST removal requirement instead of a "variance." Amends language regarding the material with which to fill the UST for abandonment in place.
9) Dec. 22, 1988	9) 40 C.F.R. 280.70, 280.71	9) Under USEPA's UST regulations, when "an UST system is temporarily closed, owners and operators" must take certain steps, including maintaining corrosion protection and any release detection, except "release detection is not required as long as the UST system is empty." When "an UST system is temporarily closed for more than 12 months, owners and operators must permanently close the UST system if it does not meet" certain performance standards or upgrading requirements. "Owners and operators must permanently close the substandard UST systems at the end of this 12-month period . . . unless the implementing agency provides an extension of the 12-month temporary closure period. Owners and operators must complete a site assessment . . . before such an extension can be applied for." "To permanently close a tank, owners and operators must empty and clean it . . . . All tanks taken permanently out of service must also be

		either removed from the ground or filled with an inert solid material." RCRA definitions of "owner" and "operator" (see item 7 above) are codified at 40 C.F.R. 280.12.
10) Jan. 27, 1989	10) 41 Ill. Adm. Code 170.75 (13 Ill. Reg. 1886)	10) OSFM adopts emergency rules (effective for no more than 150 days). See item 4 above. "Abandonment" is "the relinquishing of an underground storage tank to non-use for one year. However, if during that one-year period the owner of the underground storage tank submits in writing a statement to [OSFM] that the tank will be reused within the immediately subsequent 12-month period, the tank will not be considered abandoned until the end of a two-year period and will be considered 'temporarily out of service' if the required criteria are complied with during that initial one-year period. An underground storage tank abandoned for a one-year period and which has not been conformed to the criteria of a temporarily out of service tank within that period may not then comply with those criteria and be classified as temporarily out of service." "Temporarily out of service tanks may be left in place for a period of two years commencing from the date of non-use, provided [certain] criteria constituting temporarily out of service tanks are complied with during the first year of such non-use . . . ." The criteria include "[a]ll products are removed." "Tanks abandoned one year shall be removed from the site within the immediately subsequent year unless a waiver [allowing abandonment in place] is granted . . . ." See item 8 above regarding abandonment in place.
11) April 21, 1989	11) 41 Ill. Adm. Code 170.400, 170.620, 170.670 (13 Ill. Reg. 5669)	11) Renumbers Section 170.75 as Section 170.670 and moves provisions on "temporarily out of service" USTs to Section 170.620. "The owner of an UST system in a state of non-use who wants the system classified as temporarily out of service, shall submit a written statement" to OSFM. "When an UST system is temporarily closed, owners and operators" must take certain steps, including maintaining corrosion protection and any release detection, except "release detection is not required as long as the UST system is empty." "When an UST system is temporarily closed for more than 12 months, owners and operators must remove the UST system if it does not meet" certain performance standards or upgrading requirements. "Owners and operators must remove the substandard UST systems at the end of this 12-month period . . . unless [OSFM] provides in writing an extension of the 12-month temporary closure period. Owners and operators must complete a site assessment . . . before such an extension can be applied for, and submit the request for an extension and the site assessment in writing to [OSFM] within that 12-month period." "Temporarily out of service tanks may be left in place for a period of two years commencing from the date of non-use, provided [certain] criteria [some of which are discussed above] are complied with during the first year of such non-use. An underground storage tank abandoned for a one-year period that is not in compliance with those criteria, may not then comply and be classified

		as temporarily out of service." Defines "abandonment" as one year of "non-use." However, if the "owner of the property" states that reuse will occur "within a 12 month period, the facility will not be considered abandoned until the end of a 2 year period." "Permanent Abandonment (more than one year). Tanks abandoned for more than one year shall be removed from the site unless a waiver [allowing abandonment in place] is granted . . . ." See item 8 above regarding abandonment in place. Adopts RCRA definition of "operator" (see item 7 above), but OSFM's definition of "owner" differs from RCRA definition of the term (see item 7 above). OSFM defines "owner" as a "person who has legal or equitable title to an UST system which has or has had a regulated substance(s) contained in it."
12) July 28, 1989	12) Ill. Rev. Stat. Ch. 127½, par. 154, 156 (Pub. Act 86-125)	12) Deletes "except in municipalities of over 500,000 in population." See item 6 above. Adopts OSFM's definition of "owner" (see item 11 above) and deletes the reference to RCRA definition of the term (see item 7 above).
13) April 10, 1990	13) 41 Ill. Adm. Code 170.670 (14 Ill. Reg. 5781)	13) "Abandonment" is "the relinquishing of an underground storage tank to non-use for 12 consecutive months. However, if during that one-year period, the owner of the underground storage tank submits in writing a statement to [OSFM] that the tank will be reused within the immediate subsequent 12-month period, the tank will not be considered abandoned until the end of a two-year period (commencing from the date of non-use) and will be considered 'temporarily out of service', provided the required criteria in Section 170.620 [see item 11 above] are complied with." "Underground storage tanks abandoned one year, shall be removed from the site within the immediate subsequent year unless a waiver [allowing abandonment in place] is granted . . . ." See item 8 above regarding abandonment in place. Amends language regarding the material with which to fill the UST for abandonment in place.
14) Sept. 15, 1992	14) Ill. Rev. Stat. Ch. 127½, par.154, 156 (Pub. Act 87-1088)	14) OSFM "shall not require the removal of an underground tank system taken out of operation before January 2, 1974, except in the case in which [OSFM] has determined that a release from the underground tank system poses a current or potential threat to human health and the environment." "Operation" means "that the tank must have had input or output of petroleum, petroleum products, or hazardous substances, with the exception of hazardous wastes, during the regular course of its usage. 'Operation' does not include (i) compliance with leak detection requirements . . . or (ii) the mere containment or storage of petroleum, petroleum products, or hazardous substances, with the exception of hazardous wastes."
15) Sept. 13, 1993	15) Ill. Rev. Stat. Ch. 127½, par.	15) Reverts to RCRA definition of "owner" (see item 7 above) and deletes OSFM definition of "owner" (see item 11 above).

	156 (Pub. Act 88-496)	
16) April 1, 1995	16) 41 Ill. Adm. Code 170.400, 170.620, 170.670, 170.672 (19 Ill. Reg. 5467)	16) Codifies RCRA definition of "owner" (see item 7 above). OSFM also uses the statutory definition of "operation" (see item 14 above) to define "operation" or "use." "The owner of a UST system in a state of non-use who wants the system classified as temporarily out-of-service shall submit a written request to [OSFM]. The written request shall be submitted within three months from the date of non-use." "When a UST system is temporarily out-of-service, owners and operators shall continue operation and maintenance of corrosion protection . . . and any release detection . . . ." "However, release detection is not required as long as the UST system is empty." "When a UST system is temporarily closed for 12 months, owners or operators shall remove the UST system, within the subsequent 12 months. The UST system shall be removed if it does not meet" certain "performance standards . . . for new UST systems . . . ." "Owners or operators shall remove a substandard UST system at the end of this 12-month period . . . ." "Owners or operators of temporary-out-of-service UST systems in compliance . . . may apply for a second 12-month extension period. To be eligible for this second 12-month extension period, a site assessment . . . shall be completed, and the site assessment and request for an extension shall be submitted in writing to [OSFM] within the first 12-month period." "Temporarily out-of-service tanks, which have received the [second 12-month] extension . . ., shall be removed at the end of that 12-month period . . . ." "When an underground storage tank has been out of operation for 12 consecutive months, the owner of the tank shall remove it within the immediate subsequent 12-month period, subject to [certain] exceptions . . . ." The exceptions include not only USTs properly abandoned-in-place or placed temporarily out-of-service. "USTs not in operation at any time after January 1, 1974 (commonly referred to as 'pre-'74 USTs') . . . are not required to be removed, unless [OSFM] has determined that a release from the USTs poses a current or potential threat to human health and the environment . . . . [I]f they are removed or abandoned-in-place," requirements for those activities apply. "Heating oil USTs (for consumptive use on the premises where stored), regardless of when last in operation, are not required to be removed, unless [OSFM] has determined that a release from the USTs poses a current or potential threat to human health and the environment." "[I]f they are removed or abandoned-in-place," requirements for those activities apply.[2] Permissible reasons for waiver of UST removal requirement (to allow abandonment in place): "Waiver of the removal requirement for a tank and piping, allowing them to be abandoned-in-place, shall be granted where it would be infeasible to remove the UST due to loss of adjacent or subjacent support of nearby structures, railroad tracks, streets . . ., other USTs or in unusual situations where removal is infeasible due to other reasons, as determined by [OSFM], or is infeasible because of

		inaccessibility, as determined by [OSFM]."

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[1] RCRA allows state UST programs approved by USEPA to operate in lieu of the federal program. See 42 U.S.C. 6991c. Illinois does not have state program approval. See 40 C.F.R. 281, 282. Instead, through cooperative agreement with USEPA, Illinois implements the UST program. Technically, however, both the federal and State regulations apply in Illinois.

[2] USEPA's definition of "UST" excludes a "[t]ank used for storing heating oil for consumptive use on the premises where stored." 40 C.F.R. 280.12. OSFM limited this exclusion to a "[t]ank of 1,100 gallons or less capacity used for storing heating oil for consumptive use on the premises where stored." 41 Ill. Adm. Code 170.10(t)(2) (Jan 27, 1989). With the April 16, 1995 changes, OSFM changed this exclusion from the definition of "UST" to read as follows: "Heating oil tank of any capacity used exclusively for storing heating oil for consumptive use on a farm or residence." 41 Ill. Adm. Code 170.400. Various statutory changes (Ill. Rev. Stat. 127½, par. 156) took place addressing heating oil tanks with respect to the "UST" definition. See Pub. Act 86-1050 (July 11, 1990); Pub. Act 87-323 (Sept. 6, 1991).