ILLINOIS POLLUTION CONTROL BOARD
June 30, 1988

PEOPLE OF THE STATE OF ILLINOIS,	)	
Complainant,	)	
v.	)	PCB 84-93
S.C. INDUSTRIES, INC.,	)	
Respondent.	)	

KATHLEEN SMITH, ATTORNEY-AT-LAW, APPEARED ON BEHALF OF THE PEOPLE OF THE STATE OF ILLINOIS; AND

BERTRAM STONE, ATTORNEY-AT-LAW, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on the July 18, 1984 Petition of the People of the State of Illinois (hereinafter "People") complaining of J. William Carlson doing business as S.C. Industries (hereinafter "SCI"). The complaint charges SCI with numerous violations of the Board rules governing hazardous waste management, see 35 Ill. Adm. Code 700-725 (1984), adopted pursuant to the Illinois Environmental Protection Act ("Act") and the Federal Resource Conservation and Recovery Act of 1976, as amended (hereinafter "RCRA"). See 42 U.S.C. Sec. 6901 et seq. (1987); Ill. Rev. Stat. ch. 111-1/2, par. 1022.4 (1988).

SCI filed a Motion to Strike and Dismiss on August 2, 1984, and the Board responded in its September 20, 1984 Order by naming SCI as the respondent and appropriately recaptioning the case. The People responded with a First Amended Complaint filed October 2, 1984. SCI answered this complaint on October 16, 1984. The People filed their Second Amended Complaint on December 13, 1984 containing the same basic allegations as the prior complaints. SCI answered this Second Amended Complaint on May 6, 1985. Public hearings were held on August 1, 2, 8 & 19, 1985. No member of the public attended. The People filed their post-hearing brief on October 4, 1985. SCI filed a Motion for Extension of Time for Filing Briefs on November 21, 1985. The People filed a Motion to Close Record on December 26, 1985. SCI filed its post-hearing brief on January 8, 1986 on motion. The Board ordered the record closed on January 25, 1986 by its January 9, 1986 Order. The People filed their Reply Brief on January 24, 1986.

I. Facts

SCI is an Illinois corporation engaged in the business of electroplating nickel, chromium, and brass onto wire and tubular products at 2350 North 17th Street in Franklin Park, Illinois. It has continuously engaged in this business at this location since 1969. SCI occupies a 31,000 square foot leased plant and employs 50 to 60 persons full-time. (R. 307-13). SCI produces several hazardous wastes from its plating operations for ultimate disposal. (P. Ex. 18).

The People charge SCI with non-compliance with various Board regulations governing the proper management of these wastes. The alleged non-compliance arose out of numerous Illinois Environmental Protection Agency (hereinafter "Agency") inspections of SCI during 1983 and 1984. The Agency sent a notice of apparent violations to SCI on April 22, 1983. (P. Ex. 15). The People subsequently filed this action on August 24, 1984. The details of the allegations are reserved for later discussion, but it is presently useful to briefly describe them as contending that SCI committed acts of both transient and continuing non-compliance with various of the Board's rules governing hazardous waste generator and hazardous waste treatment, storage, and disposal (hereinafter "T/S/D") facility standards.

The Board concludes that SCI was in non-compliance with various of the the hazardous waste generator and T/S/D facility regulations. The Board believes that certain actions by SCI can readily bring about full compliance. The Board's Order will require these actions. It will also require SCI to pay an aggregated administrative penalty of $10,500 for its former non-compliance.

II. Preliminary Discussion

Preliminary to its analysis of the substance of the several counts of the complaint, the Board feels it appropriate to take a broader look at this case. Initially, the Board examines the character of the case. It then gives an overview of its RCRA regulations. Finally, this preliminary discussion gives a generalized outline of the complaint.

The People characterize the nature of SCI's non-compliance as willful and egregious. SCI counters that it has made good-faith efforts to correct its "technical" non-compliance, and that no harm has resulted from its non-compliance. It is worthy of note that the major purpose of enforcement actions is to assure compliance. The appropriateness of any administrative action to correct non-compliance is largely dependent on the actions of the respondent under the circumstances. Repeated, continuing, or flagrant non-compliance can indicate the need for stronger administrative action to encourage compliance. On the other

hand, a demonstrated ready willingness of the respondent to promptly correct its non-compliance, that its non-compliance was based on a good-faith misunderstanding of applicable law or regulations, or other mitigating circumstances, can indicate that less administrative action is necessary. The relief granted will depend on the facts established by the record in the individual case.

This case, like most, lies between the extremes: the record indicates that SCI has not so willfully remained in non-compliance as the People contend, yet it also indicates that SCI has not acted in the full good faith that it describes, and that SCI's non-compliance was not merely "technical." Part of SCI's non-compliance was purely transient, but other parts were continuing in nature. Part of SCI's non-compliance arose from certain mutual misunderstandings of the regulations between SCI and the Agency. Some of this continuing non-compliance was unnecessarily prolonged by SCI's apparent intransigence prior to the filing of this complaint. The record also includes certain key disputed facts between the Agency and SCI, and certain internal inconsistencies make central portions of SCI's version of these facts less credible. The record includes evidence that would tend to indicate that SCI took a cavalier attitude towards hazardous waste compliance, but the Board expressly makes no finding in this regard. The record supports the conclusion that SCI's non-compliance was not singularly egregious, but that SCI could have acted in a more straightforward, diligent manner to more fully and promptly achieve compliance with the Board's RCRA regulations. The ready compliance of the regulated community is necessary to the continuing vitality of the RCRA program and the achievement of the regulatory objectives.

The intent of the RCRA rules is to follow certain wastes defined as "hazardous wastes" from "cradle to grave" to assure their proper management and ultimate disposition. Their purpose is to minimize the risk of harm to human health and the environment resulting from the management and disposal of these wastes. The RCRA regulations impose various requirements on those engaging in various activities relating to hazardous wastes. The three major regulatory categories of hazardous waste activities include generation; transportation; and treatment, storage, and disposal of hazardous wastes. The nature of a person's hazardous waste-related activities will govern which of these three major categories of rules apply to their activities and, often, which sub-category as well.

A key element running throughout the generator, transporter, and T/S/D facility standards requires hazardous waste manifesting. The generator of the waste initiates a manifest prior to shipment, indicating a description of the waste, its packaging and quantity, its intended destination, the designated transporters, and the date of shipment. The transporter signs the manifest upon receipt and can only deliver the waste as

designated on the manifest. The receiving T/S/D must sign the manifest, verify the information it contains with regard to the wastes received, and return a copy to the generator to verify receipt. All persons participating in the transfer of the consignment of hazardous wastes must retain copies of the manifest, and the generator shipping the waste and T/S/D facility receiving it must each forward a copy to the Agency. The regulations further provide that either the generator or the T/S/D facility must report certain problems occurring in the transaction to the Agency within certain specified times. These requirements assure that hazardous wastes are properly accounted for--from the time of generation to the time of final disposition. All persons participating in the transfer of hazardous wastes must comply with these important manifesting and related provisions in order to achieve the regulatory objective of sound hazardous waste management.

Additional requirements apply to generators and T/S/D facilities with regard to the management of hazardous wastes at their respective facilities. These apply from the time the waste comes into the facility (from the time it is generated or received) to the time it leaves (to the time it is transferred away, is finally disposed of, or is no longer a hazardous waste). Certain of these requirements apply solely to hazardous waste generators, whereas others apply only to T/S/D facilities. Depending on the nature of a generator's hazardous waste-related activities, however, certain T/S/D facility standards may apply to its activities, whether as a generator or as a T/S/D facility itself. Again, compliance with these various requirements, as applicable, is necessary to achieve the regulatory goal of minimized risk to human health and the environment. The Act vests certain enforcement authority in the Board to assure the compliance of the regulated community and the maintenance of the statutory and regulatory schemes.

The People's Second Amended Complaint against SCI alleges non-compliance with various generator requirements, various T/S/D facility requirements that purportedly apply to SCI as a generator, various T/S/D facility requirements that purportedly apply to SCI as a T/S/D facility, and one miscellaneous violation of the rules. It is convenient for the Board to so categorize and consider the substance of the various counts of the complaint. The asserted non-compliance with the first category, including only alleged non-compliance with the RCRA generator requirements, alleges violations of the manifest initiation requirements and exception reporting requirements (for the late receipt of T/S/D facility-signed return copies of certain manifests). This includes Counts IV and V of the complaint. The second category includes Counts I through III and alleges certain administrative T/S/D facility standards that purportedly apply to SCI as a hazardous waste generator (those requiring a written contingency plan, the designation of an emergency coordinator, and certain personnel training and recordkeeping requirements).

Counts VII through XI, in category three, pertain to certain requirement that would apply to SCI solely as a T/S/D facility (requiring a written waste analysis plan, a written facility inspection plan, the filing of annual reports with the Agency, a written facility closure plan, and a written closure cost estimate and the maintenance of closure cost assurance). Count VI is unique and stands alone. It derives from the same facts as Count V, however, so it is topically categorized and discussed together with Count V for convenience. It alleges that SCI established a T/S/D facility in violation of the Act and regulations by parking a trailer of hazardous wastes in an off-site location.

The following discussion considers each category of alleged non-compliance in the order as outlined, with one exception: it is most convenient to consider the unique count together with part of the first category. The discussion below will proceed to analyze the substance of the complaint under the following topical sub-headings:

1. "Generator Standards" (Counts IV, V, and VI);
2. "Generator T/S/D Facility Standards" (Counts I, II, and III); and
3. "T/S/D Facility Standards" (Counts VII, VIII, IX, X, and XI).

Although followed by a summary of the count-by-count findings, the posture of this case makes it expedient to consider the individual counts together in the three major broader categories. Preceding the discussions of the four categories of violations is a preliminary citation of a relevant statutory provision that the People allege SCI violated.

III. Status of Claimed Violations

The Act authorizes the Board to adopt and amend rules governing the management and disposition of hazardous wastes. Ill. Rev. Stat. ch. 111-1/2, pars. 1022 & 1022.4 (1988). This the Board has done, and the resulting body of regulations resides at Subtitle G of Title 35 of the Illinois Administrative Code. The Act further provides:

> No person shall:
>
> f. Conduct any hazardous waste-storage, hazardous waste-treatment or hazardous waste-disposal operation;

> 2. In violation of any regulations or standards adopted by the Board under this Act ....
>
> Ill. Rev. Stat. ch. 111-1/2, par. 1021 (1988).

The violation of this provision is alleged as part of each count of the complaint. SCI has violated this provision of the Act if it has violated any RCRA requirement directly affecting hazardous waste storage, treatment, or disposal, whether the particular rule directly regards the activities of a hazardous waste generator, transporter, or T/S/D facility.

A. Generator Standards

The first topical category of alleged SCI non-compliance includes only those regulatory provisions applicable to a hazardous waste generator. For analytical convenience, the miscellaneous count (Count VI) is included in this category. The analysis follows in order for Count V, Count VI, and Count IV.

The RCRA generator standards require a generator to prepare a manifest for each consignment of hazardous wastes to an off-site facility for treatment, storage, or disposal. 35 Ill. Adm. Code 722.120(a) (1984). These standards further require that the generator must designate as the consignee only a permitted RCRA T/S/D facility. Sec. 722.120(b). The People contend in Count V that SCI violated this provision of the RCRA requirements. "Storage" is defined as "the holding of hazardous waste for a temporary period ...." Sections 702.110 & 720.110. Therefore, SCI violated Section 722.120 of the Board's RCRA rules if it transferred hazardous wastes for temporary holding at an off-site facility without using a manifest, and/or if it transferred hazardous wastes to a facility which was not a permitted RCRA T/S/D facility.

The record reflects that SCI transferred hazardous wastes to a lot adjoining its plant, that the wastes remained on the lot for a period of several days, that SCI did not initiate a manifest for that transfer, and that the lot was not a permitted RCRA facility. The remaining issues are whether the lot was "off-site" for the purposes of the Board's RCRA rules, and whether the record shows any extenuating or aggravating facts for consideration. The Board concludes that the adjoining lot was "off-site" for the purposes of RCRA, and that SCI intentionally transferred the wastes to the lot for the purpose of avoiding Agency detection of the wastes. The Board concludes that SCI thereby violated Section 722.120 of the RCRA rules and Section 21(f)(2) of the Act.

SCI admitted shipping hazardous wastes to a lot adjoining its plant without a manifest, and the record strongly suggests that SCI did so to avoid Agency detection of the wastes. One

issue raised by the Agency's March 24, 1983 inspection of SCI was whether SCI had stored hazardous wastes in its plant for longer than 90 days.* (P. Ex. 2, p. 27; R. 39). SCI was aware that the Agency had determined on this basis that it was a hazardous waste T/S/D facility in violation of various Board rules following that inspection. (P. Ex. 15; R. 324-25). SCI was therefore aware that Agency detection of the same wastes at its plant would confirm the Agency's conclusion that it was a hazardous waste T/S/D facility. The Agency attempted an unannounced follow-up inspection on June 30, 1983, but failed to gain admittance to the SCI plant. The Agency returned for a scheduled inspection on July 6. (P. Ex. 4; R. 59 & 467-68). During that inspection the Agency observed three drums of hazardous wastes at SCI, so that the approximately 15 drums of hazardous wastes present on March 24 were no longer at the plant. The Agency also observed that SCI still had initiated no manifests since November, 1982. (P. Ex. 2, p. 27; P. Ex. 4, p. 27; R. 58-69). Mr. Carlson explained at the time of the inspection that about two weeks earlier it had shipped the drums of wastes to an intermediate Waste Management transfer point pending an ultimate destination. He explained that SCI did not initiate a manifest for the shipment because its ultimate destination was unknown at that time.** (P. Ex. 4, p. 27). The Agency learned on either July 6 or 7 from Waste

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* This bears on the issue of whether SCI was merely a hazardous waste generator or a T/S/D facility for the purposes of RCRA regulation. This issue is dealt with fully below, at pages 18-23 of this discussion.

** Mr. Carlson later submitted conflicting testimony with regard to these events. During a January 22, 1985 deposition, he stated that he personally inspected the trailer a week before the Agency inspection and the wastes were not in it. He testified that SCI personnel placed the wastes in the trailer without his knowledge and authorization while he was on vacation when Waste Management did not arrive for a scheduled pickup. (R. 378-79.) During the August 19, 1985 segment of the hearings, Mr. Carlson testified that he was on vacation from June 29 through July 4, 1983. He said that he first learned that Waste Management had not picked up the wastes only after the Agency confronted him with the Waste Management denials of his unmanifested waste pickup story. Mr. Carlson admitted that he was in his office for brief times on Thursday and Friday, June 29 and 30, when he refused to allow the unscheduled Agency inspection of his plant. (R. 369-79, 427-32 & 466-69.) It is clear that SCI could not have both shipped the wastes to an undisclosed location two weeks prior to the Agency inspection and anticipated a Waste Management pickup while Mr. Carlson was on vacation June 29 and 30. Mr. Carlson's later explanations are less credible than his earlier explanations. Further, the contemporaneous explanation would constitute an admission.

Management that no such transfer had occurred, and when it confronted SCI with this information, SCI disclosed that the wastes were in a semi-trailer parked on a lot adjoining the SCI plant. (P. Ex. 4, p. 27; R. 70-74). The Agency returned to SCI on July 8 to see a total of 28 drums of hazardous wastes in the trailer. (P. Ex. 4, p. 27; P. Ex. 8; R. 73-74, 165-67, 202-05 & 366-77). Waste Management was at SCI at that time, and later took 20 of the drums for disposal after they were properly repackaged and the Agency had left. (P. Ex. 18 G & H; P. Ex. 8; R. 204).

Initially, the Board observes that SCI employees placed the wastes on the adjoining lot which was not a permitted RCRA T/S/D facility without initiating a hazardous waste manifest. Without an affirmative showing of some legal justification for having done so, this is sufficient to establish a violation of Section 722.120 of the RCRA rules and Section 21(f)(2) of the Act if the lot was "off-site." The RCRA rules define "off-site" as "any site which is not 'on-site.'" 35 Ill. Adm. Code 702.110 & 720.110 (1984). They define "on-site" as follows:

> "On-site" (RCRA) means on the same or geographically contiguous property which may be divided by public or private right(s)-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing as opposed to going along, the right(s)-of-way. Non-contiguous properties owned by the same person but connected by a right-of-way which the person controls and to which the public does not have access, is also considered on-site property.
>
> Sections 702.110 & 720.110.

Implicit to this definition of "on-site" is the requirement that both properties between which the wastes transfer are in the exclusive possession and control of the same person: the owner or operator of the hazardous waste facility.

The record indicates that the adjoining lot was not in SCI's exclusive possession and control, despite SCI's right of access to it, so the Board concludes that the adjoining lot was not "on-site" for the purposes of the RCRA rules. SCI leases its plant from a trust whose beneficial owner leases the adjoining lot from Jewel Foods. (P. Ex. 10; P. Ex. 11, pp. 6-15; P. Ex. 12; R. 255-56 & 309). Despite the right of access given in the Jewel lease to SCI and other tenants for the purpose of parking vehicles, the adjoining lot is not in SCI's possession and control (P. Ex. 10, p. 2), and public access to it is not restricted. (P. Ex. 11, p. 17). Further, both the third-person lessee of the lot and Jewel Foods were unaware that SCI had used the lot for the temporary

storage of hazardous wastes in the trailer. (P. Ex. 11, p. 19; R. 274). Therefore, SCI violated Section 722.120 of the RCRA rules and Section 21(f)(2) of the Act by transferring its hazardous wastes to that unpermitted location without a manifest.

Further, with regard to knowledge and intent, the Board finds that SCI's conduct and testimony severely affect its credibility and brings its motivations and assertions of good-faith into serious doubt. The Board observes that throughout the record of these proceedings SCI has continuously attempted to avoid the conclusion that it has stored its wastes for more than 90 days and thereby become a RCRA T/S/D facility.* Further, the Board observes that SCI's version of the facts has changed since the time of the July, 1983 inspections. The Board concludes from these facts that SCI intentionally placed the drums of waste in the trailer and on the adjoining lot for the purpose of avoiding Agency detection of its non-compliance with the Board's RCRA rules.

For the foregoing reasons, the Board finds that SCI violated Section 722.120 of the Board's RCRA rules and Section 21(f)(2) of the Act without legal justification when at some time prior to July 6, 1983 it placed about 28 drums of hazardous wastes in a semi-trailer and parked the trailer off-site on a lot adjoining the SCI plant. That lot was not a permitted RCRA T/S/D facility, and SCI did not initiate a hazardous waste manifest for the transfer. In aggravation, the Board finds that SCI intentionally performed these acts for the purpose of avoiding Agency detection of the wastes. In mitigation, the Board finds that SCI did have access to the lot for the purpose of parking vehicles, and that SCI could reasonably have had confusion as to whether the lot was indeed "off-site" for the purposes of the RCRA rules, since the lot immediately abutted the SCI plant premises. Further, the Board notes that SCI's intent was not the most egregious conceivable under the RCRA scheme: the improper, illegal disposal or release of the wastes into the environment. The Board, however, does not condone SCI's surreptitious acts performed with the apparent intent of avoiding compliance with applicable RCRA rules.

Count VI is also based on this incident and the same facts. However, the People contend that by parking its trailer on the lot, SCI thereby created a T/S/D which did not comply with the RCRA rules. The asserted non-compliance was with numerous of the Board's RCRA T/S/D facility standards. The Board has already determined that SCI temporarily stored hazardous wastes on the lot, and obviously, the lot was not in full compliance with

* For example, SCI's testimony includes a strained set of assertions obviously designed to avoid the conclusion that it has stored its wastes for more than 90 days. This testimony is outlined below on pages 20-21 of this discussion.

applicable RCRA T/S/D facility standards if it thereby became a T/S/D facility which was not excepted from regulation.

The only conceivably applicable regulatory exceptions from the T/S/D facility regulations are the small quantity exception, 35 Ill. Adm. Code 721.105 (1984); the 90-day generator exception, Sections 722.134 & 725.101(c)(7); and the transportation exception, Sections 723.112 & 725.101(c)(2). The quantity of wastes in 28 drums clearly exceeds 1,000 kilograms, so the small quantity exception does not apply. (See P. Ex. 14; P. Ex. 18; R. 48 & 321-23). The 90-day generator exception does not apply because the wastes were not "on-site," as found above. Finally, the storage was not incident to transportation because SCI had not initiated a manifest or otherwise consigned the wastes, because SCI is not a hazardous waste "transporter" for the purposes of this exception, and because SCI's containers apparently did not comply with the RCRA container requirements. (P. Ex. 8; R. 208, 214 & 432-33; see Sections 723.112 & 725.101(c)(12)).

The Board concludes that SCI created a T/S/D facility of the adjoining lot when it stored its hazardous wastes there in July, 1983, and that that facility did not comply with Sections 725.111 (USEPA identification number requirement), 725.113(b) and (c) (requiring a written waste analysis plan), 725.114 (facility security requirements), 725.115 (facility inspection requirements), 725.131 (facility maintenance and operation requirements), 725.132 (facility emergency and communications equipment requirements), 725.133 (maintenance and testing requirements for facility emergency and communications equipment), 725.135 (aisle space requirements), and 725.137 (requirements for emergency arrangements with local authorities). SCI thereby violated Section 21(f)(2) of the Act.

The Board foregoes a detailed section-by-section analysis of the various T/S/D facility standards with which SCI failed to comply on this adjoining lot T/S/D facility. SCI cannot seriously suggest that it attempted to comply with any of those requirements listed in Count VI. The Board does observe, however, that SCI did maintain physical and chemical test results for its wastes, so it did comply with Section 725.113(a) of the Board's RCRA rules (P. Ex. 2, p. 8; P. Ex. 4, p. 8; R. 133). Further, the Board specifically finds that aisle space is required for drummed hazardous wastes stored in semi-trailers because spilling or leakage is possible.* (See Section 725.135;

* Although the Board can foresee other situations in which it is both physically safe and environmentally sound not to maintain aisle space, this is not such a situation. For example, there is no means of spill containment on the lot adjoining the SCI plant. (See R. 287-89 & 476-77).

P. Ex. 8; R. 205 & 212-13). The Board's prior findings with regard to mitigating and aggravating circumstances relating to Count V apply to Count VI with the following added aggravating factor: SCI stored its hazardous wastes on the adjoining lot without the knowledge and consent of either the third-person lessee or the owner, Jewel Foods. This is a very serious breach.

Count IV of the People's Second Amended Complaint alleges that SCI failed to file with the Agency an exception report when SCI did not receive certain T/S/D facility-signed copies of the manifest within the required 45 days. 35 Ill. Adm. Code 722.142 (1984).

In support of its allegation, the People cite that during a March 24, 1983 inspection of SCI, the Agency observed that SCI had failed to submit exception reports when it failed to receive the return copies of the manifests for three shipments of hazardous wastes to Alabama. (P. Ex. 2, pp. 7 & 27; P. Ex. 3; R. 44-45). The record includes copies of five manifests for SCI shipments to Alabama which occurred prior to the March, 1983 inspection. Three occurred February 24, 1982 and were received in Alabama on March 2, 1982. (P. Ex. 18 B, C & D). Two occurred October 28, 1982 and were received November 19, 1982. (P. Ex. 18 E & F). All copies indicate receipt and signature within the designated times, and all are the return copies of the manifests. These documents do not support the allegations. Mr. Carlson testified that the only time he did not receive a return copy was once when his wastes were returned because they included too much supernatant liquid. He removed the liquid, shipped the wastes again, and received return copies of the manifests. Mr. Carlson recalled no other shipments without manifest return copies, (R. 426-27 & 465-66), and the record fails to indicate which shipment the waste return affected.

The Agency inspector's reports, which constitute the People's primary evidence, add confusion to the evidentiary discrepancies. The inspector noted at the time of the inspection that SCI had also failed to submit Agency copies of the manifests, see 35 Ill. Adm. Code 722.123(a)(4) (1984), and that SCI's last shipment had occurred November 19, 1982 "according to company manifest [sic] ...," (P. Ex. 2, p. 27), or "according to Mr. Carlson." (P. Ex. 3). The inspector later noted on February 6, 1984: "[T]he date of the last manifest was [November 19, 1982]. (Neither [the Agency] or [sic] [Mr.] Carlson had manifest copies for that shipment. The previous manifest for which [the Agency] had copies was [October 28, 1982])." (P. Ex. 6, Att.). Because the October, 1982 consignment was received on November 19, 1982, and because Mr. Carlson asserts that Exhibit 18 represents all manifests and all his shipments of hazardous wastes, (R. 359-60), it is possible that the inspector and SCI failed to properly communicate on this issue, so the inspector only thought SCI did not receive return copies for a non-existent November 19, 1982 shipment. It is also possible that SCI somehow

did not retain any manifest copies for a shipment which occurred on this date. The record is unclear.

The burden was on the People to prove that SCI failed to file exception reports with the Agency in violation of Section 722.142(b) of the Board's RCRA regulations. The facts are confused on this issue, and the People have failed to clarify them in a way that would demonstrate that they bore this burden of proving a violation of the rules. The Board would not find that SCI violated the exception reporting requirement of Section 722.142(b), but SCI's post-hearing brief twice flatly admits the violation. Therefore, the Board finds that SCI violated Section 722.142(b) of the RCRA rules and Section 21(f)(2) of the Act. In mitigation, the Board finds that SCI ultimately contacted the receiving T/S/D facility and obtained a return copy of the manifest.

This concludes the Board's consideration of those counts of the complaint pertaining solely to alleged SCI violations of the Board's generator standards. The Board next considers the counts alleging violations of the Board's RCRA T/S/D facility standards that purportedly apply to SCI as a generator of hazardous wastes.

B. Generator T/S/D Facility Standards

The second topical category of alleged non-compliance focuses on certain T/S/D facility standards that apply to some hazardous waste generators. The analysis of this topical category involves the central focus of the parties throughout this proceeding: the characterization of SCI's conduct. It concludes that SCI is not the willful violator, as contended by the People, nor the small, beleaguered businessman who has throughout attempted to comply in full good faith, as contended by SCI.

Counts I, II, and III of the Second Amended Complaint allege that SCI violated various T/S/D facility requirements that would apply to SCI as a hazardous waste generator. These allege that SCI had no adequate written contingency plan (Count I), had not designated emergency coordinators (Count II), and had no adequate written personnel training records (Count III).

The Board's RCRA regulations require that all generators which store hazardous wastes comply with certain of the interim T/S/D facility standards. This is true of all generators, whether they merely store the wastes one day past the date of generation, or they store the wastes for extended periods and thereby become a T/S/D facility for the purposes of

regulation.* See 35 Ill. Adm. Code 722.134 & 725.101(c)(7) (1984) (generator accumulation time exception provisions). The relevant, applicable portions of the interim T/S/D facility standards of Part 725 of the Board rules include the personnel training requirements of Section 725.116 and the contingency plan and emergency coordinators requirements of Subpart D, Sections 725.150 through 725.156. These are very explicit and somewhat detailed requirements.

The Board feels it is useful to cite significant portions of the contingency plan, emergency coordinator, and personnel training requirements preliminary to its core analysis of the issues involved in this topical category. A major factor implicit to the resolution of the issues involved is the clarity and particularity of the relevant provisions. Their clarity and particularity illustrate any deficiencies in SCI's compliance efforts and directly bear on SCI's ability and willingness to promptly comply with the requirements.

The T/S/D facility contingency plan requirements provide that the facility owner and operator must assemble a written plan:

> designed to minimize hazards to human health or the environment from fires, explosions or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water.
>
> Section 725.151(a).

The regulations specify the contents of the plan with some particularity. They provide in part as follows:

> a) The contingency plan must describe the actions facility personnel must take to comply with Sections 725.151 and 725.156 in response to fires, explosions or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water at the facility.
>
> c) The plan must describe arrangements agreed to by local police departments, fire departments hospitals contractors and state and local emergency response teams to coordinate emergency.

* The generator accumulation time exception and its applicability to SCI's operations is analyzed more fully below at pages 18-22 of this discussion.

d) The plan must list names, addresses and phone numbers (office and home) of all persons qualified to act as emergency coordinator ... and this list must be kept up to date.

e) The plan must include a list of all emergency equipment at the facility (such as fire extinguishing systems, spill control equipment, communications and alarm system (internal and external) and decontamination equipment) where this equipment is required. This list must be kept up to date. In addition, the plan must include the location and a physical description of each item on the list and a brief outline of its capabilities.

f) The plan must include an evacuation plan for facility personnel where there is a possibility that evacuation could be necessary. This plan must describe signal(s) to be used to begin evacuation, evacuation routes and alternate evacuation routes (in cases where the primary routes could be blocked by releases of hazardous waste or fires).

Section 725.152.

These comprehensive, detailed requirements continue to describe that the T/S/D facility (or excepted generator) must maintain copies of the plan at the facility and submit copies to local emergency services entities (such as police departments, fire departments, hospitals, etc.). Section 725.153. They further provide for the amendment and implementation of the plan. Section 725.154 & 725.156.

The contingency plan provisions also require the facility to designate an "emergency coordinator" to carry out the plan if necessary:

> At all times there must be at least one employee either on the facility premises or on call (i.e., available to respond to an emergency by reaching the facility within a short period of time) with the responsibility for coordinating all emergency response measures. This emergency coordinator must be thoroughly familiar with all aspects of the facility's contingency plan, all operations and activities at the facility, the location

> and characteristics of waste handled, the location of all records within the facility and the facility layout. In addition, this person must have the authority to commit the resources needed to carry out the contingency plan.
>
> Section 725.155.

These detailed contingency plan and emergency coordinator requirements set forth with particularity the actions a facility must take and the written documentation necessary to achieve compliance.

The Board's personnel training requirements are less comprehensive in scope than those for a contingency plan, but equally particular as to the nature and contents of the required written records:

> The owner or operator must maintain the following documents and records at the facility:
>
> 1) The job title for each position at the facility related to hazardous waste management and the name of the employee filling each job;
>
> 2) A written job description for each position listed under paragraph (d)(1) of this Section. This description ... must include the requisite skill, education or other qualifications and duties of facility personnel assigned to each position;
>
> 3) A written description of the type and amount of both introductory and continuing training that will be given to each person filling a position listed under paragraph (d)(1) of this Section; and
>
> 4) Records that document that the training or job experience required under ... this Section has been given to and completed by facility personnel.
>
> Section 725.116(d).

The facility must retain its personnel training records for the life of the facility, with one limited exception not applicable here. Section 725.116(e).

Compliance with these provisions would have required SCI to assemble the required information, engage in the required personnel training, and submit information to various local authorities. The record indicates that SCI did not fully perform these actions until some time after the People filed their complaint.

The Agency inspection reports indicate that SCI did not have any required documentation of personnel training, or contingency planning, and had not designated an emergency coordinator at the time of the March 24, 1983 Agency inspection. (P. Ex. 2, pp. 4, 6-7 & 27; P. Ex. 3). At the time of the July 6, 1983 inspection, SCI had only acquired written job descriptions and job titles for personnel training documentation, but had made no progress with regard to a written contingency plan. (P. Ex. 4, pp. 4, 6-7, 27 & Att.). By the February 6, 1984 inspection, SCI had an incomplete contingency plan, which failed to give the names and addresses of qualified emergency coordinators; which did not fully describe the locations, physical attributes, and capabilities of SCI's emergency equipment; and which failed to describe arrangements SCI made with local emergency response authorities. SCI showed no personnel training records to the Agency. (P. Ex. 6, pp. 4, 6-7 & Att.; P. Ex. 7).

Subsequent to the filing of the complaint in this action, SCI had written job titles and descriptions of the required personnel training, but training records and job descriptions were not present during the February 13, 1985 Agency inspection. (P. Ex. 9, p. 32). At that time, SCI's contingency plan did not outline the emergency coordinators' responsibilities and actions, did not give their addresses, and did not outline SCI's emergency equipment capabilities. (P. Ex. 9, pp. 34-35; see R. Ex. 1). SCI submitted a complete contingency plan together with written personnel training records to the Agency on July 16, 1985. (R. Ex. 3-7). It took over two years from the time of the April 22, 1983 detailed notice of apparent violations before SCI complied fully with these requirements. (See P. Ex. 15).

Mr. Carlson has repeatedly expressed confusion as to what is required for compliance with the regulations. (See, e.g., R. Ex. 1; R. 327.) He further asserts that he has always had a contingency plan that complied with his interpretation of the regulations. (R. 436-38). A facial examination of that document, however, reveals the speciousness of this contention: it is merely a two-page description of SCI's wastewater pretreatment system and a plant floor plan crudely indicating floor space usage and the locations of the plating line, "pollution control," and "sludge [sic] storage." (R. Ex. 8). SCI's available documentation was wholly insufficient for the purposes of RCRA compliance. Further, this conflicts with Mr. Carlson's other testimony that SCI assembled its first written contingency plan in 1984. (R. 348). It was this plan that Mr.

Carlson elsewhere asserted that SCI assembled in 1983. (P. Ex. 7; R. 381-82). SCI did not make this version available to the Agency until February, 1984, and it was incomplete, as noted above. Finally, had SCI fully intended to dispel its confusion as to the RCRA requirements, it could have in good faith done so within a time shorter than two years.

SCI contends that certain other documents not directly related to hazardous wastes management constituted partial compliance with the requirements, and that its RCRA-required job descriptions do not need to reference hazardous wastes. (R. 329-30; see P. Ex. 16 & 17). While this is partially true, and specific references to hazardous wastes as such is not required for every phase of the contingency plan or personnel training, except as otherwise required by regulation or by personnel and environmental safety considerations, SCI subverts its position with regard to its own good faith efforts by these arguments. People's Exhibit 17 illustrates how rapidly SCI can comply with law when motivated to do so: it is SCI's July 1, 1984 "Employee Toxic Substance Training Program" adopted to comply with Illinois' "Toxic Substances Disclosure to Employees Act," P.A. 83-240, approved September 8, 1983 and effective January 1, 1984. See Ill. Rev. Stat. ch. 48, par. 1401-1420 (1985). SCI tries to make it seem like the replacement of the former Agency inspector removed an impediment to SCI's full compliance, (see R. Ex. 1), but it is more likely that the filing of the People's complaint in 1984 provided the motivation for good-faith efforts at compliance by 1985.

The Board finds that SCI violated Section 725.151 of the Board's RCRA rules in that it failed to assemble and maintain an adequate contingency plan for its facility. SCI also violated Section 725.153 in that it failed to maintain a copy of an adequate contingency plan at its facility and submit copies to local entities who might be called upon to provide emergency services. Finally, SCI violated Section 725.155 of the RCRA rules and Section 21(f)(2) of the Act in that it failed to designate an emergency coordinator on the facility premises or on call and available to respond to an emergency within a short period of time, until some date after the filing of this action. The People have failed to present any arguments and evidence to demonstrate the need for contingency plan revision, so the Board finds that the People have failed to establish an SCI violation of Section 725.154 of the Board rules. The foregoing constitutes the Board's findings and conclusions as to Counts I and II. As to Count III, the Board finds that SCI violated Section 725.116 of the RCRA rules and Section 21(f)(2) of the Act in that it failed to maintain a full documentation of its personnel training, including written job titles, written job descriptions, written descriptions of required job training, and written documentation of job training or experience received, until some time after the filing of this complaint. The Board further finds that there was no cognizable impediment that should

excuse SCI's prolonged non-compliance of about two years from when the Agency initially notified SCI of its non-compliance.

The third and final category of alleged non-compliance includes alleged SCI violations of various Board RCRA rules that would apply to SCI only as a T/S/D facility. Because this category requires preliminary analysis of whether SCI was a T/S/D facility, the preliminary analysis precedes and is separate from the determination of the merits of Counts VII through XI.

C. T/S/D Facility Standards

The threshold issue relating to the Counts VII through XI alleged violations of the Board's rules is whether SCI is a T/S/D facility for the purposes of RCRA regulation. The violations alleged in these counts are of standards that would only apply to SCI as a T/S/D facility. The parties hotly contend on this issue, and the issue initially arose with the first Agency inspection. Because of the importance of this preliminary issue and the conflicting testimony relating to it, the Board proceeds with care.

SCI's Regulatory Status As A T/S/D Facility

The RCRA rules provide for a generator accumulation time exception from the broader T/S/D facility standards as follows:

a) A generator may accumulate hazardous waste on-site for 90 days or less without a permit or without having interim status provided that:

1) The waste is placed in containers and the generator complies with Subpart I of 35 Ill. Adm. Code 725 or the waste is placed in tanks and the generator complies with Subpart J of 35 Ill. Adm. Code 725 except 35 Ill. Adm. Code 725.293;

2) The date upon which each period of accumulation begins is clearly marked and visible for inspection on each container;

3) While being accumulated on-site, each container and tank is labeled or marked clearly with the words, "Hazardous Waste", and

4) The generator complies with the requirements for owners and operators in Subparts C and D in 35

> Ill. Adm. Code 725 and with 35 Ill. Adm. Code 725.116.
>
> b) A generator who accumulates hazardous waste for more than 90 days is an operator of a storage facility and is subject to the requirements of 35 Ill. Adm. Code 724 and 725 ....
>
> 35 Ill. Adm. Code 722.134 (1984).

The rules further provide for a small quantity generator exception, which potentially affects the accumulation time as follows:

> The time period of Section 722.134 for accumulation of wastes on-site begins for a small quantity generator when the accumulated wastes exceed the applicable [1,000 kilogram] exclusion level.
>
> Section 721.105(f).

The combined impact of these provisions is this: a generator may store hazardous wastes for a maximum of 90 days after the date upon which it has accumulated 1,000 kilograms* of hazardous wastes and not become a RCRA T/S/D facility--so long as it meets certain conditions. To remain exempt from the broader T/S/D facility standards, therefore, the generator must:

1. Place its wastes in containers or tanks and comply with the related T/S/D facility standards that apply to containers and/or tanks;

2. Clearly and visibly mark each container for inspection with its respective date of accumulation;

3. Clearly mark each container "Hazardous Waste;"

4. Comply with certain limited T/S/D facility standards;** and

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* This limit is only one kilogram or 100 kilograms for certain defined "acutely hazardous wastes." Section 721.105(e). The record does not indicate that SCI generates such wastes.

** These limited T/S/D facility standards are more fully described in part above at pages 12-16 of this discussion.

5. Not store its hazardous wastes more than 90 days beyond the first date the generator has accumulated more than 1,000 kilograms.*

If at any time the generator violates any of these conditions while storing hazardous wastes, it loses the exemption and becomes a regulated RCRA T/S/D facility. The Board determines that SCI was such a regulated T/S/D facility--on this and on an alternative basis.

The Agency inspection of March 24, 1983 disclosed that SCI had about 15 drums of hazardous wastes in its plant. These drums bore no accumulation date markings, were stored open, and one was observed leaking. SCI manifest records indicated that SCI's next preceding shipment of hazardous wastes had occurred about 125 days prior to the inspection, on about November 19, 1982. (P. Ex. 2, p. 27; P. Ex. 3; R. 30-53, 105-61 & 191). The Agency determined based on the last date of shipment that SCI stored its wastes longer than the 90 days allowed a generator. The Agency inspections of July 6 and 8, 1983 disclosed about two or three drums of hazardous wastes inside the SCI plant, which were in good condition and clearly marked with accumulation dates, and about 28 drums in a trailer, which were not marked with accumulation dates, which did not appear to be in good condition to the inspector, and one of which appeared rusted and leaking. (P. Ex. 4, p. 27; P. Ex. 8; R. 60-80, 161-78, 200-08 & 212-18). Waste Management picked up 20 of these drums for disposal on July 8, 1983, following the Agency inspection. (P. Ex. 4, p. 27; P. Ex. 8; P. Ex. 18 G & H). This was 106 days since the last Agency inspection and about 231 days since the last shipment of about November, 1982.** The Agency renewed its contention that SCI had stored its wastes longer than the excepted 90 days based on these facts. SCI's next shipment of 16 drums of hazardous wastes occurred on October 6, 1983, or 106 days after the July inspection and shipment date.

In response to these facts, SCI still maintains that it has never stored its hazardous wastes for longer than 90 days after it had accumulated more than 1,000 kilograms. Initially, SCI asserts that it generates most of its wastes in large batches at one time, and only a small portion on an on-going basis. (R. 368, 418-25, 435 & 462-64). Mr. Carlson then asserts that he never has authorized any storage for more than 90 days. (R.

* See supra note on preceding page re the maximum waste limit.

** It is perhaps useful at this point to recall the preceding consideration of these events located above at pages 6-8 of this discussion.

434). SCI's major contention with regard to the 90-day limit, however, is that SCI evaporates and removes supernatant liquid from the drummed wastes to reduce their volume and weight before disposal. Mr. Carlson asserts that the 15 drums of wastes present during the March, 1983 inspection thereby reduced to about three drums, or less than the 1,000 kilograms maximum, so shipment was not necessary because the 90-day clock had not started. (R. 365-66, 435 & 397-99). Finally, with regard to drum condition and accumulation dates marking, SCI maintains that its drums were in good condition, they never leaked, and SCI always marked them with accumulation dates--even if the markings may have become obscured during storage and handling. (R. 396, 428 & 432-33).

Initially, the Board finds that SCI violated the conditions of the generator accumulation time exclusion and thereby became subject to the applicable T/S/D facility standards. SCI placed hazardous wastes in open containers and at least one rusted and leaking container. See Sections 722.134(a)(1) & 725.271-725.274. SCI failed to mark each container durably and visibly with its respective accumulation date for inspection. See Section 722.134(a)(2). Also, SCI failed to comply with Subpart D of Part 725 (contingency plan and emergency coordinator requirements) and Section 725.116 (personnel training requirements).* Finally, SCI stored hazardous wastes in its plant for more than 90 days past the date on which it first had accumulated 1,000 kilograms of hazardous wastes. See Section 722.105(f), 722.134(b) & 725.101(c)(7).

Various facts support these conclusions. With regard to the condition of SCI's drums, the Board finds that the Agency's repeated observations are more credible than SCI's assertions that its drums were not rusted and leaking. Furthermore, the drums were left open. With regard to the marking of accumulation dates, if the Board were to believe that SCI did appropriately mark each drum, it observes that the object of this provision is "for inspection." Section 722.134(a)(2). The Board holds that the markings must therefore be present for inspection, or it is irrelevant for the purposes of regulation that the generator ever applied them. As to the accumulation and storage times, the Board first holds that it is the volume or quantity of waste as initially generated that is relevant for the purposes of the 1,000 kilogram limit. Second, the Board finds that even if it were otherwise, SCI stored its wastes for longer than 90 days. This is partly because it strains credulity to believe that SCI

* See supra discussion at pages 12-18.

reduced 15 drums of pre-evaporated waste down to three drums.* It is also because SCI admitted to generating one continuous waste stream that it does not subsequently treat to reduce in volume, and SCI allowed 231 days to pass before it shipped this waste for disposal. Finally, it is sufficient of itself that SCI had about 15 drums present on March 24, 1983 that it did not ship until July 8, or 106 days later, and eight or eleven drums left behind by Waste Management on July 8, 1983 that it did not ship until at least October 6, or 106 days later. SCI misapprehends both the facts and the regulations.

Finally, the Board has an alternative basis for holding that SCI was subject to the applicable T/S/D facility standards: SCI engaged in the treatment of its hazardous wastes. SCI admitted that it evaporates and removes supernatant liquid from the hazardous wastes in its drums in order to reduce or "condense" the volume and water content. This is hazardous waste treatment. The Board's rules define hazardous waste treatment as follows:

> "Treatment" means any method, technique or process ... designed to change the physical [or] chemical ... character or composition of any hazardous waste ... so as to render such waste nonhazardous or less hazardous; safer to transport, store or dispose of; or amenable for recovery, amenable for storage or reduced in volume.
>
> Sections 702.110 & 720.110.

The rules provide no hazardous waste treatment exception from the T/S/D facility standards similar to the generator accumulation time exception, and the only treatment exception even remotely similar permits treatment only at the time the hazardous wastes are first placed in the containers. See Section 725.101(c)(13). SCI treated its hazardous wastes in drums and thereby became a T/S/D facility for the purposes of RCRA regulation.** The Board concludes that SCI engaged in hazardous waste storage in such a manner that the generator accumulation time exception did not apply to its hazardous waste activities. The Board further concludes that SCI engaged in hazardous waste treatment. Therefore, SCI was subject to the applicable T/S/D facility standards.

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* By making this observation, the Board does not subvert its holding that it is the weight as initially generated that is relevant for the 1,000 kilogram limit. This is merely an evidentiary finding as to SCI's credibility.

** The Board does not hereby give any opinion as to the propriety of SCI's hazardous waste treatment in its drums.

T/S/D Facility Non-Compliance

The Board now addresses the substance of Counts VII through XI, which allege SCI non-compliance with the RCRA T/S/D facility standards. The Board has already determined in the foregoing discussion that these standards apply to SCI. The substance of these allegations is that SCI failed to maintain a written waste analysis plan, (Count VII; see 35 Ill. Adm. Code 725.113(b) (1984)); a written facility inspection plan, (Count VIII: see Sections 725.115(b), 725.115(d) & 725.274); a written facility closure cost estimate for the facility, (Count XI; see Sections 725.173(b)(7) & 725.242); and financial assurance for facility closure. (Count XI; see Section 725.243). The complaint also alleges that SCI failed to submit required T/S/D facility annual reports of hazardous waste activities to the Agency. (Count IX; see Section 725.175). Finally, the Second Amended Complaint alleges that SCI failed to maintain a written facility closure plan, (Count X; see Sections 725.210-725.215), but the People erroneously allege this as a violation of Section 725.173 (operating records requirement), an unrelated provision of the T/S/D facility standards.

The required documents were not present during any of the Agency inspections, and SCI has not submitted any T/S/D facility annual reports. In fact, SCI has not submitted the required Part A application to obtain interim T/S/D facility status. (P. EX. 2-6, 8 & 9; R. 79-80, 133-34, 137-39; see P. Ex. 1, pp. 2-3; P. Ex. 14 (generator annual report); see also Sections 703.153-703.157 (Interim Status Requirements)). SCI does not contend that it complied with these requirements. Instead, SCI's arguments were directed to the contention that it did not store its wastes longer than 90 days, as discussed above.*

In light of the record, the Board concludes that SCI did not comply with the T/S/D facility standards that the People contend SCI violated in Counts VII through XI of the Second Amended Complaint. SCI thereby violated Sections 725.113(b), 725.115(b), 725.115(d), 725.173(b)(7), 725.175, 725.212(a), 725.242, and 725.243 of the Board's RCRA rules and Section 21(f)(2) of the Act. The Board finds in aggravation that SCI did not seek compliance with the regulations when confronted with the requirements by the Agency. Instead, SCI falsely sought to hide the fact of its storage from the Agency inspectors and to erect an elaborate, unacceptable set of facts to avoid the requirements--which facts actually force a conclusion contrary to

* See supra pages 9 & 20-21 of this discussion.

that sought by SCI.* The Board cannot simultaneously find that SCI acted in good faith, was sincerely confused as to the requirements, or had a bona fide argument that the RCRA T/S/D facility standards did not apply to its activities. Further, the record indicates no SCI efforts at compliance with these requirements:

IV. Summary and Conclusion

A count-by-count summary of the Board's findings follows:

Count I: SCI violated 35 Ill. Adm. Code 725.151 and 725.153 (1984) and Ill. Rev. Stat. ch. 111-1/2, par. 1021(f)(2) (1988) in that it failed to assembly, maintain, and distribute a contingency plan as required by the Board' RCRA rules. The People have failed to prove a violation of Section 725.154.

Count II: SCI violated 35 Ill. Adm. Code 725.155 (1984) and Ill. Rev. Stat. ch. 111-1/2, par. 1021(f)(2) (1988) in that it failed to designate an emergency coordinator as required by the Board's RCRA rules.

Count III: SCI violated 35 Ill. Adm. Code 725.116 (1984) and Ill. Rev. Stat. ch. 111-1/2, par. 1021(f)(2) (1988) in that it failed to maintain written personnel training records as required by the Board's RCRA rules.

Count IV: SCI violated 35 Ill. Adm. Code 722.142 (1984) and Ill. Rev. Stat. ch. 111-1/2, par. 1021(f)(2) (1988) in that it failed to submit an exception report to the Agency as required by the Board's RCRA rules.

Count V: SCI violated 35 Ill. Adm. Code 722.120 (1984) and Ill. Rev. Stat. ch. 111-1/2, par. 1021(f)(2) (1988) in that it transferred hazardous wastes to an unpermitted off-site location for storage without using a hazardous waste manifest as required by the Board's RCRA rules.

Count VI: SCI violated Ill. Rev. Stat. ch. 111-1/2, par. 1021(f)(2) (1988) in that it stored hazardous wastes at an unpermitted off-site location and thereby created a hazardous waste treatment, storage, or disposal facility that did not comply with numerous of the Board's RCRA rules.

Count VII: SCI violated 35 Ill. Adm. Code 725.113 (1984) and Ill. Rev. Stat. ch. 111-1/2, par. 1021(f)(2) (1988) in that it

*See supra pages 20-22 of this discussion. The Board does not hereby condemn good faith efforts to structure hazardous waste activities so that major portions of the regulations do not apply to the affected facility.

failed to maintain a written waste analysis plan as required by the Board's RCRA rules.

Count VIII: SCI violated 35 Ill. Adm. Code 725.115(b), 725.115(d), and 725.274 (1984) and Ill. Rev. Stat. ch. 111-1/2, par. 1021(f)(2) (1988) in that it failed to maintain a written facility inspection plan as required by the Board's RCRA rules.

Count IX: SCI violated 35 Ill. Adm. Code 725.175 (1984) and Ill. Rev. Stat. ch. 111-1/2, par. 1021(f)(2) (1988) in that it failed to submit annual hazardous waste treatment, storage, and disposal facility reports to the Agency as required by the Board's RCRA rules.

Count X: SCI violated 35 Ill. Adm. Code 725.212(a) (1984) and Ill. Rev. Stat. ch. 111-1/2 1021(f)(2) (1988) in that it failed to maintain a written facility closure plan as required by the Board's RCRA rules.

Count XI: SCI violated 35 Ill. Adm. Code 725.173(b)(7), 725.242, and 725.243 (1984) and Ill. Rev. Stat. ch. 111-1/2, par. 1021(f)(2) (1988) in that it failed to maintain a written facility closure cost estimate and financial assurance for facility closure as required by the Board's RCRA rules.

With regard to mitigating and aggravating facts, the Board summarizes its count-by-count findings as follows:

Counts I, II, and III: SCI may have initially been unaware or confused as to the precise nature of the regulatory requirements relating to these counts, but the record indicates nothing that would excuse or mitigate the prolonged period of SCI's continued non-compliance with the Board's RCRA requirements that form the basis for the found violations.

Count IV: SCI sought and ultimately obtained the missing return copy of the manifest.

Counts V and VI: SCI had lawful access to the adjoining lot for the purpose of parking vehicles and may have therefore been confused as to whether this lot was "off-site," but SCI stored hazardous wastes on the lot without the knowledge and consent of either the property owner or its lessee, and SCI intentionally stored hazardous wastes on the lot for the purpose of avoiding Agency detection of those wastes.

Counts VII, VIII, IX, X, and XI: SCI improperly sought to avoid the regulatory requirements by unacceptably hiding and elaborating facts, rather than by properly and permissibly restructuring its activities so as to render the regulations inapplicable to its operations. SCI made no effort at compliance with the Board's RCRA requirements forming the basis for the found violations.

The Board must next consider the appropriate remedy for the found violations. The Board will proceed in light of various factors, including the above findings.

V. Remedy

The Act authorizes the Board to impose sanctions on those found in violation of the Act or Board Rules:

> a. Except as provided in this Section, any person that violates any provisions of this Act or any regulation adopted by the Board ... shall be liable to a civil penalty of not to exceed $10,000 for said violation and an additional civil penalty of not to exceed $1,000 for each day during which violation continues ...;
>
> b. Notwithstanding the provisions of subsection (a) of this Section:
>
> 3. Any person that violates Section 21(f), 21(g), 21(h) or 21(i) of this Act or any RCRA permit or term or condition thereof, or any filing requirement, regulation or order relating to the State RCRA program shall be liable to a civil penalty of not to exceed $25,000 per day of violation.
>
> Ill. Rev. Stat. ch. 111-1/2, par. 1042 (1988).

The Act outlines the protocol for a Board decision and further authorizes the Board to issue cease and desist orders:

> a. After due consideration of the written and oral statements, the testimony and arguments that shall be submitted at the hearing, ... the Board shall issue and enter such final order, or make such final determination, as it shall deem appropriate under the circumstances. ...
>
> b. Such order may include a direction to cease and desist from violations of the Act or of the Board's rules and regulations ... and/or the imposition by the Board of civil penalties in accord with Section 42 of this Act. ...
>
> c. In making its orders and determinations,

> the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:
>
> 1. the character and degree of injury to, or interference with the protection of health, general welfare and physical property of the people;
>
> 2. the social and economic value of the pollution source;
>
> 3. the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
>
> 4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
>
> 5. any economic benefits accrued by a noncomplying pollution source because of its delay in compliance with pollution control requirements.
>
> Section 1033.

Although Section 33(c) applies by its terms to the "reasonableness of the emissions, discharges, or deposits involved," and various other aspects of this provision would render it more appropriate to pollution sources, it still provides at least minimal guidance in such a case as this one. This is a case involving violations of a body of regulations intended to entirely prevent the release of pollutants into the environment.

The People urge the Board not to apply Section 33(c) to this case. They assert that the application of this provision is not mandatory where there are no "emissions, discharges, or deposits," and that the application would be "contrary to the federal mandate." Complainant's Post-Hearing Brief at 25-26; see 42 U.S.C. 6928 (1987). The People instead urge the Board to apply the USEPA RCRA Civil Penalty Policy (final draft, May 8, 1984). Complainant's Post-Hearing Brief at 27-28. The Board believes it is possible to apply the Section 33(c) factors in a way that would overcome any deficiencies too literal a reading would make apparent. The Board believes also that the non-

limiting language of Section 33(c) subsumes the factors in the USEPA policy and obviates its application. Further, although the USEPA policy may provide limited guidance in some future case, its unnecessary application would likely result in confusion. The Board will not apply the USEPA RCRA Civil Penalty Policy in this case, but will apply Section 33(c) as intended by the General Assembly.

The Board observes that no tangible "harm" resulted from SCI's non-compliance and will concede that the potential for injury to or interference with "the health, general welfare, and physical property of the people" was not vast, but neither was it negligible. Misuse of the manifesting system and the improper storage and transportation of hazardous wastes present a very significant threat when done to avoid proper hazardous waste disposal. That SCI engaged in these acts to avoid regulatory compliance slightly diminished but did not eliminate the risk. The Board cannot conclude that SCI's non-compliance was reasonable based on this factor. Rather, the Board concludes that the purpose of improperly avoiding regulation is an unreasonable basis for non-compliance.

SCI is of social and economic value to Illinois and the smaller community in which it resides. It is suitable for its location. The Board finds with regard to these two factors that SCI is a greater community asset, more compatible with its environs, if it fully complies with the RCRA rules. The Board concludes that the desirability of enhanced local compatibility and value would make SCI's non-compliance unreasonable.

The Board finds that compliance with the RCRA rules was both technically feasible and economically reasonable for SCI. The Board also finds that SCI incurred some slight economic benefit through its non-compliance. The record does not reflect the exact magnitude of this benefit, but it would probably include the costs of more frequent hazardous wastes shipments (if SCI did not desire to comply with the Board's RCRA T/S/D facility standards) and the costs of assembling all necessary documentation and engaging in all required activities. On the basis of these two factors, the Board concludes that SCI's non-compliance was not reasonable.

Other factors bearing on the reasonableness of SCI's non-compliance are discussed in more detail above. These are included with the discussions of the individual violations to which they pertain. They include the findings that SCI could have complied with the regulations more promptly had it acted in the full good faith that it now asserts (Counts I, II, and III), that SCI could have complied had it not improperly sought to avoid the requirements (Counts VII, VIII, IX, X, and XI), and that SCI violated the rules and the Act for the improper purpose of avoiding Agency detection (Counts V and VI). These force the conclusion that SCI's non-compliance was not reasonable. Similar

other factors in mitigation include possible initial confusion as to the regulatory requirements (Counts I, II, and III) and the fact that SCI had a legitimate right of access to the lot adjoining its plant (Counts V and VI). These mitigating factors do not alter the Board's conclusion that SCI's non-compliance was unreasonable. They do, however, impact what the Board feels is an appropriate civil penalty.

Based on all the foregoing, the Board concludes that it is appropriate for the Board to order SCI to cease and desist in its non-compliant activities. This would include the cessation of its shipments of hazardous wastes to unauthorized locations without the use of manifests. Unless SCI is now in compliance with the various T/S/D facility requirements that would apply to it as a hazardous waste generator, it would include the cessation of its non-compliance with those various provisions that the Board has found SCI to have violated. It would also include SCI's non-compliance with those regulations the Board has found SCI to have violated as a T/S/D facility. Finally, although the People have not alleged it as a separate violation of the RCRA rules, the Board would order SCI to cease and desist all impermissible efforts at avoiding the regulatory requirements.

The rules provide that a RCRA permittee bears a burden of providing requested information to the Agency and not hindering Agency inspections. 35 Ill. Adm. Code 702.148-702.150 (1984). SCI will possibly find itself subject to this requirement in the future if its T/S/D facility status continues. The regulations further require that a facility owner or operator must furnish "[a]ll records, including plans, required under ... Part [725]" upon request during an Agency inspection. A failure to show required hazardous waste drum markings is arguably a violation of this provision. For these reasons, the Boards feels this last, additional prohibition is both warranted and necessary in this case.

The Board also feels that a non-punitive monetary sanction would further the cause of RCRA compliance. SCI's non-compliance was not merely "technical," and SCI acted less than forthrightly to seek compliance with the rules. The Board does not agree with the People that an aggregated penalty of $106,250 is appropriate. See Complainant's Post-Hearing Brief at 49. The Board believes that the lesser aggregated civil penalty of $10,500 will adequately serve the desired purposes of encouraging future compliance and discouraging future non-compliance, without acting as a predominantly punitive measure and severely impairing SCI's continued vitality. On the contrary, the Board feels that a lesser penalty in this case would not adequately communicate the desirability of compliance in light of the seriousness of many of the violations committed. RCRA compliance decisions cannot be left in the hands of the regulated community as a balancing of the costs of compliance against the risks of "getting caught."

The Board derives its aggregated $10,500 penalty from the following count-by-count supplemental, independent considerations, without reference to the statutory maxima:

Counts I, II, and III: $2,000 total. Had SCI paid a professional engineer the then-prevailing rate of about $50 per hour (see R. 526) for about 20 hours of work, it could have promptly acquired the compliance requisites. The Board increases this approximated cost by $1,000 to account for the aggravating and mitigating factors outlined above, and to discourage non-compliance risk-taking as a potential means of saving money.

Count IV: $500 total. This is a potentially serious violation of the RCRA rules if it impairs the investigation of lost, delayed, or improperly disposed hazardous wastes; results in the release of hazardous wastes or hazardous waste constituents into the environment; or results in a threat to human health or the environment. However, in mitigation, SCI investigated and obtained the missing return manifest copy. The Board feels that the penalty imposed properly encourages future compliance while balancing the potential gravity of this type of violation against the mitigating factor.

Counts V and VI: $5,500 total. These were the most serious violations of the RCRA rules and the Act--even apart from any aggravating considerations--because they constitute actions directed at removing hazardous wastes, even temporarily, from the RCRA regulatory system. This amount includes $2,000 for SCI's failure to manifest its wastes for shipment to a permitted facility and $1,000 for each day (July 6 and 7, 1983) or part of a day that the record indicates the wastes were improperly stored off-site. The Board imposes the additional penalty of $1,500 to account for the mitigating and aggravating factors outlined above, and to discourage future attempts to improperly avoid regulatory compliance by evading Agency detection of hazardous waste-related activities. Engaging in surreptitious acts for the purpose of avoiding Agency detection of the wastes and the intent of avoiding regulatory compliance is egregious aggravating conduct in the Board's opinion.

Counts VII, VIII, IX, X, and XI: $2,500 total. Had SCI paid a professional engineer the then-prevailing rate of $50 per hour for 40 hours work, it would have promptly acquired most of the required compliance requisites. It would have cost SCI at least another $250 to acquire the necessary financial assurance for RCRA closure. The Board imposes an additional $250 penalty to account for the mitigating and aggravating factors outlined above, and to discourage future attempts to improperly avoid regulatory compliance by evading Agency detection of hazardous waste-related activities.

In summary, the Board imposes $10,500 in civil penalties. Of this total, $3,250 is the estimated amount that the Board

believes SCI saved by its non-compliance; $2,000 is for two days improper waste storage; $2,000 is for SCI's failure to properly manifest and ship wastes off-site; $500 is for SCI's failure to file an exception report; and $2,750 is imposed in light of the aggravating and mitigating circumstances found to exist, to discourage future acts of non-compliance, and to encourage future compliance efforts. This amount is substantially less than that sought by the People, and much less than the maximum allowed by the Act, but it is the amount that the Board feels is appropriate in this case.

IV. Fees and Costs

The Act authorizes the Board to award fees and costs as follows:

> Without limiting any other authority which may exist for the awarding of attorney's fees and costs, the Board ... may award costs and reasonable attorney's fees, including the reasonable costs of expert witnesses and consultants, to the ... Attorney General in a case where he has prevailed against a person who has committed a wilful, knowing or repeated violation of the Act.
>
> Any funds collected under this subsection (f) in which the Attorney General has prevalied shall be deposited in the Hazardous Waste Fund ....
>
> Ill. Rev. Stat. ch. 111-1/2, par. 1042(f) (1988).

The Board has found that SCI knowingly, wilfully, and/or repeatedly violated the Act. Despite the fact that the People have not specifically prayed for such fees and costs, see Second Amended Complaint at 10-11, and because the record includes no basis for awarding such fees and costs, the Board hereby grants the People 30 days until July 30, 1988 to file their petition for fees and costs. If the People file such a petition, the Board hereby grants SCI an additional 14 days from the date of filing of any such petition to file its response. Any subsequent filings shall only be accepted on motion within the discretion of the Board.

VII. Final Action

This is a final action of the Board. The time period for the purposes of 35 Ill. Adm. Code 103.240 shall commence to run on this date for all issues except the propriety and amounts of costs and fees.

The foregoing constitutes the Board's findings of fact and conclusions of law in this case.

ORDER

The Board hereby orders S.C. Industries, Inc. to undertake the following actions:

1. S.C. Industries, Inc. shall cease and desist from all present and future violations of or non-compliance with Ill. Rev. Stat. ch. 111-1/2, par. 1021(f)(2) and 35 Ill. Adm. Code 702.148, 702.149, 702.150, 722.120, 722.142, 725.113, 725.115(b), 725.115(d), 725.116, 725.151, 725.153, 725.155, 725.173(b)(7), 725.174, 725.175, 725.212(a), 725.242, 725.243, and/or 725.274.

2. S.C. Industries, Inc. shall, prior to 60 days after the expiration of any time provided by 35 Ill. Adm. Code 103.240, tender to the Fiscal Services Division of the Illinois Environmental Protection Agency at 2200 Churchill Road, Springfield, Illinois 62708, the sum of $10,500 payable to the "Environmental Protection Trust Fund."

IT IS SO ORDERED

Board Member J. Anderson concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 30th day of June, 1988, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board