ILLINOIS POLLUTION CONTROL BOARD
September 20, 1984

SOUTHERN CALIFORNIA CHEMICAL CO., INC.,	)	
Petitioner,	)	
v.	)	PCB 84-51
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

MR. BRUCE L. WALD, TISHLER & WALD, LTD. APPEARED ON BEHALF OF THE SOUTHERN CALIFORNIA CHEMICAL CO., INC.;

MR. DONALD L. GIMBEL, ATTORNEY-AT-LAW, APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by J. D. Dumelle):

This matter comes before the Board upon an April 25, 1984, petition for variance filed on behalf of the Southern California Chemical Company (SCC) requesting variance from the manifest requirements of 35 Ill. Adm. Code 809, or alternatively, that the proceeding be dismissed as unnecessary. On May 29, 1984, the Illinois Environmental Protection Agency (Agency) filed a recommendation that variance by denied and a request for hearing. Hearing was held on August 2, 1984, at which the parties appeared and two witnesses testified.

SCC is the original manufacturer and formulator of ammoniacal etching solutions which are supplied to its customers essentially copper-free. There are no organics or acids used in the proprietary, patented formulations (U.S. Patent No. 3,705,061) which have been developed to be reused and to be valuable at all stages during treatment. These ammoniacal etching solutions are used by SCC's customers at their facilities in automatically controlled etching systems, utilizing SCC-supplied chemical monitoring and replenishment equipment. After they are used to remove copper from printed circuit boards, the copper-laden solutions are returned to SCC via SCC-supplied returnable deposit containers, or leased railcars and trucks. The copper-bearing solutions are routinely picked up at the time delivery of "fresh" product is made. On receipt of these solutions at the Company's Union plantsite, the copper is

removed from these solutions using a closed-loop Liquid Ion Exchange System. The recovered copper is processed into copper sulfate and sold as a normal item of commerce. The ammoniacal etching solutions, depleted of copper, are chemically adjusted to compensate for loss due to evaporation during customer use and are resold as "fresh" ammoniacal etching solution. All of the copper-laden solutions returned to SCC are either regenerated in this manner or directly sold by SCC to customers in other industries. The value of the spent etchant exceeds the value of the fresh etchant.

SCC contends that there are no wastes generated in this totally closed-loop system and the only waste products that might be generated at the facility would come from plant clean-up or routine container washing. These wash waters are held for batch neutralization and then periodically disposed of according to the appropriate regulations. SCC argues that the Board's decision in this case should be controlled by Safety-Kleen Corp. v. EPA (PCB 80-12, 37 PCB 363, February 7, 1980; affirmed by the Illinois Appellate Court, 2nd District, No. 80-650, January 4, 1982.) On the other hand, the Agency takes the position that after the etchant sold by SCC to its customers is used, it becomes a special waste and is thus subject to the manifest requirements of 35 Ill. Adm. Code 809. Furthermore, because the waste is hazardous, the waste is subject to the manifest regulations in 35 Ill. Adm. Code 722.120 to 722.123.

The Board agrees with the Petitioner that this case is controlled by the Safety-Kleen decision. The Agency's reasoning in this case is based on the same faulty assumption which was rejected in the Safety-Kleen case. As the Appelate Court in Safty-Kleen stated:

> "The Agency posed the question of whether or not wastes cease to be wastes under Chapter 9 of the waste regulations if they are destined to be recycled. This, however, is not the proper inquiry on the facts in this case. Rather the threshold question is whether or not the materials in issue are "wastes" in the first place." (Ill. E.P.A. v. Ill. Pollution Control Board and Safety-Kleen Corp., Ill. Appellate Court, 2nd District, No. 80-650, January 4, 1982.)

The Agency attempts to distinquish this case on the basis that P.A. 82-380 amended the Environmental Protection Act definition of "hazardous waste" which was in effect at the time Safety-Kleen was decided. (See Respondent's Brief In Lieu of Closing Argument.) The Board finds that this is "a distinction without a difference" since, as stated in Safety-Kleen, one doesn't get to the question of whether there is either a "special" or a "hazardous" waste until it is determined that a "waste" is involved in the first

place. Similarly, the Agency's arguments relating to the RCRA hazardous waste delisting requirements are premature and irrelevant.*

Having stated that this case is controlled by Safety-Kleen, we will nonetheless review the reasoning in that case in order to clarify the factors to be considered in a case involving the "Is there a waste?" question. To determine whether a "waste" is involved, we turn to the definition of "waste" in 35 Ill. Adm. Code 809.103:

> "Waste" means any garbage, refuse, 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. "Waste" as here defined does not include solid or dissolved material in domestic sewage, or solid or dissolved material in irrigation return flows, or in industrial discharges which are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, 33 U.S.C., par. 1251 et seq.; or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, 42 U.S.C., par. 2001 et seq.; or radioactive materials discarded in accordance with the provisions of "Illinois Revised Statutes, 1977, Chapter 111½, par. 230.1 et seq." approved August 16, 1963, as now or hereafter amended, and as authorized by regulations promulgated pursuant to the "Radiation Protection Act," Ill. Rev. Stat., 1977, Ch. 111½ par. 211 et seq.; as now or hereafter amended. "Waste as here defined is intended to be consistent with the definition of "solid waste" set forth in Section 1004(27) of resource Conservation and Recovery Act of 1976, U.S.C., par. 6901 et seq.

Since the spent etchant does not fit into any of the enumerated categories in this definition, the question is whether it is "other discarded material." In Safety-Kleen the Board articulated the standard that something "destined to be reused" is not "discarded." The Board's finding that the product involved was "destined to be reused" was based on the unique facts in that case, i.e., that the company involved maintained ownership over the solvent and maintained control over the solvent at all stages.

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*For the record, the Board notes that both the federal and state RCRA regulations exempt from regulation "hazardous waste" which is "being beneficially used or reused or legitmately recycled or reclaimed." See 35 Ill. Adm. Code 721.106(a)(1) and 40 CFR. IEPA concedes this point in its "Brief In Lieu of Closing Argument."

The question, then, is whether SCC maintains ownership and control over the etchant in question in this case. Contrary to the allegation of the Agency that the Petitioner has failed to prove ownership of the spent etchant, Petitioner presented evidence that the contract price for the use of its solvent is conditioned on "all spent material generated being the property of Southern California Chemical Co., Inc." (See Petitioner's Group Exhibit No. 1.) SCC states that the one instance in which it has sold the etchant without maintaining ownership of the spent etchant involves a customer which itself recycles the etchant and, again, there is no "waste" involved. (Petitioner's Reply to Agency's Recommendation and Request for Hearing, p. 2.)

While the transaction involved is characterized as a "sale", SCC retains a property right in and responsibility for the etchant before and after its use. In light of a lack of any evidence to the contrary, this is sufficient for the Board to find that SCC retains control over the etchant. We note that in this situation the etchant remains within a "closed loop" system which tracks the spent etchant in a manner that meets the purposes of the manifest system. Any etchant that does not remain within the closed loop system presents a different question which is not within the scope of this particular inquiry.

The Board, therefore, concludes that SCC's spent etchant when it is returned to SCC is not a waste, and that it is, therefore, not subject to the manifest requirements of 35 Ill. Adm. Code 809 and that the variance petition should be denied as unnecessary.

This Opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

Southern California Chemical Company's request for variance from the manifest requirements of 35 Ill. Adm. Code 809 is hereby denied as unnecessary.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 20th day of September, 1984 by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board