

ILLINOIS POLLUTION CONTROL BOARD
November 19, 1998

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 97-66
)	(Enforcement - Land)
D'ANGELO ENTERPRISES, INC., an)	
Illinois corporation,)	
)	
Respondent.)	

ORDER OF THE BOARD (by K.M. Hennessey):

Respondent D'Angelo Enterprises, Inc. (D'Angelo) manufactures circuit boards and other electroplated products at a facility in Franklin Park, Illinois. In this case, the People of the State of Illinois (People) allege that D'Angelo has violated provisions of the Environmental Protection Act (Act), 415 ILCS 5/1 *et seq.* (1996), and Board regulations on solid and hazardous wastes. The People now move for summary judgment on all counts of the complaint. D'Angelo has filed a cross-motion for summary judgment on all counts. The People have filed a response to the cross-motion in which, among other things, they have moved to strike the portion of the cross-motion that seeks a summary judgment on penalties.

The Board grants the People's motion in part and denies it in part, and grants D'Angelo's motion in part and denies it in part. Several claims were not resolved by either motion. The Board denies the People's motion to strike the portion of the cross-motion that seeks a summary judgment on penalties, and allows the People 14 days from the date of this order to respond to that portion of the cross-motion. Following the Board's resolution of that issue, the parties should proceed to hearing on the remaining claims.

PROCEDURAL HISTORY

The People filed an eleven-count complaint against D'Angelo on October 3, 1996. On August 5, 1998, the People moved for summary judgment (Mot. Sum. J.) on all counts. On September 9, 1998, D'Angelo filed a response to the motion (Resp.), along with a cross-motion for summary judgment on all counts and on penalties. On September 17, 1998, the People filed a response to the cross-motion for summary judgment, along with a motion to strike the portion of the response in which D'Angelo seeks summary judgment on penalties (Reply). On September 24, 1998, D'Angelo filed a response to the motion to strike (Resp. Mot. Strike).

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (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.” *Id.* 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.” *Id.*, 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 (2d Dist. 1994).

Therefore, the Board must construe the pleadings, depositions, and affidavits strictly against the People on its motion for summary judgment. Conversely, the Board must construe the pleadings, depositions, and affidavits strictly against D’Angelo on D’Angelo’s cross-motion.

Furthermore, the Board will only consider the affidavits submitted in support of the motion and cross-motion to the extent that they meet the requirements of Illinois Supreme Court Rule 191(a). Although Supreme Court Rule 191(a) is not a Board rule, the Board may look to it for guidance. See 35 Ill. Adm. Code 101.100(b). Supreme Court Rule 191(a) requires that affidavits submitted in support of a motion for summary judgment:

[S]hall be made on the personal knowledge of the facts; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. Illinois Supreme Court Rule 191(a).

STATEMENT OF FACTS

The following facts are uncontested unless stated otherwise.

D’Angelo is an Illinois corporation that manufactures printed circuit boards and other products that are electroplated. Answer at 1, 2. D’Angelo has a facility at 9955 Pacific Avenue, Franklin Park, Illinois (the “site” or “facility”). Answer at 2. At the facility, D’Angelo performs the following processes: anodizing; chromating; copper and solder electroplating; spray painting; silk-screening; and etching. *Id.* D’Angelo has a waste water treatment system. Resp. at 3; Resp. Exh. J (affidavit of James Post). In its operations, D’Angelo generates wastes, including: paint/ink solvents; plating sludge; bifluoride waste; paint filters; and pretreatment filters. Resp. Exh. A (Agency RCRA Inspection Report) at 5; Resp. Exh. M (affidavit of Mark Steger).

On November 19, 1993, two Illinois Environmental Protection Agency (Agency) inspectors, Gino Bruni (Bruni) and Anna VanOrden (VanOrden), investigated the facility. See Mot. Sum. J. Exh. A (affidavit of VanOrden) at 2; Mot. Sum. J. Exh. B (affidavit of Bruni) at 2. The foreman of the facility, Walter Schwetz (Schwetz), told them that the facility had 55 55-gallon drums of plating sludge and three 55-gallon drums of biflouride waste. Mot. Sum. J. Exh. A at 3; Mot. Sum. J. Exh. B. at 3. These drums had been accumulating since at least 1990.¹ Resp. at 5. The facility also had three 55-gallon drums of paint/ink solvents. Mot. Sum. J. Exh. A at 2-3; Mot. Sum. J. Exh. B at 2-3; Resp. at 5, Resp. Exh. K (affidavit of Schwetz). None of these drums were labeled. Mot. Sum. J. Exh. A at 3; Mot. Sum. J. Exh. B at 3.

On October 5, 1993, D'Angelo determined that the paint/ink solvents consisted of the hazardous wastes. Under Illinois regulations, hazardous wastes are given a number based on whether they have certain characteristics such as ignitability, toxicity, corrosivity, or reactivity ("characteristic wastes") or are specifically listed on various regulatory lists ("listed wastes"). D'Angelo determined that the paint/ink solvents consisted of the hazardous wastes designated D001 (ignitable), D035 (methyl ethyl ketone), F003 (certain spent non-halogenated solvents), and F006 (certain wastewater treatment sludges from electroplating operations). Resp. Exh. A at 5; Exh. M; 35 Ill. Adm. Code 721.Subpart C. D'Angelo analyzed the plating sludge on December 14, 1993, and determined that it was an F006 hazardous waste. Resp. Exh. A at 5; Resp. Exh. M.

D'Angelo had no records of ever having made any other hazardous waste determinations on these waste streams, or on its biflouride waste or paint and pretreatment filters. Mot. Sum. J. Exh. A at 3; Mot. Sum. J. Exh. B at 3; Resp. Exh. A at 5; Resp. Exh. M. D'Angelo does not have a permit to store hazardous waste. Mot. Sum. J. Exh. A at 3; Mot. Sum. J. Exh. B at 3.

On December 21, 1993, D'Angelo disposed of the biflouride waste and plating sludge off-site. Resp. at 5; Resp. Exh. K; Resp. Exh. L (hazardous waste manifests). The manifest that D'Angelo submitted for these wastes described them in part as "hazardous waste solid" and "F019." Resp. Exh. L.²

On January 21, 1994, D'Angelo disposed of the paint/ink solvents off-site. Resp. at 5; Resp. Exh. K; Resp. Exh. L. The manifest that D'Angelo submitted for these wastes

¹ VanOrden and Bruni state that Schwetz told them that these drums had been on-site since at least 1990. See Mot. Sum. J. Exh. A at 3; Mot. Sum. J. Exh. B at 3. While D'Angelo states that the drums of biflouride waste had been on-site "for an undetermined length of time," it does not contest the statement that VanOrden and Bruni attribute to Schwetz. See Resp. at 5; Resp. Exh. K.

² The People attached a number of other hazardous waste manifests to the motion as Exh. C. The People did not establish, however, that these manifests related to the wastes that are the subject of the complaint. The Board relies instead on the manifests attached to the Response as Exh. L because D'Angelo admits these manifests relate to the wastes that are the subject of the complaint. See Resp. at 5.

described them in part as “waste flammable liquids . . . (toluene & xylene) . . . (F005).” Resp. Exh. L. F005 wastes are certain spent non-halogenated solvents. 35 Ill. Adm. Code 721.131(a).

As of November 19, 1993, D’Angelo had not provided enough aisle space to allow Agency personnel to inspect the containers of waste, or to allow for the unobstructed movement of emergency equipment and personnel. Mot. Sum. J. Exh. A at 4; Mot. Sum. J. Exh. B at 4. As of that date, D’Angelo also had no weekly inspection reports or other documents on-site that indicated that D’Angelo had inspected the container storage area. Mot. Sum. J. Exh. A at 4; Mot. Sum. J. Exh. B at 4.

As of November 19, 1993, D’Angelo had no copies of annual reports regarding hazardous wastes disposed of off-site. Mot. Sum. J. Exh. A at 3; Mot. Sum. J. Exh. B at 3. As of that date, D’Angelo also did not maintain records identifying personnel by title, position, description of job duties, and compliance training for hazardous waste management. Mot. Sum. J. Exh. A at 3; Mot. Sum. J. Exh. B at 3. In addition, D’Angelo did not have a contingency plan for emergency situations or an emergency coordinator. Mot. Sum. J. Exh. A at 4; Mot. Sum. J. Exh. B at 4. As of November 19, 1993, D’Angelo had not made any arrangements with or notified the local fire, police, hospital, and emergency response teams that would respond to emergencies at the facility. Mot. Sum. J. Exh. A at 4; Mot. Sum. J. Exh. B at 4.

As of November 19, 1993, the facility had paint and pretreatment filters. Mot. Sum. J. Exh. A at 2-3; Mot. Sum. J. Exh. B at 2-3; Resp. at 5; Resp. Exh. K. At that time, it was D’Angelo’s practice to place paint and pretreatment filters in an on-site dumpster, the contents of which D’Angelo disposed of in a solid waste landfill. Mot. Sum. J. Exh. A at 3; Mot. Sum. J. Exh. B at 3.

DISCUSSION

Count I: Conducting a Hazardous Waste Storage Operation Without a RCRA Permit

In count I of the complaint, the People allege that D’Angelo has conducted a hazardous waste-storage operation in violation of Section 21(f)(1) and (2) of the Act, 415 ILCS 5/21(f)(1) and (2) (1996). Those provisions read as follows:

No person shall:

- f) Conduct any hazardous waste-storage, hazardous waste-treatment or hazardous waste-disposal operation:
 - 1) Without a RCRA permit for the site issued by the Agency under subsection (d) of Section 39 of this Act, or in violation of any condition imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder.

- 2) In violation of any regulations or standards adopted by the Board under this Act. 415 ILCS 5/21(f)(1) and (2) (1996).

Section 21(f)(1)

The first question on the People's Section 21(f)(1) claim is whether any of D'Angelo's wastes were hazardous wastes.¹ In its response to the motion, D'Angelo admitted that the plating sludges, the bifluoride wastes, and the paint/ink solvents were hazardous wastes, and provided copies of manifests that state that these wastes were hazardous wastes. Response at 5; Resp. Exh. K; Resp. Exh. L. D'Angelo also admits that it was the "generator"² of this waste. Resp. at 5; Resp. Exh. K; Resp. Exh. L.

The People have not shown, however, that the paint and pretreatment filters were hazardous waste. Mot. Sum. J. Exh. A at 3; Mot. Sum. J. Exh. B at 3. The Board therefore denies the People's motion as it relates to the paint and pretreatment filters.

Next, the Board must consider whether D'Angelo conducted a hazardous waste-storage operation without a RCRA permit. "Storage" is "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal." 415 ILCS 5/3.46 (1996). D'Angelo does not contest that it was storing the plating sludge, the bifluoride waste, and the paint/ink solvents. Resp. at 5; Resp. Exh. L; Mot. Sum. J. Exh. A at 3, Exh. B at 3. The Board finds that D'Angelo has "stored" hazardous wastes within the meaning of the Act.

The Board further finds that D'Angelo was required to obtain a RCRA permit to store the plating sludge and the bifluoride waste. A "RCRA permit" is "a permit issued by the Agency pursuant to authorization received by the Agency from the United States Environmental Protection Agency under Subtitle C of the Resource Conservation and Recovery Act of 1976, (P.L. 94-580) (RCRA) and which meets the requirements of Section 3005 of RCRA and of this Act." 415 ILCS 5/3.29 (1996). Generally, anyone storing hazardous waste is required to obtain a RCRA permit. See 415 ILCS 5/21(f)(1) (1996), 35 Ill. Adm. Code 703.121.

However, D'Angelo may not have needed a RCRA permit to store the paint/ink solvents. For the purposes of the People's motion, the Board must assume, as D'Angelo asserts, that the paint/ink solvents had been on-site for less than 90 days as of November 19, 1993. Resp. at 5; Resp. Exh. K. Under 35 Ill. Adm. Code 703.123(a) and 35 Ill. Adm. Code 722.134, generators who accumulate waste on-site for less than 90 days are not required to obtain a RCRA permit. D'Angelo has raised a question of material fact as to whether its paint/ink solvents fit within this exception. Therefore, the Board denies the People's motion on this count to the extent that it relates to the paint/ink solvents.

¹ The Act defines "hazardous wastes" at 415 ILCS 5/3.15 (1996).

² The Act defines "generator" at 415 ILCS 5/3.12 (1996). See also 35 Ill. Adm. Code 702.110, which more specifically defines "generator" with respect to hazardous waste.

No exemption is available for the plating sludge or the biflouride waste. But D'Angelo claims that the Agency concluded, in a letter dated August 21, 1994, that D'Angelo did not need to obtain a RCRA permit. See Resp. at 6, citing Resp. Exh. I (letter from the Agency to D'Angelo dated August 21, 1994). The Agency letter that D'Angelo cites, however, merely states that D'Angelo has "returned to compliance for the apparent violations of 703.121(a) and 722.134(a)." Resp. Exh. I at 2. This letter, which the Agency issued after D'Angelo removed certain hazardous wastes from its site, does not say that D'Angelo never needed to obtain a RCRA permit. Therefore, it does not provide a defense to this count. The Board finds that Section 21(f)(1) required D'Angelo to obtain a RCRA permit to store the plating sludge and biflouride waste, and that D'Angelo violated this requirement.

D'Angelo further notes that it removed the hazardous waste by January 1994. Resp. at 5; Resp. Exh. L. While this evidence may be relevant to the appropriate penalty that the Board may impose on D'Angelo for violating Section 21(f)(1) (see 415 ILCS 5/42(h) (1996)), it is not a defense to the charge that D'Angelo violated Section 21(f)(1). The Board therefore grants the People summary judgment on this claim.

The Board also denies D'Angelo's cross-motion on this claim as it relates to the plating sludge and biflouride waste, for the reasons given above. Furthermore, while D'Angelo claims that it accumulated the paint/ink solvents on-site for less than 90 days before disposing of them, the People's affidavits claim that they had been on-site since 1990. Mot. Sum. J. Exh. A at 2-3, Mot. Sum. J. Exh. B at 2-3. This material question of fact precludes summary judgment for D'Angelo on this count as it relates to the paint/ink solvents. D'Angelo makes no arguments regarding the paint and pretreatment filters and therefore the Board denies the cross-motion as it relates to those wastes.

Section 21(f)(2)

As noted above, Section 21(f)(2) of the Act provides that no person shall conduct a hazardous waste-storage operation in violation of any regulations or standards that the Board has adopted under the Act. The regulations that the People claim D'Angelo has violated are 35 Ill. Adm. Code 703.121(a) and (b), 721.121(b), 721.124(a) and (b), 721.131(a), and 728.150(a)(1) and (c). For the reasons given above, the Board denies the People's motion on these claims to the extent they relate to the paint/ink solvents and paint and pretreatment filters, and considers these claims only to the extent they relate to the plating sludge and biflouride waste.

Section 703.121(a) and (b). Section 703.121(a) prohibits any person from conducting a hazardous waste storage operation without a RCRA permit for the hazardous waste management facility. A hazardous waste management (HWM) facility means, in part, "all contiguous land, and structures, other appurtenances and improvements on the land, used for treating, storing or disposing of 'hazardous waste.'" 35 Ill. Adm. Code 702.110. For the same reasons that the Board found D'Angelo in violation of Section 21(f)(1) of the Act, the Board finds D'Angelo in violation of 35 Ill. Adm. Code 703.121(a) and Section 21(f)(2) of the Act, and grants the People summary judgment on this claim as it relates to the plating sludge and the biflouride waste.

Section 703.121(b) provides in part: “Owners and operators of HWM units shall have permits during the active life (including the closure period) of the unit.” 35 Ill. Adm. Code 703.121(b). D’Angelo operated a HWM unit without a permit, and therefore violated this section as well. The Board grants the People summary judgment on this claim as it relates to the plating sludge and the bifluoride waste.¹

Sections 721.124(b), 721.124(a) and (b), and 721.731(a). Sections 721.124(b), 721.124(a) and (b), and 721.731(a) each describe ways in which a waste may be considered hazardous; for example, Section 721.121(b) describes when a solid waste is “ignitable” and therefore a hazardous waste. Because these sections are merely descriptive, the Board cannot find that D’Angelo has violated them. The Board grants D’Angelo summary judgment on these claims.

Section 728.150(a)(1) and (c). Section 728.150(a)(1) prohibits the storage of hazardous wastes restricted from land disposal unless certain conditions are met. D’Angelo’s plating sludges and bifluoride wastes are restricted from land disposal. See Resp. Exh. L; 35 Ill. Adm. Code 728.135. Therefore, D’Angelo is subject to Section 728.150(a)(1).

One of Section 728.150(a)’s conditions is that a generator may store wastes restricted from land disposal in containers on-site “solely for the purpose of the accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment or disposal and the generator complies with the requirements in 35 Ill. Adm. Code 722.134” 35 Ill. Adm. Code 728.150(a)(1). Section 722.134(a) only allows generators to accumulate waste on-site for 90 days without a permit. As noted earlier, D’Angelo did not have a permit and stored the plating sludges and bifluoride wastes on-site for approximately three years. In addition, D’Angelo did not comply with the requirement of Section 722.134(a) to label hazardous waste containers with their accumulation dates and contents.

While D’Angelo again argues that the Agency found it in compliance with Section 728.150(a) as of June 23, 1994 (see Resp. Exh. G), subsequent compliance is not a defense. The Board therefore grants the People summary judgment on this claim as it relates to the plating sludge and the bifluoride waste.

Section 728.150(c) allows an owner of a treatment, storage or disposal facility to store hazardous wastes restricted from land disposal for beyond one year, but also provides that the owner or operator bears the burden of proving that such storage was solely for the purpose of accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment or disposal. D’Angelo has not shown that it is entitled to claim the benefit of this exception. However, because this provision contains an exception and not a prohibition, the

¹ In the complaint, the People also allege that 35 Ill. Adm. Code 703.150(a) also required D’Angelo to obtain a RCRA permit. Comp. at 16. The People do not request, however, that the Board find D’Angelo in violation of this section (see Comp. at 18-19); therefore, the Board does not address it.

Board cannot find that D'Angelo violated this provision. The Board therefore grants D'Angelo summary judgment on this claim.

Summary on Count I

In summary, the Board grants the People summary judgment on its claim that D'Angelo violated Section 21(f)(1) and (2) of the Act with respect to the plating sludge and the biflouride waste. D'Angelo also violated 35 Ill. Adm. Code 703.121(a) and (b) and 728.150(a) with respect to the plating sludge and the biflouride waste. The Board denies the People's motion for summary judgment on count I as it relates to the paint and pretreatment filters and the paint/ink solvents. The Board grants D'Angelo summary judgment, and denies the People summary judgment, on the People's claim that D'Angelo violated Section 21(f)(2) of the Act by violating 35 Ill. Adm. Code 721.121(b), 721.124(a) and (b), 721.731(a), and 728.150(c). The Board denies the remainder of D'Angelo's cross-motion on count I.

Count II: Failure to Conduct Hazardous Waste Determination

In count II, the People allege that D'Angelo failed to determine if its wastes were hazardous wastes, as Section 722.111 requires. That section provides:

A person who generates a solid waste, as defined in 35 Ill. Adm. Code 721.102,¹ shall determine if that waste is a hazardous waste using the following method
35 Ill. Adm. Code 722.111.

By failing to do so, the People allege, D'Angelo violated this provision, and Section 21(f)(2) of the Act as well. In support of this claim, the People cite the affidavits of VanOrden and Bruni, each of which states that on November 19, 1993, the date of VanOrden's and Bruni's inspection, D'Angelo did not have records of ever having made a hazardous waste determination on their drums of waste. Mot. Sum. J. Exh. A at 3; Mot. Sum. J. Exh. B at 3.

In response, D'Angelo cites the Agency's inspection report, attached to the response as Exh. A., which apparently was completed on December 22, 1993. Page five of the inspection report, which is labeled "Waste Disposition," lists the paint/ink solvent waste, states that the "date of last analysis" of these wastes is October 5, 1993. The document lists the paint/ink solvents' hazardous waste numbers as F005, D001, F003, and D035. The document does not state when these wastes were first analyzed and does not indicate how they were analyzed. *Id.* D'Angelo states, however, that it had determined that its paint/ink solvent wastes were hazardous wastes before November 19, 1993, the date of the Agency's inspection. Resp. at 6; Exh. K.

Because the Board must construe these documents favorably to D'Angelo with respect to the People's motion, the Board must find that D'Angelo has raised a genuine issue of fact as to whether it complied with its obligation to analyze the paint/ink solvent wastes. For the

¹ The parties do not dispute that the wastes that D'Angelo generated were solid wastes.

purposes of the People's motion, the Board must assume, as D'Angelo asserts, that these wastes had been on-site less than 90 days as of November 19, 1993. Furthermore, Resp. Exh. A suggests that these wastes were analyzed on October 5, 1993. Mot. Sum. J. Exh. A at 2-3; Mot. Sum. J. Exh. B at 2-3; Resp. at 5; Resp. Exh. K. Because D'Angelo may have analyzed these wastes promptly after they were generated, the Board must deny the People's motion for summary judgment on this count with respect to the paint/ink solvents.

However, the Board must deny D'Angelo's cross-motion on these wastes. While the People have not contested the evidence that the paint/ink solvent wastes were tested within at least 90 days after they were generated, D'Angelo has not shown that the wastes were analyzed in accordance with the methods specified in 722.111.

With respect to the plating sludge, the "Waste Disposition" form in Resp. Exh. A indicates that it was last analyzed on December 14, 1993, and lists its hazardous waste number as F006. Resp. Exh. A at 5. Unlike the paint/ink solvents, however, it is clear that the plating sludges had been on-site since at least 1990, and thus were not analyzed promptly after they were generated. Mot. Sum. J. Exh. A at 3, Exh. B. at 3. D'Angelo has not produced any evidence that these wastes were ever analyzed before December 14, 1993. Therefore, the undisputed facts show that D'Angelo did not comply with the requirements of Section 722.111 with respect to the plating sludges.

The People also have introduced evidence showing that D'Angelo had not analyzed the other wastes that VanOrden and Bruni observed on-site: the bifluoride waste and the paint and pretreatment filters. Mot. Sum. J. Exh. A at 3, Exh. B at 3. D'Angelo does not contest this evidence, although it does argue that it later made hazardous waste determinations for some of these wastes. Resp. at 7. As previously noted, subsequent compliance is not a defense; therefore, the Board finds that D'Angelo violated Section 722.111 with respect to these wastes as well.

In summary, the Board grants the People summary judgment on its claim that D'Angelo violated 35 Ill. Adm. Code 722.111, and thereby Section 21(f)(2) of the Act, with respect to the plating sludge, the bifluoride waste, and the paint and pretreatment filters. The Board denies the People summary judgment on its claim that D'Angelo violated 35 Ill. Adm. Code 722.111 with respect to the paint/ink solvents. The Board denies D'Angelo's cross-motion on count II.

Count III: Failure to Determine Whether Waste is Restricted From Land Disposal

In count III, the People allege that D'Angelo did not meet its obligations under 35 Ill. Adm. Code 728.107(a), which provides:

Except as specified in Section 728.132, where a generator's waste is listed in 35 Ill. Adm. Code 721.Subpart D, the generator shall test his waste, or test an extract using the test method described in 35 Ill. Adm. Code Appendix B, or use knowledge of the waste, to determine if the waste is restricted from land disposal under this Part 35 Ill. Adm. Code 728.107(a).

The People allege that D'Angelo should have made this determination on the paint/ink solvents, the biflouride waste, the paint and pretreatment filters, and the plating sludge. Comp. at 3, 21.

In response, D'Angelo asserts only that "the pleadings, admissions on file, together with affidavits, demonstrate that the Respondent complied with the requirements of Section 728.107(a)(2) and Section 21(f)(2) of the Act prior to June 7, 1994." Resp. at 7. D'Angelo points to no evidence demonstrating compliance before that date.

The Board finds that the undisputed facts show that D'Angelo violated Section 728.107(a)(2) with respect to the paint/ink solvents, the biflouride wastes, and the plating sludge, and therefore grants the People's motion to that extent. The Board denies the People's motion with respect to the paint and pretreatment filters, however, because Section 728.107 only applies to wastes that are listed in 35 Ill. Adm. Code 721.Subpart D – *i.e.*, listed hazardous wastes – and it has not been shown that the paint and pretreatment filters were listed hazardous wastes.

D'Angelo has not set forth any argument that would entitle it to summary judgment on this count. The Board therefore denies D'Angelo's cross-motion on this count.

In summary, the Board grants the People summary judgment on its claim that D'Angelo violated Section 728.107(a)(2), and thereby Section 21(f)(2) of the Act, with respect to the paint/ink solvents, the biflouride wastes, and the plating sludge. The Board denies the People summary judgment on this count, however, with respect to the paint and pretreatment filters. The Board denies D'Angelo's cross-motion on this count.

Count IV: Failure to Submit and Retain Annual Reports

In count IV, the People allege that D'Angelo violated 35 Ill. Adm. Code 722.140(b), which provides in part:

A generator must keep a copy of each Annual Report and Exception Report for a period of at least three years from the due date of the report (March 1). 35 Ill. Adm. Code 722.140(b).

Under 35 Ill. Adm. Code 722.141(a), any generator who ships any hazardous waste off-site to a treatment, storage or disposal facility must prepare and submit an Annual Report to the Agency by March 1 for the preceding calendar year. That section provides:

A generator who ships any hazardous waste off-site to a treatment, storage or disposal facility within the United States shall prepare and submit a single copy of an annual report to the Agency by March 1 for the preceding calendar year. The annual report must be submitted on a form supplied by the Agency, and must cover generator activities during the previous calendar year, and must include the following information 35 Ill. Adm. Code 722.141(a).

The People allege that at the Agency's November 19, 1993 inspection, D'Angelo failed to make available the generator annual reports that Section 722.141(a) requires. Comp. at 24; Mot. Sum. J. Exh. A at 3; Mot. Sum. J. Exh. B at 3. The People further allege that as of November 19, 1993, D'Angelo failed to submit to the Agency the annual reports that Section 722.141(a) requires. Comp. at 25; Mot. Sum. J. Exh. A at 3; Mot. Sum. J. Exh. B at 3.

In response, D'Angelo asserts that it was a small-quantity generator until 1993 and therefore exempt from reporting requirements under Subpart D of Part 722. Resp. at 7; Resp. Exh. K; see also 35 Ill. Adm. Code 722.144 (exempting generators of greater than 100 kilograms but less than 1,000 kilograms of hazardous waste in a calendar month from certain reporting requirements). D'Angelo further asserts that it met the requirements of Section 722.140(b) by filing an annual report for 1993 by June 1, 1994. Resp. at 7; Resp. Exh. K.

The Board finds that even if D'Angelo were not exempt for the years 1989-1992 because it was a small-quantity generator, the People have not introduced any evidence that D'Angelo shipped any hazardous wastes off-site during this period. As our disposition of earlier counts makes clear, D'Angelo should have done so, and D'Angelo violated other Board regulations by not doing so. But Section 722.141(a) does not apply when a generator does not ship any hazardous waste off-site. The Board therefore denies the People's motion on this count to the extent that each relates to the calendar years 1989 through 1992.

D'Angelo admits that it was obligated to prepare an annual report for calendar year 1993, and that it did not prepare and submit that report until June 1, 1994. Resp. at 7; Resp. Exh. K. Under Section 722.141(a), D'Angelo should have filed this report on March 1, 1994. However, it was not due as of November 19, 1993, the date of the Agency's inspection, and the date on which the People allege D'Angelo was out of compliance. See Comp. at 24-25. To the extent that the People claim that D'Angelo violated 35 Ill. Adm. Code 722.141(a) by failing to submit its annual report for 1993 on a timely basis, the Board therefore denies the People summary judgment and grants D'Angelo summary judgment.

The Board denies the remainder of D'Angelo's cross-motion on this count. D'Angelo cross-moves for summary judgment based on its claim that until 1993, it was a small-quantity generator and exempt from the reporting requirements of 35 Ill. Adm. Code 722.141(a). Resp. at 7; see also 35 Ill. Adm. Code 722.144 (setting forth exemption for small-quantity generators). However, D'Angelo has not submitted any evidence to substantiate this conclusion, other than affidavits that incorporate this conclusion. See Resp. Exh. J; Resp. Exh. K; Resp. Exh. M. The Board may consider affidavits submitted in support of a motion for summary judgment only to the extent that they "set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which affiant relies . . . and [do] . . . not consist of conclusions but of facts admissible in evidence." Illinois Supreme Court Rule 191(a). D'Angelo's affidavits do not meet this standard on this issue. Therefore, the Board must deny D'Angelo's cross-motion on this count.

In summary, the Board denies the People's motion on count IV. The Board grants D'Angelo's cross-motion on this count as it relates to the People's claim that D'Angelo

violated 35 Ill. Adm. Code 722.141(a) by failing to file its annual report for 1993. The Board denies the remainder of D'Angelo's cross-motion.

Count V: Violation of Hazardous Waste Training Program Requirement

In count V, the People allege that D'Angelo violated 35 Ill. Adm. Code 725.116. This provision, which applies to owners and operators of hazardous waste facilities (see 35 Ill. Adm. Code 725.110), requires training for all personnel regarding hazardous waste management procedures. It also requires these owners and operators to maintain various records regarding those personnel with jobs related to hazardous waste management. The section reads in relevant part as follows:

- a)1) Facility personnel must successfully complete a program of classroom instruction or on-the-job training that teaches them to perform their duties in a way that ensures the facility's compliance with the requirements of this Part. The owner or operator must ensure that this program includes all the elements described in the document required under paragraph (d)(3) of this Section

* * *

- d) 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 may be consistent in its degree of specificity with descriptions for other similar positions in the same company location or bargaining unit, but 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;
 - 4) Records that document that the training or job experience required under paragraphs (a), (b) and (c) of this Section has been given to and completed by facility personnel. 35 Ill. Adm. Code 725.116.

The People claim that as of the Agency's November 19, 1993 inspection, D'Angelo had not provided the required training and had not maintained the required records. Mot.

Sum. J. Exh. A at 4. As a result, the People claim that D'Angelo violated 35 Ill. Adm. Code 725.116 and Section 21(f)(2) of the Act.

In response, D'Angelo claims that it had complied with these requirements before June 7, 1994. This is not a defense. Accordingly, the Board grants the People summary judgment on this count and denies D'Angelo's cross-motion on this count.

Count VI: Failure to Maintain Adequate Aisle Space

In this count, the People allege that on November 19, 1993, and on June 7, 1994, D'Angelo did not have adequate aisle space between its hazardous waste storage sites to allow for inspection or for the unobstructed movement of emergency equipment and personnel. Mot. Sum. J. Exh. A at 4. As a result, the People allege that D'Angelo violated 35 Ill. Adm. Code 725.135, which provides as follows:

The owner or operator must maintain aisle space to allow the unobstructed movement of personnel, fire protection equipment, spill control equipment and decontamination equipment to any area of the facility in operation in an emergency, unless aisle space is not needed for any of these purposes. 35 Ill. Adm. Code 725.135.

The People also claim this conduct violated Section 21(f)(2) of the Act.

In response, D'Angelo asserts that it complied with this requirement before July 21, 1994. Resp. at 8. This is not a defense, and accordingly the Board grants the People summary judgment on this count and denies D'Angelo's cross-motion on this count.

Count VII: Failure to Make Arrangements with Local Authorities

In count VII, the People allege that as of November 19, 1993, D'Angelo had failed to make arrangements with or to notify the fire, police, hospital and emergency response teams who would respond to the facility in the event of an emergency. As a result, the People allege that D'Angelo violated 35 Ill. Adm. Code 725.137, which provides as follows:

- a) The owner or operator must attempt to make the following arrangements, as appropriate for the type of waste handled at his facility and the potential need for the services of these organizations:
 - 1) Arrangements to familiarize police, fire departments and emergency response teams with the layout of the facility, properties of hazardous waste handled at the facility and associated hazards, places where facility personnel would normally be working, entrances to roads inside the facility and possible evacuation routes;
 - 2) Where more than one police and fire department might respond to an emergency, agreements designating primary emergency

authority to a specific police and a specific fire department and agreements with any others to provide support to the primary emergency authority;

- 3) Agreements with State emergency response teams, emergency response contractors and equipment suppliers; and
 - 4) Arrangements to familiarize local hospitals with the properties of hazardous waste handled at the facility and the types of injuries or illnesses which could result from fires, explosions or releases at the facility.
- b) Where state or local authorities decline to enter into such arrangements, the owner or operator must document the refusal in the operating record. 35 Ill. Adm. Code 725.137.

The People also claim that D'Angelo violated Section 21(f)(2) of the Act through this conduct.

In response, D'Angelo asserts that it complied with this requirement before June 7, 1994. Resp. at 8; Resp. Exh. K. This is not a defense, and accordingly the Board grants the People summary judgment of this count and denies D'Angelo's cross-motion on this count.

Count VIII: Failure to Maintain a Contingency Plan

In count VIII, the People allege that as of November 19, 1993, D'Angelo did not have a contingency plan for the facility to minimize the hazard to human health and the environment in the event of fire, explosion, or release of hazardous materials. Mot. Sum. J. Exh. A at 4. The People claim that D'Angelo therefore violated 35 Ill. Adm. Code 725.151 (and therefore Section 21(f)(2) of the Act), which provides in part:

- a) Each owner or operator must have a contingency plan for this facility. The contingency plan must be 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. 35 Ill. Adm. Code 725.151.

In response, D'Angelo asserts that it complied with this requirement before June 7, 1994. Resp. at 8; Resp. Exh. K. This is not a defense, and therefore the Board grants the People summary judgment on this count and denies D'Angelo's cross-motion on this count.

Count IX: Failure to Appoint an Emergency Coordinator

In this count, the People claim that as of November 19, 1993, D'Angelo had not appointed an emergency coordinator, as 35 Ill. Adm. Code 725.155 requires:

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. 35 Ill. Adm. Code 725.155.

See also Mot. Sum. J. Exh. A at 4. As a result, the People allege that D'Angelo violated 35 Ill. Adm. Code 725.155 and Section 21(f)(2) of the Act.

In response, D'Angelo asserts that it complied with this requirement before June 7, 1994. Resp. at 8; Resp. Exh. K. This is not a defense. Therefore the Board grants the People summary judgment on this count and denies D'Angelo's cross-motion on this count.

Count X: Failure to Inspect Container Storage Area

In this count, the People allege that D'Angelo violated 35 Ill. Adm. Code 725.274 and Section 21(f)(2). Section 725.274 provides:

The owner or operator must inspect areas where containers are stored at least weekly, looking for leaks and for deterioration caused by corrosion and other factors.

The undisputed facts show that on November 19, 1993, D'Angelo was not conducting weekly inspections of its hazardous waste storage areas. Mot. Sum. J. Exh. A at 4. D'Angelo also did not have a written inspection program or written records of inspection on-site. *Id.* As a result, the People allege that D'Angelo violated Section 725.274 and Section 21(f)(2) of the Act.

In response, D'Angelo asserts that it complied with this requirement before June 7, 1994. Resp. at 8; Resp. Exh. K. This is not a defense, and therefore the Board grants the People summary judgment on this count and denies D'Angelo's cross-motion on this count.

Count XI: Special Waste Manifest Violations

In this count, the People allege that D'Angelo violated Section 21(e) of the Act and 35 Ill. Adm. Code 809.301. Section 21(e) of the Act provides:

No person shall:

e. 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 regulations and standards thereunder. 415 ILCS 5/21(e) (1996).

The People assert that D'Angelo's paint and pretreatment filters are a "special waste" under the Act and subject to restrictions on the disposal of special waste. Comp. at 41-42. "Special waste" is:

[A]ny industrial process waste, pollution control waste or hazardous waste, except as may be determined pursuant to Section 22.9 of this Act. "Special Waste" also means any potentially infectious medical waste. 415 ILCS 5/3.45 (1996).

The People claim that the paint and pretreatment filters are special waste because they are an "industrial process waste," which the Act defines as:

[A]ny liquid, solid, semi-solid, or gaseous waste generated as a direct or indirect result of the manufacture of a product or the performance of a service. Any such waste which would pose a present or potential threat to human health or to the environment or with inherent properties which make the disposal of such waste in a landfill difficult to manage by normal means is an industrial process waste. "Industrial Process Waste" includes but is not limited to spent pickling liquors, cutting oils, chemical catalysts, distillation bottoms, etching acids, equipment cleanings, paint sludges, incinerator ashes (including but not limited to ash resulting from the incineration of potentially infectious medical waste), core sands, metallic dust sweepings, asbestos dust, and off-specification, contaminated or recalled wholesale or retail products. Specifically excluded are uncontaminated packaging materials, uncontaminated machinery components, general household waste, landscape waste and construction or demolition debris. 415 ILCS 5/3.15 (1996).

The Board finds that because D'Angelo generates paint and pretreatment filters as a result of its manufacture of a product, the filters are a special waste and subject to the requirements of 35 Ill. Adm. Code 809.301. The Board further finds that the uncontested facts show that D'Angelo disposed of the paint and pretreatment filters at a solid waste landfill. However, solid waste landfills may be permitted to accept special waste. See 35 Ill. Adm. Code 811.Subpart D. The affidavits that the People submitted do not state that the landfill at which D'Angelo disposed of the paint and pretreatment filters was not permitted to accept special waste. As explained earlier, the Board must construe all documents in favor of D'Angelo when considering the People's motion against D'Angelo. Accordingly, the Board denies the People's motion on its claim that D'Angelo violated Section 21(e) of the Act.

The People also allege that when D'Angelo disposed of the paint and pretreatment filters, it violated 35 Ill. Adm. Code 809.301. That section provides:

No person shall deliver any special waste generated within Illinois or for disposal, storage or treatment within Illinois unless that person concurrently delivers a manifest completed in accordance with Subpart E of this Part to a special waste hauler who holds a current, valid special waste hauling permit issued by the Agency under Subpart B of this Part. 35 Ill. Adm. Code 809.301.

The affidavits that the People have submitted, however, do not state that D'Angelo did not provide the required special waste manifest. See Mot. Sum. J. Exh. A; Mot. Sum. J. Exh. B. Accordingly, the Board must deny the People's motion on its claim that D'Angelo violated Section 809.301.

In support of its cross-motion on this count, D'Angelo asserts that it complied with Section 21(e) and Section 809.301 before June 7, 1994. Resp. at 9; Resp. Exh. K. Because subsequent compliance is not a defense, this evidence cannot sustain D'Angelo's cross-motion. In addition, D'Angelo does not introduce any evidence that shows that the landfill at which it disposed of the filters was permitted to accept special waste, or that it properly manifested the filters as special waste. The Board therefore denies D'Angelo's cross-motion as well.

In summary, the Board denies both the People's motion and D'Angelo's cross-motion on count XI.

Civil Penalty

In section V of the response, D'Angelo concedes that it has violated certain unspecified provisions of 35 Ill. Adm. Code Parts 722, 728, and 809. Resp. at 9. D'Angelo states that the Board must now determine the appropriate penalty, if any, to be assessed. *Id.* D'Angelo states that in determining the penalty, the Board should consider the factors set forth in 415 ILCS 5/33(c) and 42(h) (1996). *Id.* D'Angelo then sets forth a series of arguments on these factors in support of its claim that no penalty is appropriate.

The People have moved to strike this portion of the response. The People argue that the only issues before the Board on the People's motion for summary judgment relate to liability. Mot. to Strike at 5. Following the resolution of those issues, the People argue, a hearing can be held for both parties to present issues of penalty mitigation and aggravation. *Id.* The People argue that D'Angelo cannot unilaterally bring the issue of penalty before the Board, and therefore request that the Board strike this portion of the response. *Id.* In reply, D'Angelo argues that its cross-motion raises the issue of penalties, and that the Board therefore can reach the penalty issue. Resp. Mot. Strike at 1.

The Board denies the motion to strike section V of the response. While the People's motion only requests summary judgment on liability, not penalties, D'Angelo's cross-motion is broader. D'Angelo's cross-motion, in effect, includes a motion for partial summary judgment on penalties. Penalties may be awarded on a summary judgment motion if there are no issues of material fact regarding the penalties. See 735 ILCS 5/1005(a) and (b) (1996).

However, the Board will consider D'Angelo's cross-motion on penalties only as it relates to those claims on which the Board has granted the People summary judgment. The Board has dismissed those claims on which it has granted D'Angelo summary judgment, so no penalties will be awarded on those claims. On the claims that remain to be heard, it would be premature for the Board to consider penalties. For example, under Section 42(h)(1), the Board may consider "the duration and the gravity of the violation." 415 ILCS 5/42(h)(1). The Board cannot consider this factor when it has not determined that there was a violation.

Therefore, the cross-motion on penalties is denied as it relates to claims on which the Board has granted D'Angelo summary judgment and on the claims that remain to be heard.

In order to allow the People to contest D'Angelo's cross-motion on penalties, the Board grants the People 14 days from the date of this order to file a response to section V of the cross-motion, as it relates to those claims on which the Board has granted the People summary judgment. Following the Board's resolution of this portion of the cross-motion on penalties, the parties should proceed to hearing on any remaining issues.

CONCLUSION

The Board grants the People's motion in part and denies it in part. The Board grants D'Angelo's cross-motion in part and denies it in part. As set forth above, several claims were not resolved on either motion. These claims arise under count I (as it relates to the paint/ink solvents and paint and pretreatment filters); count II (as it relates to the paint/ink solvents), count III (as it relates to the paint and pretreatment filters), count IV (as it relates to the years 1989-1992), and count XI (in its entirety).

The Board denies the People's motion to strike and grants the People 14 days from the date of this order to file a reply to section V of D'Angelo's cross-motion as it relates to the claims on which the Board has granted the People summary judgment. Following the Board's resolution of the cross-motion on penalties, the parties should proceed to hearing the remaining issues.

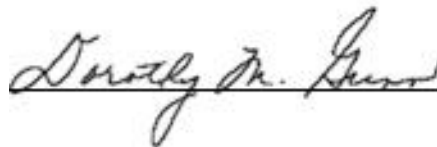
ORDER

1. The Board grants the People's motion for summary judgment on liability on:
 - a. The People's claims, in count I of the complaint, that:
 - i. D'Angelo violated Section 21(f)(1) of the Act with respect to the plating sludge and the biflouride waste;
 - ii. D'Angelo violated Section 21(f)(2) of the Act and 35 Ill. Adm. Code 703.121(a) and (b) and 728.150(a) with respect to the plating sludge and the biflouride waste.
 - b. The People's claim, in count II of the complaint, that D'Angelo violated Section 21(f)(2) of the Act and 35 Ill. Adm. 722.111 with respect to the plating sludge, the biflouride waste, and the paint and pretreatment filters.
 - c. The People's claim, in count III of the complaint, that D'Angelo violated Section 21(f)(2) of the Act and 35 Ill. Adm. 728.107(a) with respect to the paint/ink solvents, the biflouride wastes, and the plating sludge.
 - d. The People's claim, in count V of the complaint, that D'Angelo violated Section 21(f)(2) of the Act and 35 Ill. Adm. Code 725.116.

- e. The People's claim, in count VI of the complaint, that D'Angelo violated Section 21(f)(2) of the Act and 35 Ill. Adm. Code 725.135.
 - f. The People's claim, in count VII of the complaint, that D'Angelo violated Section 21(f)(2) of the Act and 35 Ill. Adm. Code 725.137.
 - g. The People's claim, in count VIII of the complaint, that D'Angelo violated Section 21(f)(2) of the Act and 35 Ill. Adm. Code 725.151.
 - h. The People's claim, in count IX of the complaint, that D'Angelo violated Section 21(f)(2) of the Act and 35 Ill. Adm. Code 725.155.
 - i. The People's claim, in count X of the complaint, that D'Angelo violated Section 21(f)(2) of the Act and 35 Ill. Adm. Code 725.274.
2. The Board denies the People's motion for summary judgment in all other respects.
 3. The Board grants D'Angelo's cross-motion for summary judgment on the People's claim, in count I of the complaint, that D'Angelo violated 35 Ill. Adm. Code 721.121(b), 721.124(a) and (b), 721.131(a), and 728.150(c), and thereby Section 21(f)(2) of the Act, and the People's claim, in count IV of the complaint, that D'Angelo violated 35 Ill. Adm. Code 722.141(a) by failing to file an annual report for calendar year 1993.
 4. The Board reserves ruling on D'Angelo's cross-motion for summary judgment on penalties as it relates to the claims on which the Board has granted the People summary judgment.
 5. The Board denies D'Angelo's cross-motion for summary judgment in all other respects.
 6. The Board grants the People 14 days from the date of this order to file a response to section V of the cross-motion as it relates to the claims on which the Board has granted the People summary judgment. Following the Board's resolution of this portion of the cross-motion, the parties should proceed to hearing on the remaining issues.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 19th day of November 1998 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board