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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of<br><br>Humko Products, An Operation of Kraft, Inc.,<br><br>Respondent | )<br>)<br>)<br>)<br>)<br>) | Docket No. V-W-84-R-014 |

Resource Conservation and Recovery Act - Beneficial Use Exemption - (40 CFR 261.6) - Small Quantity Generator Exclusion (40 CFR 261.5) - Where a generator of unlisted hazardous wastes contended that it was a small quantity generator in accordance with 40 CFR 261.5, because quantities of hazardous waste generated and accumulated in excess of 1,000 kilograms per month were intended for use as fuel in its boiler or were otherwise intended to be reclaimed pursuant to 40 CFR 261.6, and that, accordingly, such quantities were not to be counted toward the small quantity limit, but Respondent lacked a demonstrated capability to recycle or reclaim the waste, its claim to the § 261.6 beneficial use exemption was denied. The § 261.6 beneficial use exemption is limited to bona fide and legitimate recycling and reclamation operations and to wastes accumulated prior to actual recycling.

Resource Conservation and Recovery Act - Determination of Hazardous Waste - Determination of hazardous waste based on knowledge of characteristics thereof in lieu of testing as permitted by 40 CFR 262.11, held to be adequate.

Resource Conservation and Recovery Act - State Programs - Determination of Penalty - Notwithstanding that regulations of state authorized on an interim

basis to administer its own hazardous waste program were being enforced in an action instituted by the Administrator, penalty determined in accordance with EPA, rather than state, policy was held to be appropriate.

Appearance for Respondent: Douglas T. Moring, Esq.
Kraft, Inc.
Glenview, Illinois

Appearance for Complainant: Roger C. Field
Assistant Regional Counsel
U.S. EPA, Region V
Chicago, Illinois

## Initial Decision

This is a proceeding under § 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA, 42 U.S.C. 6928).1/ The proceeding was commenced on February 21, 1984, by the issuance by the Director, Waste Management Division, U.S. EPA, Region V, Chicago, Illinois, of a Findings of Violation and Compliance Order charging Respondent, Humko Products, an Operation of Kraft, Inc., with violations of the Act and regulations. It was proposed to assess Humko a penalty of $35,000.

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1/ Section 3008 of the Act provides in pertinent part:

> (c) Requirements of Compliance Orders--Any order issued under this section may include a suspension or revocation of a permit issued under this subtitle, and shall state with reasonable specificity the nature of the violation and specify a time for compliance and assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.
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> (g) Any person who violates any requirement of this subtitle shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

Humko answered, denying the alleged violations, asserting that it qualified as a "small quantity" generator as defined in the regulations and requested a hearing.

A hearing on this matter was held in Chicago, Illinois on October 25 and 26, 1984.

## Findings of Fact

Based on the entire record, including the proposed findings and conclusions of the parties, I find that the following facts are established:

1. Humko Products, an Operation of Kraft, Inc., (hereinafter Humko) produces edible oils and non-dairy [coffee] creamers at a facility in Champaign, Illinois (Tr. 178).
2. Humko generated three separate wastes which are considered hazardous: I.V. (Iodine Value), chloroform and oil and solvent waste (Tr. 179-182; Data Sheets, EPA Exhs 3, 4 and 5). These wastes are generated from laboratory tests, which are conducted for quality control purposes.
3. In September 1980, Humko was the subject of an anonymous complaint as to the improper disposal of mercury as laboratory waste (Tr. 28, 29; EPA Exh 17). On March 23, 1983, the Humko facility was inspected by Mr. William E. Zierath of the Illinois EPA (Tr. 133; memo, EPA Exh 16). This inspection was conducted as a result of an anonymous complaint to the effect that Humko maintained drums of hazardous waste which were leaking into a storm sewer. Mr. Zierath interviewed Messrs. R. P. Deschner and Lou Perkins, Engineering Manager and Environmental Engineer, respectively, and inspected the drums. Although some of the drums were

not in good condition, none was leaking at the time of the inspection (Tr. 142-43). Mr. Zierath was informed that Humko had been previously contacted or visited by representatives of the City of Champaign and that Humko had transferred the contents of any leaking drums into drums in good condition. Mr. Zierath was given the data sheets describing the wastes referred to in finding 2. He observed 30 drums of hazardous wastes. He was informed that 14 drums contained I.V. waste, eight contained chloroform waste and the remaining eight an unidentified hazardous waste (Tr. 136-37). He did not recall seeing any markings on the drums.

5. Mr. David Jansen of the Illinois EPA, accompanied by Mr. Zierath, made a second inspection of the Humko facility on April 21, 1983 (Tr. 26, 32, 138; RCRA Inspection Report, EPA Exh 1). Prior to conducting the inspection, Mr. Jansen had checked the RCRA notifier's log and determined that Humko had not filed a Notification of Hazardous Waste Activity with the federal government (Tr. 28). Messrs. Jansen and Zierath met with Mr. Perkins, Environmental Engineer, Mr. Deschner, identified finding 3, and Mr. Thompson, Plant Manager for Humko (Tr. 32).

6. In contrast to the situation prevailing at the time of Mr. Zierath's visit (findings 2 and 4), Humko combined the I.V. and chloroform waste and generated only one other hazardous waste, oil and solvent waste, also referred to as "fuel" waste (Tr. 39-43; Attachments A and A-1, EPA Exh 2). Mr. Jansen was informed that mercury acetate was no longer a component of the chloroform and I.V. waste. From his review of the constituents of the fuel or oil and solvent waste (Attachment

A, EPA Exh 2), which included acetone and toluene, two listed wastes,[2/] and a number of alcohols, ethers, ethanols and heptanes having low flash points, Mr. Jansen determined that this waste was hazardous (Tr. 45, 46). Although they had not conducted any tests to determine that fact, Humko representatives agreed that the waste had a low flash point. An Arro Laboratories, Inc. test report, dated June 21, 1983 (EPA Exh 6), reveals that a sample described as "fuel waste usage" had a flash point of 6° centigrade. This is far below the 60° centigrade flash point specified by 40 CFR 261.21(a) and the waste is clearly hazardous (Tr. 48).

7. Mr. Jansen made no determination at the time of his visit whether the I.V. waste was hazardous (Tr. 49). He was concerned, however, about the hazardousness of the waste, because of a barrel of waste labeled I.V. (Tr. 51). Based on the data sheets furnished Mr. Zierath (finding 3), which indicated that the I.V. waste contained mercuric acetate, Mr. Jansen concluded that Humko had an obligation to test the waste for the characteristic of EP toxicity. An Arro Laboratories, Inc. test report, dated June 21, 1983 (EPA Exh 14), reflects that a sample described as "I.V. waste" had a mercury content of 3.3 mg/liter or ppm, which is substantially above the 0.2 mg/liter specified for EP toxicity in 40 CFR 261.24 for making a waste hazardous (Tr. 50).

8. A special waste hauling manifest issued by the State of Illinois (EPA Exh 10) and a straight bill of lading (EPA Exh 11) reflect the shipment by Humko to Alburn, Inc., 2200 E. 119th Street, Chicago, Illinois on October 30, 1981 of 64 drums of lab waste identified as flammable liquid not otherwise specified. The material was identified as EPA

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2/ Listed in 40 CFR 261.31 as hazardous wastes from non-specific sources, spent non-halogenated solvents, Nos. F003 and F005.

Hazardous Waste No. D001, which is the designation for ignitable hazardous waste (Tr. 66). Mr. Jansen was told that this was a combined shipment of oil and solvent, chloroform and I.V. waste. He stated that the number on the special waste hauling manifest was a number issued to Humko for a one-time disposal of the material on an emergency basis (Tr. 67).

9. Regarding chloroform waste, a hazardous waste manifest, dated August 19, 1982 (EPA Exh 9), reflects that ten drums of this material identified as U044 were shipped to Alburn, Inc., Chicago, Illinois. This manifest does not contain an EPA identification number, but indicates that Humko is a small quantity generator. Mr. Jansen testified that, in his opinion, Humko had made a mistake in referring to the material as U044 (Tr. 114). This was apparently because he did not consider the material as a commercial chemical or off-specification commercial chemical product waste. A subsequent shipment of 30 drums or 1500 gallons identified as I.V. and chloroform waste was made to Triangle Resource Industries (TRI), Greenbriar, Tennessee on April 5, 1983 (EPA Exh 7). This material was identified as D002, which is the designation for corrosive hazardous waste. An Arro Laboratories, Inc. test report, dated June 21, 1983 (EPA Exh 15), reflects that a sample described as chloroform and I.V. waste had a pH of 2.2, which is above the pH of 2 specified by 40 CFR 261.22 for a waste to be hazardous because of corrosivity. Mr. Jansen testified that he was told by Mr. Perkins that the shipment consisted of 23 drums of I.V. waste and seven of chloroform waste (Tr. 62). This is confirmed by the Triangle Resource Industries Hazardous Waste Manifest for this shipment (EPA Exh 8).

10. The authorization number on the manifest (EPA Exh 7) for the shipment referred to in the preceding finding, No. 800286, was the number authorizing the Joliet ESL Landfill to accept oil and solvent wastes from Kraft's Glenview, Illinois, facility and was not authorized for use by Humko (Tr. 62, 63). Likewise, the generator number on the manifest, 0311020002, was for Kraft's Glenview, Illinois facility and was not authorized for use in waste disposal by Humko (Tr. 63, 64). The EPA number shown on the manifest, which is a number assigned by the U.S. EPA to hazardous waste facilities, was also the number for Kraft's Glenview, Illinois facility. Mr. Jansen was informed by Mr. Perkins that Kraft people in Glenview told him (Perkins) to use those numbers (Tr. 111).

11. Mr. Jansen was shown or observed 22 or 23 drums of hazardous waste at the time of his inspection of the Humko facility (Tr. 52 - 54). One of the drums was labeled I.V. waste and he was told that the other 18 drums at the storage area, which were unlabeled, contained oil and solvent waste. At another location of the facility, he was shown two or three drums of chloroform and I.V. waste and one drum of oil and solvent waste. Only two drums, one labeled "I.V. waste" and the other labeled "fuel waste" were marked, the rest were unlabeled (Tr. 103-04). He was told by Messrs. Perkins and Deschner that the materials had been accumulating for nine months (Tr. 55, 103). Six of the 18 drums of oil and solvent waste in the storage area had apparently leaked through the bungs and the waste, a thick, dark, oily-looking substance, was visible

on the tops of the barrels (Tr. 74). The waste had run down the side of one of the drums. In addition, one drum was severely dented in the middle, the top of another drum was distended and Mr. Jansen observed bubbling from the closed bung in the pooled liquid on top of another drum (Tr. 75). The question of whether the containers were stored closed was answered in the negative with an explanation that containers were leaking through the bungs (Inspection Report at 9).

12. From the data sheets furnished by Humko (Attachments A and A-1, EPA Exh 2), Mr. Jansen calculated that Humko generated approximately 169 gallons per month of fuel waste (oil and solvent) and approximately 187 gallons per month of chloroform and I.V. waste (Tr. 52, 53; EPA Exh 2). Mr. Thompson, Humko's Plant Manager, testified that based on the number of tests performed in the laboratory, they had calculated that Humko generated 944 kilograms of hazardous waste a month (Tr. 183-84). Using a larger number of tests performed, he indicated that the total was approximately 1137 kilograms of hazardous waste per month. Although he stated that the number of tests performed in the lab varied, Mr. Thompson appeared to acknowledge wastes generated exceeded 1,000 kilograms a month (Tr. 252).

13. After being informed that the oil and solvent waste had been accumulating for nine months (finding 11), Mr. Jansen inquired what Humko did with the waste prior to that time. He was informed by Mr. Deschner that Ilada Energy Company of Cape Girardeau, Missouri, had picked up about 700 gallons of this waste in June or July 1982 (Tr. 56 - 58; EPA Exh 2). An Ilada truck was reportedly at the Humko facility to pick up a load of No. 6 fuel oil that was no longer needed. The driver reportedly agreed to take the oil and solvent waste as well. Mr. Deschner was unable to

produce a manifest for this shipment and the documentation he did produce, an Ilada pickup ticket, a Humko Plant Order and an Ilada Energy Company invoice (Attachments B, B-1 and B-2, EPA Exh 2) do not establish that oil and solvent or fuel oil waste was picked up by Ilada. In fact, the Humko plant order (Attach. B-1) has a line drawn through the second item on the order "fuel oil recovered from lab waste," followed by the notation "Did not take Item #2" and the initials "RPD," the initials of Mr. Deschner. Nevertheless, Mr. Jansen testified Mr. Deschner assured him he was certain Ilada had picked up the oil and solvent waste (Tr. 58). Although Humko's letter to the Illinois EPA, dated July 7, 1983 (EPA Exh 19), signed by Mr. Thompson, states that Humko delivered one load of solvent waste to Ilada Energy Company for recycling in June 1982, he testified that a recheck of Humko's records and discussions with the people involved revealed that this shipment did not take place, because Ilada did not have equipment to move the material from the drums to the truck (Tr. 299).

14. Regarding General Facilities Standards (40 CFR Part 265, Subpart B), Humko had not, at the time of the inspection, obtained a detailed chemical and physical analysis of the waste and did not have a detailed waste analysis plan on file (Tr. 46, 69, 70; Inspection Report, EPA Exh 1 at 3). While acknowledging that the data sheets (EPA Exhs 3, 4 and 5), constituted Humko's waste analysis, Mr. Thompson insisted that they had weighed the material and knew exactly what was in the waste including the properties thereof (Tr. 197-98, 200). He seemed surprised, however, that the constituents of the oil and solvent waste shown on the data sheet (EPA Exh 5) differed from those listed on the Fuel Waste Usage data sheet (Attach. A, EPA Exh 2). For example, absolute methanol,

bipyridene, ferric chloride and dimethylamine appear on the latter document, but not on the former (Tr. 247-49). Mr. Thompson maintained that there was no difference in BTU value as to the waste listed on Exhibit 5 and that on Attachment A (Tr. 297). He acknowledged that Humko had not conducted EP toxicity and other tests on the waste (EPA Exhs 6, 14 and 15) until after the April inspection (Tr. 250-51). He stated that, prior to the test (EPA Exh 6), Humko had estimated the BTU value as around 8,000 (Tr. 300).

15. Humko had not posted danger signs warning unauthorized persons to keep out at the entrance to the active portion of the facility (Tr. 70, 200). The facility is, however, fenced and access is through an entrance having guard service on a 24-hour basis (Tr. 205; Inspection Report; Plot Plan, Respondent's Exh A). The waste storage area, where the majority of drums are kept, is in the extreme rear (southeastern) portion of the facility and is not open to the public (Tr. 187-88, 203; Plot Plan). According to Mr. Thompson, tours of the facility were extremely rare as a matter of company policy and a maximum of five people would be near the storage area at any one time (Tr. 190, 203).

16. While Humko maintained an inspection log (Inspection Report at 4), it was not specific to hazardous waste (Tr. 289). Guard service personnel were required to make checks at various stations within the facility after hours to watch for fires or unusual occurrences, one such station being located within ten feet of the waste barrel storage area, and to turn in a log on a daily basis (Tr. 205). Mr. Thompson testified that the facility was regularly inspected by people from Kraft, Inc. and that management inspected the facility on a monthly basis for cleanliness and compliance with other criteria. Humko did not, however, have records of

malfunctions, operator errors and discharges (Tr. 70-72). In view of his observations of leaking drums, Mr. Jansen concluded that some record of these discharges should have been made.

17. Humko did not have records of required personnel training, there were no indications of special handling for hazardous waste, no smoking signs were not posted and there was no separation and protection from sources of ignition (Tr. 73, 74; Inspection Report at 4). Mr. Thompson testified that two employees worked in the environmental building, near the waste storage area, at one time, that these individuals were the only ones involved with the wastes in the drums and that these employees were instructed as to the chemicals in the drums, the proper procedures for handling the wastes and to monitor the drums (Tr. 190-92, 206). He described Humko's safety program as including weekly films and the use of respirators and safety equipment. He acknowledged, however, that none of the training was specific to hazardous waste in accordance with 40 CFR 265 (Tr. 290). Mr. Jansen's conclusion that Humko did not separate hazardous wastes from sources of ignition was based in part on his observation of a valve in a steam line in the hazardous waste storage area at an elevation approximately five feet above and several feet laterally from the drums (Tr. 77, 105-06). Some of the drums had liquid waste pooled on the top (finding 11) and the valve was emitting steam at a low rate. He was concerned about the potential for a sudden release of large quantities of steam, which might ignite the waste.

18. Mr. Jansen observed two large copper kettles within approximately ten feet of several of the drums of oil and solvent waste. The legs of one of the drums had a "fresh bead," such as would be applied by an arc welder and he noticed ten or 15 welding rods on top of one of the

drums of oil and solvent waste (Tr. 75, 76, 104-05; EPA Exh 2 at 2). He inquired of Mr. Perkins whether welding had taken place in that area and upon receipt of a response to the effect that was apparently the case, expressed the opinion that it was dangerous to be welding in the vicinity of drums of ignitable waste. He mentioned this welding to Mr. Deschner, who stated he would move the kettles to another area. Mr. Jansen did not see any welding in progress and the welding rods he saw were unused. Humko handles hydrogen and Mr. Thompson described the safety precautions instituted before welding, whether by contractor or Humko personnel, was allowed to take place on the premises as including a welding permit (Tr. 210-11). He testified that a review of Humko's records and inquiries of personnel revealed that no welding had taken place in the storage area (Tr. 290-95). He stated the kettles were fragile and that the legs were welded in order to move the kettles. He acknowledged, however, that a permit for welding the kettles had not been found.

19. Humko maintained a Spill, Prevention and Control Countermeasures (SPCC) Plan, which did not refer specifically to hazardous waste (Tr. 78, 290; Inspection Report at 6). Moreover, the plan did not include a list of emergency equipment and its capabilities and did not include an evacuation plan (Tr. 79). Mr. Jansen concluded that Humko had not made arrangements with local police, fire departments and emergency organizations to coordinate services that might be required in the event there was a problem with hazardous wastes. He stated that he was told by Mr. Perkins that no such arrangements had been made. Mr. Thompson, however, testified that Humko did have a fire and evacuation plan for the entire facility and did

have inspections by the local fire department (Tr. 201-03, 211-13). He explained that he was the emergency coordinator and on the plant management team, which would assess the risks and determine whether to evacuate the facility. The fire department was invited in and made aware of the layout of the plant, of the materials being stored, i.e., hydrogen, oil and chemicals, and what equipment Humko had available. There were fire extinguishers within 25 or 30 feet of the drum storage area and Humko maintained sprinkler and alarm systems within the buildings.

20. Because Humko representatives did not know the flash point of the oil and solvent waste and could not locate records relating to hazardous waste such as the reported shipment by Ilada Energy Company (finding 13), Mr. Jansen concluded the emergency coordinators were not familiar with hazardous waste procedures (Tr. 80; Inspection Report at 7). Mr. Jansen asked for records of the dates and quantities hazardous wastes were placed in storage (Tr. 81). No such records were produced. Mr. Thompson testified that it was his understanding that such records were maintained (Tr. 242-43). He acknowledged, however, that he never saw such records and never asked for them. Humko did not have a closure and post-closure plan, an estimate of the costs thereof and financial assurance for closure (Tr. 82; Inspection Report at 8).

21. Mr. Thompson, who became Humko's plant manager in July of 1982,3/ testified that Humko had not complied with the regulations applicable to hazardous waste storage facilities referred to in the preceding

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3/ It is considered that the transcript report of Mr. Thompson testifying he became plant manager on July 1, 1981 (Tr. 232) is in error (Tr. 238, 241, 245, 273, 279).

findings because Humko was holding some of the materials for recycling, Humko qualified as a small quantity generator and the regulations were not applicable (Tr. 200-01, 214, 215, 216-17, 236-38, 239-41, 243-44, 288-89). Although Humko had been sent a hazardous waste permit application at the time of the 1980 complaint concerning alleged improper disposal of mercury (finding 3), Humko didn't return the application, because it wasn't considered necessary. Mr. Thompson acknowledged that as a food company, Humko was reluctant to register as a storage facility for hazardous waste because it was considered bad publicity (Tr. 244). Humko filed a Notification of Hazardous Waste Activity on April 1, 1983 (Tr. 165; EPA Exh 13).

22. Mr. Thompson testified that because of its low flash point, the oil and solvent waste was treated as hazardous (Tr. 194). Because of its high BTU content (9356, EPA Exh 6), Humko decided to reclaim the oil and solvent waste in its boiler system (Tr. 184, 187, 193). Mr. Thompson understood that Humko was working on this process when he came on board (Tr. 253). While he maintained that the oil and solvent waste was being accumulated for use as fuel in the boiler, he didn't tell Mr. Zierath or Mr. Jansen that at the time of the inspection, because the question never came up (Tr. 259-60). He did tell them that Humko was a small quantity generator, but explained that he found it difficult to argue with inspectors, because [the hazardous waste regulations] were their area of expertise (Tr. 262). Mr. Thompson's letter to the Illinois EPA, dated July 7, 1983 (EPA Exh 19), states Humko's intention to reclaim the heat value of the oil and solvent waste.

23. Construction and operating permits to burn the oil and solvent waste were not, however, applied for until August of 1983 (Tr. 195; Humko letter, dated August 17, 1983, (Respondent's Exh F). The applications were initially denied, but upon the submission of additional information, were approved on November 28, 1983 (Illinois EPA letter, dated September 21, 1983, Humko letter, dated October 28, 1983 and Illinois EPA letters, dated November 28, 1983, Respondent's Exhs G, H & I). Mr. Thompson stated that alterations to the boiler system in order to burn the waste were completed in late December of 1983 (Tr. 258).

24. According to Mr. Thompson, Humko was also accumulating the chloroform and I.V. wastes for recycle (Tr. 185-87, 194-95). He indicated that the plan was to remove the mercuric acetate from I.V. waste and that they had developed what he referred to as a "bench scale run" in order to test the removal. The removal process involved the addition of chemicals to the waste in order to precipitate the mercury (Tr. 275, 280). The mercury was to be sold, but Mr. Thompson did not know the purchasers. When Humko attempted to implement the process, difficulties were encountered, because the materials didn't properly precipitate (Tr. 281-82). This was apparently because I.V. waste and chloroform waste had been mixed. While he stated that the difficulties were resolved, that the process worked fine and was "ready to go," he acknowledged that it was never placed in full production (Tr. 283-84). He further acknowledged that he did not inform either Mr. Zierath or Mr. Jansen at the time of their inspections that I.V. waste was being accumulated for the purpose of reclaiming mercury (Tr. 287-88). Some support for Mr. Thompson's testimony as to Humko's plans to reclaim

mercury is provided by the record of the 1980 investigation of the complaint of alleged improper disposal of mercury (finding 3), wherein Mr. Deschner is quoted as saying he was considering a process to recover mercury from the [waste] solution.

25. Notwithstanding that these plans to reclaim mercury were underway at the time Mr. Thompson became plant manager, he testified that his former employer did not use mercury for running such laboratory tests and that he personally did not like the idea of using mercury, believing it was unnecessary (Tr. 238, 267-72). He collected data and had discussions with Memphis (headquarters) as to whether alternative testing methods gave comparable results and had discontinued use of mercury in the testing of approximately 40% to 50% of Humko's products at the time of the inspection (Tr. 266-70). Use of mercuric acetate was discontinued after Mr. Zierath's inspection on March 23, 1983.

26. Regarding chloroform waste, Mr. Thompson explained that the idea was to ship or sell the material to firms or individuals who would recover the chloroform and Humko would re-purchase it. He indicated that least 40 drums of chloroform were necessary in order to determine if this plan was economically feasible (Tr. 185-86, 273). This plan was apparently never implemented, because after mercuric acetate was no longer used, it wasn't economically feasible to accumulate chloroform for recycle (Tr. 216). After Mr. Zierath's inspection, Humko obtained a number and shipped the materials to TRI (Tr. 192, 194, finding 9).

27. Humko's letter to the Illinois EPA, dated July 7, 1983, (finding 3 and 22) states in part that through an administrative oversight, we

inadvertently accumulated waste materials on-site for too long a period. In June of 1983, Humko wrote to United Waste Systems, Inc., Villa Grove, Illinois asking it to obtain the necessary permits to dispose of on a regular basis what was described as a special waste "miscellaneous mixed laboratory wastes, predominantly water, vegetable oil, acetic acid and chloroform" (letter, dated June 29, 1983, Respondent's Exh B). This application was denied, because the waste contained chloroform (U044) and because the site was not permitted to accept hazardous wastes (Illinois EPA letter, dated August 30, 1983, Respondent's Exh C). Although Humko argued that the waste was a manufacturing process waste within the comment at 40 CFR 261.33(d), rather than a commercial chemical product or off-specification chemical product, the Illinois EPA refused to permit the disposal, stating chloroform was highly toxic by inhalation and that inspections revealed leachate was flowing or seeping from the site (Humko letter, dated September 26, 1983 and Illinois EPA letter, dated December 30, 1983, Respondent's Exhs D and E).

28. Although the State of Illinois has been granted interim authorization to administer its hazardous waste program (Tr. 156), the authorization does not extend to permitting activities such as Part A Permit Applications and failures with regard thereto (Tr. 166-67). Accordingly, the entire matter was referred to the U.S. EPA for enforcement action. The State was notified telephonically of the issuance of the complaint and provided a copy thereof (Tr. 303-04; letter, dated February 21, 1984, EPA Exh 20).

29. Mr. William H. Miner, Chief of the Technical Permits and Compliance Section in the Waste Management Branch, Waste Management Division, in conjunction with his staff, determined the penalty proposed to be assessed of $35,000 (Tr. 146, Tr. 150-51). He determined that the penalty should be $2,000 for Class I violations and $500 for Class III violations (Tr. 150-51, 164-65). He defined a Class I violation as one that may pose a threat to human health and the environment, while a Class III violation is an attempt at compliance that does not fully meet the requirements (Tr. 156-57). He concluded that Humko had committed 16 Class I violations and three Class III violations. The additional $1,500 was an add-on for Humko's failure to notify that they were a handler of hazardous waste (Tr. 165).

30. Mr. Miner identified the most serious Class I violations as failure to file a Notification of Hazardous Waste Activity and failure to file a Part A Permit Application (Tr. 153-54, 158-59). He explained that EPA was only able to monitor compliance with facilities that have filed hazardous waste activity notifications and that the Part A Application provided more details as to hazardous waste activities. Other Class I violations included failure to make a proper waste determination and analysis, offering hazardous waste for shipment without a manifest, failure to have a waste analysis plan, failure to post warning signs prohibiting entry by unauthorized personnel, failure to have a written inspection schedule for hazardous waste, failure to have records demonstrating personnel training in the management of hazardous waste, failure to post no smoking signs, failure to have an SPCC Plan that specifically addresses hazardous waste and failure to have operating

records showing quantities, movement, inspection and disposal of hazardous waste (Tr. 159-162). Three other Class I violations included failure to have a closure plan, failure to have a cost estimate for closure and failure to demonstrate financial assurance for closure. The final two Class I violations were that stored containers of hazardous waste were not in good condition and some of the containers were open (Tr. 162-63). The Class III violations were discrepancies on the manifests, no labels or identification on containers of hazardous waste and the fact the emergency coordinator at the site was not familiar with hazardous waste records and operating procedures.

## Conclusions

1. The oil and solvent (fuel waste usage) waste is hazardous because it is ignitable, having a flash point less than the 60° centigrade specified in 40 CFR 261.21.[4/]
2. The I.V. waste was hazardous prior to Humko's discontinuance of the use of mercuric acetate, because the mercury content of the waste exceeded .2 mg/liter (ppm) for EP toxicity specified in 40 CFR 261.24.
3. Complainant makes no contention that the chloroform waste is hazardous and because this waste doesn't meet the description of chloroform (U044) in 40 CFR 261.33 and its pH is above the 2 specified by 40 CFR 261.22 to make a waste hazardous because of corrosivity, it is not a hazardous waste.

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4/ As a matter of strict accuracy, with the exception of permitting requirements, it is provisions of the Illinois Administrative Code that are being enforced here. The parties, however, agree that the applicable provisions are identical (Complaint; Complainant's Posthearing Memorandum at 1; Respondent's Posthearing Brief at 12 et seq.). CFR references will be used herein.

4. Humko generated and stored more than a 1,000 kilograms of hazardous waste (oil and solvent and I.V.) per month and thus is prima facie not entitled to the small quantity generator exclusion in 40 CFR 261.5.

5. Although Humko contends that it was accumulating the oil and solvent waste prior to beneficial use or re-use, recycling or reclamation, i.e., for use as fuel in its boiler system, pursuant to 40 CFR 261.6, it was not permitted and equipped to burn this waste at the time of the inspections and, in fact, did not become so permitted and equipped until several months later. The § 261.6 beneficial use exemption is limited to bona fide and legitimate recycling and reclamation operations and to wastes accumulated prior to actual recycling.

6. Humko had not implemented its asserted program to reclaim mercury from the I.V. waste and its contention that this waste was being accumulated for recycling or reclamation is not accepted.

7. Humko, not being entitled to the small quantity generator exclusion in 40 CFR 261.5 or the exemption for hazardous waste which is used, re-used, recycled or reclaimed in 40 CFR 261.6 and having stored hazardous waste for periods in excess of the 90 days specified in 40 CFR 262.34,5/ is subject to the Interim Status Standards in 40 CFR Part 265 and the permit requirements of 40 CFR Part 270.

8. Complainant, having the burden of proof, has failed to establish several of the alleged violations, i.e., failure to make a proper waste determination (40 CFR 262.11), that the alleged unmanifested shipment by Ilada

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5/ Humko doesn't appear to be entitled to the 90-day accumulation time in 40 CFR 262.34, because it did not comply with 40 CFR 265, Subparts C, D and I and did not mark and label the containers as specified in § 262.34(a).

Energy Company (40 CFR 262.20) actually took place and that failure to mark or identify containers of hazardous waste is a separate violation.

9. Complainant having established the other violations of the Act and regulations alleged in the complaint by a preponderance of the evidence, Humko is liable for a civil penalty in accordance with § 3008(c) & (g) of the Act.

## Discussion

There is no dispute that the oil and solvent waste and the I.V. waste are hazardous. The former because it is ignitable, having a flash point less than 60° centigrade as specified in 40 CFR 261.21 and the latter because it contained mercury at a concentration in excess of 0.2 mg/liter specified for EP toxicity in 40 CFR 261.24. The oil and solvent waste contains acetone and toluene, spent non-halogenated solvents from non-specific sources listed in 40 CFR 261.31 (Nos. F003 and F005) and the only matter warranting comment here is whether this makes the waste "listed" as distinguished from a "characteristic" waste.[6/] Complainant does not contend that the waste is listed and because the waste at no time meets the listing description set forth in Subpart D and it does not appear that a waste listed in Subpart D was added to the mixture after the mixture became a waste, i.e., was intended to be discarded, it is concluded that the oil and solvent waste is hazardous by characteristic, solely because it is ignitable (40 CFR 261.3(b)).

In support of its contention that it is entitled to the small quantity generator exclusion, because the oil and solvent waste was being accumulated

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6/ Acetone and toluene are acutely hazardous wastes for which the small quantity generator exclusion limit is one kilogram per month (40 CFR 261.5(e) and 40 CFR 261.30(d)). Moreover, if the waste were listed in 40 CFR 261.31 or § 261.32 or contains one or more hazardous wastes listed in §§ 261.31 or 261.32, the exemption for wastes being transported or stored prior to being recycled or reclaimed is not applicable (40 CFR 261.6(b)).

for beneficial use, i.e., use as fuel, and that, in accordance with 40 CFR 261.5(c) such quantities are excluded from the small quantity generator limit of 1,000 kilograms, Humko points to 40 CFR 260, Appendix I, Figure 3 (Reply Brief at 2). The cited Figure indicates that a hazardous waste, which is or is intended to be legitimately and beneficially used, re-used, recycled or reclaimed and which is not a sludge, a waste listed in Subpart D or a mixture containing a waste listed in Subpart D, is not subject to regulation under Subtitle C of RCRA. This coupled with the language of 40 CFR 261.6(a)(2), providing in pertinent part that a hazardous waste which " * * is being accumulated, stored or physically, chemically or biologically treated prior to beneficial use or re-use, or legitimate recycling or reclamation" is not subject to regulation under [40 CFR] Parts 262 through 265, or Parts 270, 271 or 124 and the notification requirements of § 3010 of RCRA, afford substantial support for Humko's position.7/ That intent plays a part in the recycling exemption is emphasized by the preamble to the May 19, 1980 RCRA regulations, which at 45 FR 33093 refers to materials other than garbage, refuse or sludge "which are (or are intended to be) used, re-used, recycled or reclaimed * *." The preamble further provides: " * * we are at the present time confining our regulation of the storage and transportation of wastes prior to use, re-use, recycling and reclamation to sludges, wastes listed in Subpart D and waste mixtures containing wastes listed in Subpart D (§ 261.6 (b))." (Id. at 33094)

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7/ See also the RCRA Enforcement Guidance Memorandum: "Subject: Burning Low Energy Hazardous Waste Ostensibly for Energy Recovery Purposes," 48 FR No. 52, March 16, 1983, at 11157 et seq., stating in effect that hazardous wastes which are not sludges, which exhibit a characteristic of hazardous waste and that are not listed in 40 CFR 261.31 or 261.32 are totally exempt from regulation, <u>if they are to be recycled</u> (emphasis supplied).

Humko points out that although a time constraint has been proposed,[8/] there is no time element in the regulations as to the [accumulation of hazardous waste for recycle or reclamation] (Reply Brief at 3).

Complainant contends first, that Humko is not entitled to the small quantity generator exclusion in any event, because it did not comply with 40 CFR 262.11 which requires a hazardous waste determination (Posthearing Memorandum at 7). Complainant says Humko's determinations in this respect were inadequate (Reply Memorandum at 3). This contention is addressed infra at 26-28. Second, Complainant asserts that the recycling exemption is in the nature of an affirmative defense, that Humko has the burden of proof on this issue, and that Humko has failed to demonstrate that it had a bona fide and legitimate recycling operation at the facility for either the oil and solvent or the I.V. waste (Posthearing Memorandum at 8 et seq.). Complainant emphasizes that Humko representatives did not inform Mr. Zierath or Mr. Jansen at the time of either inspection that any hazardous waste was being held for recycling and indeed, asserts that Humko's action in immediately disposing of the I.V. waste after Mr. Zierath's visit on March 23, 1983 (finding 9), belies any such intention (Posthearing Memorandum at 12, 13). It is noted, however, that Humko's July 7 letter to the Illinois EPA (finding 22) stated it would be reclaiming the heat value of the oil and solvent waste. Moreover, having decided to discontinue the use of mercuric acetate in conducting laboratory tests, it is logical that Humko would no longer be interested in reclaiming mercury, irrespective of its prior operations or plan in that respect.

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8/ The proposed regulation specified that a waste was a solid waste unless at least 75% of accumulated or stored materials were to be recycled within one year (48 FR No. 65, April 4, 1983, at 14476). This concept has been retained in the final rule for so-called "speculative accumulation," (50 FR No. 3, January 4, 1985, at 618; § 261.1 at 663).

Complainant asserts that wastes cannot be accumulated for beneficial use or legitimate recycling where no program for either is in existence (Reply Memorandum at 5). It argues that acceptance of Humko's contentions would create an enormous loophole in the RCRA program in that any person storing hazardous waste, could, with a minimal showing of future intent to implement a recycling operation, fall within the exemption (Id. at 7). Complainant says that this would be contrary to the purpose of the regulations and that the accepted rule is that exemptions to a regulatory scheme are to be narrowly construed.

In the preamble to the May 19, 1980, RCRA regulations, cited above, EPA indicated that many of its proposed and final treatment and disposal standards were not particularly well-suited for hazardous waste recycling and reclamation operations or for uses and re-uses of hazardous waste (45 FR at 33092-93). The preamble stated in pertinent part "We are therefore deferring Subtitle C regulation of the actual use and re-use of hazardous waste recycling and reclamation activities until such standards can be developed" (emphasis supplied). The preamble went on to emphasize that the temporary deferral was confined to bona fide legitimate and beneficial uses and recycling of hazardous wastes (Id. at 33093). It was further pointed out that storage, generation and transportation of hazardous waste prior to actual use, re-use, recycling or reclamation present essentially the same hazardards and should therefore require essentially the same management as wastes destined for disposal.

There can be little doubt that the language of 40 CFR 261.6(a)(2), exempting from regulation hazardous wastes that are " * * * being accumulated, stored or physically, chemically or biologically treated prior to

beneficial use or re-use or legitimate recycling or reclamation" can be read to support Humko's position. As indicated above, certain provisions of the preamble to the May 19, 1980, regulations also support Humko's arguments. Moreover, the fact that the proposed and final revisions to the regulations (note 8, supra) include accumulation time constraints, implies, as Humko points out, that no such time constraints were included or intended in the existing regulations. It is immediately apparent, however, that acceptance of Humko's position would open a vast loophole in the coverage of the RCRA regulations in that any person or firm with a minimal showing of future intent to use or re-use hazardous waste for beneficial purposes would be outside the scope of the regulations.

In a recent decision, the Chief Judicial Officer pointed out that it was a well accepted rule of statutory construction that one part of a statute should not be interpreted so as to defeat or negate some other part, that this rule was applicable to the interpretation of administrative regulations and that an interpretation of the regulation, 40 CFR 261.2(b)(2) in that case, which would so easily defeat an important component of the Agency's effort to regulate hazardous waste disposal must be rejected.9/

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9/ River Cement Company, RCRA (3008) 83-9, Final Order, February 4, 1985. River Cement intended to purchase still-bottoms, spent solvents and listed hazardous wastes under 40 CFR 261.31, from the generator for use as fuel in its kiln. River Cement contended that inasmuch as it intended to use the still-bottoms as fuel, the material was to be burned or incinerated for the purpose of recovering usable energy, was not within the definition of discarded in § 261.2(c)(2), was not "sometimes discarded" by it and accordingly, was not within the definition of solid waste set forth in 40 CFR 261.2(b). While acknowledging that the regulation could be read to support River Cement's argument, the Chief Judicial Officer, for the reasons set forth in the text, held that in order to be entitled to the exemption, River Cement must demonstrate that the still-bottoms were not "sometimes discarded" by other users or generators.

The same rationale is applicable here and it is concluded that Humko, lacking a demonstrated capability to reclaim or recycle either the oil and solvent or the I.V. waste at the time of the inspection, has not shown that it is entitled to the beneficial use exemption in 40 CFR 261.6(a).10/

Having concluded that Humko is not entitled to the § 261.6 beneficial use exemption, it is not entitled to the small quantity generator exclusion in 40 CFR 261.5, because the quantity of hazardous waste accumulated clearly exceeded 1,000 kilograms.11/ In view of these conclusions, Humko was obligated to file a Notification of Hazardous Waste Activity and a Part A Permit Application.12/ It filed the Notification of Hazardous Waste Activity on April 1, 1983 (finding 21), long after it was required to do so.

As noted previously, Complainant alleges that Humko violated 40 CFR 262.11, which requires a generator of solid waste to determine whether its waste is hazardous. The regulation at § 262.11(c) provides that if the waste is not listed in 40 CFR Part 261, the generator must determine whether the waste is hazardous by testing it in accordance with methods set forth

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10/ It would appear that the 90-day accumulation period specified in 40 CFR 262.34 is designed to cover the situation where wastes are accumulated for recycle off-site. The question of how long the off-site recycler may accumulate waste is not present here.

11/ Humko has not disputed Complainant's assertion (Posthearing Memorandum at 7) that each drum of hazardous waste weighed approximately 200 kilograms (440 lbs.)

12/ As indicated previously (note 5), Humko is not entitled to the 90-day accumulation period provided by 40 CFR 262.34, because, inter alia, it did not date and label the drums of hazardous waste. If Humko had complied with the provisos in 262.34(a), it could have accumulated hazardous waste for 90 days after the 1,000 kilogram exclusion level had been reached and then had 30 days in which to file a Part A Permit Application (Regulation Interpretation Memorandum, November 3, 1981, 46 FR No. 237, December 10, 1981, at 60446 et seq.).

in Subpart C of Part 261 or equivalent methods or by applying knowledge of the hazardous characteristic of the waste in light of the materials or the processes used. Humko clearly had not tested the waste at the time of the April 1983 inspection, but contends that its data sheets constitute compliance with the alternative to testing, that is application of knowledge of the characteristics of the waste. Complainant says these data sheets were not current and accurate and are therefore inadequate. It is clear that Humko treated the oil and solvent waste as hazardous, because it was ignitable and the I.V. waste as hazardous, because it contained mercury. Complainant's contention the data sheets were not current and accurate is apparently based upon differences between constituents of the oil and solvent waste prior to and after the discontinuance of mercuric acetate in conducting laboratory tests (finding 14). Mr. Thompson, however, testified that the BTU value of this waste did not change and Complainant has not shown that differences in the constituents had any effect on the hazardousness (ignitability) of the waste. Humko representatives were clearly aware that the oil and solvent waste had a low flash point (finding 6), and, if Humko failed in this regard, it must be because Humko personnel were unaware of the precise flash point of this waste. While it can readily be seen that a material having a flash point as low as the oil and solvent waste in question here might well require special handling, the requirement of 40 CFR 262.11 is simply that a determination be made as to whether the waste is hazardous.13/

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13/ See 45 FR No. 39, February 26, 1980, at 12725 which provides in part:

> * * * If the waste is not listed, the person must make the determination for each of the characteristics in Part 261 by either testing the waste (using the procedures in Part 261) or by applying known information about the characteristics of the waste based on the process or materials used.

One must look elsewhere in the regulations for the waste management requirements which flow from that determination. It is concluded that Humko determined that the oil and solvent waste and the I.V. waste were hazardous by applying knowledge of the characteristics of the waste as permitted by § 262.11 and that Complainant has not established a violation of the cited section.

There is no dispute that Humko, as a generator, did not obtain an EPA identification number prior to storing or offering for transportation hazardous waste as required by 40 CFR 262.12(a). The charge that Humko offered hazardous waste for transportation without a manifest in violation of 40 CFR 262.20 is based upon the alleged shipment by and to Ilada Energy Company (finding 13). Documentary evidence prepared at the time, however, refutes, rather than supports, the contention that this shipment was actually made.14/ This is considered to be more reliable than the statements regarding the shipment Mr. Deschner reportedly made to Mr. Jansen.15/

Having concluded that the most reliable evidence prepared at the time supports the conclusion that the Ilada Energy Company shipment upon which

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14/ Interestingly, Mr. Jansen concluded that the Ilada pick-up ticket and invoice and the Humko Plant Order (finding 13) established that Ilada did not pick up the oil and solvent waste with the No. 6 fuel oil [as stated by Mr. Deschner], nor did Ilada pick up that waste with a subsequent shipment of oil-water-and-detergent-waste (EPA Exh 2 at 3). He was apparently persuaded to the contrary by other statements of Mr. Deschner.

15/ Complainant points out that Mr. Deschner was present in the hearing room, but was not called as a witness and that accordingly, it may be presumed his testimony would have been adverse to Humko (Reply Memorandum at 7). The cited rule is helpful in deciding issues where the evidence does not preponderate in favor of one conclusion or another, but may not be used to tip the scales in Complainant's favor where it has the burden of proving the violation charged by a preponderance of the evidence and the most reliable evidence is contrary to the charge.

the unmanifested charge is based did not take place, the contrary statement in the Humko letter of July 7, 1983, to the Illinois EPA may be attributed to a mistake and in any event, is disregarded. The shipment having never occurred, it is, of course, unnecessary to address Humko's assertion that the shipment, if made, was for the purpose of recycling and consequently, was not required to be manifested.

Humko contends that it substantially complied with the requirement for a detailed chemical and physical analysis of its waste as specified in 40 CFR 265.13 (Brief at 19). The analysis required by § 265.13 must, however, contain all the information required to treat, store or dispose of the waste in accordance with Part 265, and it would appear that, as a minimum, such analysis should include a flash point test of the oil and solvent waste in accordance with § 261.21 and an EP toxicity test, of the I.V. waste in accordance with § 261.24 for the presence of mercury. Humko clearly did not have either at the time of the inspection (finding 14). Moreover, it is clear that Humko did not have a detailed waste analysis plan on file. It is concluded that Humko did not comply with 40 CFR 265.13.

Humko did not have danger signs warning unauthorized persons to keep out of each entrance to the active portion of the facility as required by 40 CFR 265.14(c) (finding 15). While Humko emphasizes that the entire facility was fenced and access is through an entrance having 24-hour guard service, this appears to be precisely the situation contemplated by § 265.14 and the signs are, nevertheless, required. This violation has clearly been established.

While Humko maintained an inspection log, it was not specific to hazardous waste (finding 16). Moreover, Humko did not have a written schedule for

inspecting and monitoring equipment and safety devices important to protecting human health and the environment from hazardous waste and did not maintain a record of spills, discharges or malfunctions. Humko clearly violated the general inspection requirements of 40 CFR 265.15. Although Mr. Thompson explained Humko's safety program and the training given personnel handling drums of wastes (finding 17), he acknowledged that this training was not specific to hazardous waste. Moreover, Humko did not maintain records of personnel training as required by 40 CFR 265.16 and this violation has been established.

The parties appear to treat the allegation of a violation of § 265.17, failure to take precautions with regard to ignitable wastes, as hinging on whether Complainant established that welding of copper kettles (finding 18) took place in the drum storage area.16/ No welding was in progress at the time of the inspection and the welding rods on the drums observed by Mr. Jansen were unused. While it is not surprising that the inquiries related by Mr. Thompson (finding 18), would yield denials that any welding took place in the storage area, it is concluded that Complainant has not established this allegation by a preponderance of the evidence. Nevertheless, among the requirements of § 265.17 is that "No Smoking" signs be posted where there are hazards from ignitable or reactive wastes and there is no dispute that such signs were not posted.17/ It is therefore concluded that Humko violated § 265.17 as charged in the complaint.

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16/ Humko's Brief at 20; Complainant's Posthearing Memorandum at 13, 14. Complainant appears to have abandoned any contention that the presence of a steam line (finding 17) in the waste storage area presented a hazard.

17/ Finding 17. It is of interest that Mr. Miner (findings 29 and 30) did not refer to the alleged welding in the storage area, but emphasized the lack of "No Smoking" signs.

Although Humko maintained an SPCC Plan, it was not specific to hazardous waste, did not include a list of emergency equipment and did not include an evacuation plan (finding 19). Accordingly, Humko failed to have a contingency plan as required by 40 CFR 265.51, which complied with § 265.52 and which was maintained as required by § 265.53, i.e., copies submitted to local police and fire departments, etc.

Complainant's contention that Humko violated 40 CFR 265.55 requiring an emergency coordinator or coordinators is based, not upon the absence of such coordinators, but upon an alleged lack of familiarity with hazardous waste procedures (finding 20). This, in turn, is based upon the coordinators' lack of knowledge of the flash point of the oil and solvent waste and upon the lack of records concerning the alleged shipment of oil and solvent waste by Ilada Energy Company. It has been determined above that Complainant has not established that the asserted shipment by Ilada ever occurred. Section 265.55 requires that the coordinator be thoroughly familiar with, inter alia, the location and characteristics of the waste. Although simple knowledge that the waste is ignitable could be regarded as fulfilling this requirement, the low flash point of the waste involved here requires a contrary conclusion.18/ This conclusion is supported by the detailed physical and chemical analysis required by § 265.13 and by the further fact that the emergency coordinator must be familiar with the location of all records [concerning hazardous waste] at the facility. That does not appear to be the case here. It is concluded that Complainant has established Humko violated § 265.55 as charged.

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18/ The situation alluded to in the preamble whereby because of the variety of wastes or other factors one person could not be expected to possess all of the knowledge and skills required of an emergency coordinator (45 FR No. 98, May 19, 1980, at 33186), is not present here. It is to be expected that the duties, skills and knowledge required of the emergency coordinator will vary depending on the wastes handled, type of facility, etc.

Although Mr. Thompson testified that it was his understanding records concerning the dates and quantities of hazardous waste placed in storage were maintained, no such records were produced in response to Mr. Jansen's request and Mr. Thompson acknowledged that he never saw such records (finding 20). Complainant has established that Humko violated § 265.73 requiring the maintenance of an operating record, which includes the cited and other information. There is no dispute that Humko did not at the time of inspection have written closure and post-closure plans as required by 40 CFR §§ 265.112 and 265.118 and financial assurance for closure as required by § 265.143.

The final two Class I violations alleged in the complaint are failure to transfer hazardous wastes from containers in poor condition to containers in good condition as required by 40 CFR 265.171 and failure to keep containers of hazardous waste closed during storage and to prevent them from leaking (40 CFR 265.173). With respect to the first of these allegations, Humko points out that none of the drums were leaking at the time of Mr. Zierath's inspection in March of 1983 (Brief at 21). It is clear, however, that some of the drums were not in good condition at that time (finding 3) and Mr. Jansen observed one drum with a distended top and another drum severely dented in the middle (finding 11). It is concluded that Humko failed to transfer hazardous wastes from containers in poor condition to containers in good condition and thus violated 40 CFR 265.171 as charged in the complaint. The six drums with pooled liquid waste visible on the tops (finding 11) were either open or leaking and thus a separate violation of 40 CFR 265.173 has been established.

One of the three Class III violations referred to by Mr. Miner (findings 29 and 30), i.e., that the emergency coordinator was not familiar with hazardous waste records and procedures, has been discussed above and it has

concluded that the evidence sustains this violation. The lack of markings or identification on the drums referred to by Mr. Miner is not a violation charged in the complaint and, in any event, is not an item for which a separate penalty may be assessed. This is because the requirement for such marking is, in effect, a condition precedent to the 90-day accumulation period set forth in 40 CFR 262.34, the violation of which carries its own penalty, i.e., subjection to the Interim Status Standards of Part 265.19/ Although the evidence supports the manifest discrepancies mentioned by Mr. Miner (finding 10), this is not a violation charged in the complaint20/ and absent a motion to amend the complaint to conform to the proof is not for consideration.

## Penalty

Pointing out that it is Illinois regulations that are enforced here, Humko contends that any penalty should be based on Illinois penalty policy and has moved that the record be reopened for the admission of evidence as to the Illinois policy in this regard (Brief at 21, 22). With the exception of permitting requirements, Humko is correct that Illinois regulations are being enforced herein (note 4, supra). Nevertheless, the Act (§ 3008) clearly authorizes the Administrator to commence enforcement action in states which have been authorized to carry out hazardous waste programs, the only proviso being that notice be given to the state in which the violation occurred (§ 3008(a)(2)). The Act further sets forth the criteria for determining the

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19/ The complaint does not charge that Humko failed to mark the drums prior to shipment off-site as required by 40 CFR 262.31 and 32 and the Inspection Report (EPA Exh 1 at 20) reflects that Humko complied with these requirements.

20/ Failure to obtain an EPA identification number is a separate Class I violation charged in the complaint and Paragraph 8(c) of the complaint, alleging failure to prepare a manifest, is in the singular and appears to be concerned solely with the alleged Ilada Energy Company shipment (finding 13). I decline to consider the complaint amended, sua sponte.

penalty, i.e., that it be reasonable, and the maximum amount of the penalty for each day of violation ($25,000) (§ 3008(c) and (g)). In view thereof, and because a violation of the Illinois hazardous waste regulations is also a violation of RCRA,21/ the Administrator is free to assess a penalty in accordance with the Act without regard to the Illinois penalty policy. Humko's motion to reopen the record is therefore denied.

Mr. Miner testified that an appropriate penalty for each Class I violation is $2,000 and that $500 was an appropriate penalty for each Class III violation. This appears reasonable and will not be disturbed.22/ Complainant has established 14 Class I violations and one Class III violation for which a reasonable penalty is $28,500. The $1,500 add-on referred to by Mr. Miner (finding 29) is also considered appropriate because the complaint alleges that Humko had not to date filed a Part A Permit Application.

## Order

Violations of the Act and regulations having been established, as charged in the complaint, a penalty of $30,000 is assessed against Humko Products in accordance with § 3008(c) and (g) of the Act (42 U.S.C. 6926).23/ Payment of the

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21/ Section 3006(d) of the Act provides:

> (d) Effect of State Permit--Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subtitle.

22/ The Final RCRA Penalty Policy, May 8, 1984 (unpublished), is applicable only to actions instituted after the date thereof.

23/ The compliance order issued with the complaint required Humko, inter alia, to cease all storage of hazardous waste except that which fully complied with 40 CFR Parts 262 and 265, to file a Part A Permit Application within 15 days of receipt of the complaint and to comply with 40 CFR Part 265. Except as to requirements which Complainant failed to prove, the compliance order is affirmed.

penalty shall be made by submitting a certified or cashier's check in the above amount to the Regional Hearing Clerk within 60 days of receipt of this decision.24/

Dated this 19th day of March 1985.

Spencer T. Nissen
Administrative Law Judge

24/ Unless appealed in accordance with 40 CFR 22.30 or unless the Administrator elects, sua sponte, to review the same as therein provided, this decision will become the final order of the Administrator in accordance with 40 CFR 22.27(c).