2/13/86

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Aero Plating Works, Inc.,	)	Docket No. V-W-84-R-071-P
	)	
Respondent	)	

1. Operator of a hazardous waste facility asserted to have carried on business as a de facto corporation, because although corporation was dissolved for non-payment of taxes and franchise fees it was subsequently reinstated, held individually liable for the violations of RCRA and the regulations thereunder as "operator" of the facility.

2. Owner of the land and building occupied by a hazardous waste facility held jointly and severally liable with the operator of the facility for violations of RCRA and the regulations thereunder.

3. In assessing penalty for violations of RCRA and the regulations thereunder against the owner of the land and building occupied by a hazardous waste facility, penalty assessed for failure to file a Part A permit application and for failing to properly close the facility was not reduced. Penalty for other violations relating to the management of the facility was reduced because it was questionable as to how much control the owner had over the operation.

Appearance for Complainant:

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Appearance for Respondent:

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INITIAL DECISION

This is a proceeding under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (hereafter "RCRA"), Section 3008, 42 U.S.C. 6928, on a complaint assessing civil penalties for alleged violations of the Act and containing an order requiring compliance with the Act. 1/

The complaint, issued by the United States Environmental Protection Agency ("EPA"), Region V, charged that Respondents Louis J. Maiorano, Sr., and Louis J. Maiorano, Jr., doing business as Aero Plating Works, have been storing hazardous wastes since November 19, 1980, that they have operated their facility without a permit or achieving interim status to continue operation of the facility pending issuance of a permit, and that they have violated numerous requirements prescribed by the State of Illinois under a hazardous waste program administered by the State pursuant

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1/ Pertinent provisions of Section 3008 are:

> Section 3008(a)(1): "[W]henever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period or both . . . ."

> Section 3008(g): "Any person who violates any requirement of this subchapter 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."

to authority granted under RCRA, Section 3006(c), 42 U.S.C. 6926. 2/

Specific violations charged were as follows:

Operating without a permit and without having achieved interim status in violation of RCRA, Section 3005(a).

Failure to submit Part A of the application for a permit, as required by 35 Ill. Adm. Code § 703.153.

Failure to conduct a general waste analysis, in accordance with a waste analysis plan, as required by 35 Ill. Adm. Code § 725.113(a) and (b).

Failure to comply with the general facility inspection requirements of 35 Ill. Adm. Code § 725.115(b) and (d).

Failure to provide personnel training, as required by 35 Ill. Adm. Code § 725.116(a).

Failure to maintain personnel training records, as required by 35 Ill. Adm. Code § 725.116(d).

Failure to equip the facility with spill control and emergency equipment, as required by 35 Ill. Adm. Code § 725.132(c).

Failure to maintain adequate aisle space, as rquired by 35 Ill. Adm. Code § 725.135.

Failure to make arrangements with local emergency authorities, as required by 35 Ill. Adm. Code § 725.137.

Failure to have a contingency plan, as required by 35 Ill. Adm. Code § 725.151.

Failure to designate an emergency coordinator, as required by 35 Ill. Adm. Code § 725.155.

2/ The EPA granted the State of Illinois interim authorization to operate its hazardous waste program on May 17, 1982. 47 Fed. Reg. 21043. Interim authorization included the authority to administer the regulations which are involved in this proceeding. See 47 Fed. Reg. 21045. RCRA, Section 3008(a)(2), 42 U.S.C. 6928(a)(2), authorizes the EPA to enforce state regulations issued under authorized state programs if prior notice of the enforcement action is given to the state. Such notice to the State was given in this matter. Plaintiff's Exh. 20.

Failure to maintain a written operating record, as required by 35 Ill. Adm. Code § 725.173.

Failure to prepare an annual report, as required by 35 Ill. Adm. Code § 725.175.

Failure to have a written closure plan, as required by 35 Ill. Adm. Code § 725.212.

Failure to complete closure in accordance with an approved closure plan as required by 35 Ill. Adm. Code § 725.213(b).

Failure to provide certification of facility closure by an independent registered professional engineer as required by 35 Ill. Adm. Code § 725.215.

Failure to provide a written estimate of the cost of closing the facility, as required by 35 Ill. Adm. Code § 725.242.

Failure to establish financial assurance for closure of the facility, as required by 35 Ill. Adm. Code § 725.243; and liability insurance for sudden and accidental occurrences as required by 35 Ill. Adm. Code § 725.247.

Failure to store hazardous waste in closed containers, as required by 35 Ill. Adm. Code § 725.273.

Failure to inspect hazardous waste containers weekly, as required by 35 Ill. Adm. Code § 725.274.

Failure to store hazardous waste in tanks which will not leak, corrode, etc., as required by 35 Ill. Adm. Code § 725.292(b).

Failure to maintain at least 2 feet of freeboard at uncovered hazardous waste tanks, as required by 35 Ill. Adm. Code § 725.292(c).

Failure to inspect hazardous waste storage tanks, as required by 35 Ill. Adm. Code § 725.294.

A penalty of $80,000 was requested. The compliance order included in the complaint directed Respondents to submit a closure plan for the facility, to close the facility, and to prepare manifests and comply with other requirements for shipping hazardous waste off site.

Respondents answered contending that Louis Maiorano, Sr. was improperly impleaded as a party, that Louis Maiorano, Jr. was the sole corporate shareholder of Aero Plating Works, Inc., denying that Aero Plating Works, Inc. was a storage facility for hazardous waste, and denying the violations charged. Respondents also asserted that Aero Plating Works, Inc. has terminated its business operation and will comply with the compliance order.

Settlement discussions were held but were unfruitful. The matter went to hearing and a hearing was held on July 30 and 31, 1985. Both sides thereafter filed post-hearing briefs. The following decision is entered on consideration of the entire record and the parties' submissions.

Findings of Fact

The following facts are uncontested: 3/

1. Respondent, Louis J. Maiorano, Jr. owned and operated the Aero Plating Works at 1860 N. Elston Avenue, Chicago, Illinois 60622. (Stipulation, Tr. 3). 4/

2. Respondent, Louis J. Maiorano, Sr. owns the parcel of land and the structures thereon, located at 1860 N. Elston Avenue, Chicago, Illinois, 60622. (Stipulation, Tr. 9).

3. Respondent, Louis J. Maiorano, Sr. leased the land to Aero Plating Works from January 2, 1979 to December 31, 1982, and on December 10, 1982 extended the term of the lease to December 31, 1984. (Stipulation, Tr. 9).

3/ See Respondent's answer brief at 1.

4/ "Tr." refers to the transcript of the proceeding.

4. On December 1, 1980 the corporate charter of Aero Plating Works was involuntarily dissolved by the Illinois Secretary of State. (Stipulation, Tr. 3, 4).

5. The Illinois Environmental Protection Agency (IEPA) inspected the facility on September 15, 1983, and January 24, 1984. (Stipulation, Tr. 4).

6. Since November 19, 1980, wastes which have been identified or listed as hazardous wastes under Section 3001 of RCRA, 42 U.S.C. § 6921, and 35 Ill. Adm. Code § 721, have been stored at the Aero Plating Facility for longer than 90 days without a permit and without having achieved interim status. (Stipulations, Tr. 4, 9).

7. Respondent, Louis J. Maiorano, Jr. filed a notification pursuant to Section 3010 of RCRA on August 19, 1981. This notification stated that Aero Plating Works was only a generator of hazardous wastes (D007). (Stipulation, Tr. 4).

8. IEPA inspections in September 15, 1983, and January 24, 1984, revealed that the facility was operating both as a generator and treatment, storage, and disposal facility. (Stipulation, Tr. 4).

9. At the time of each of the above-referenced inspections, hazardous wastes were stored for a period in excess of 90 days, in quantities greater than 1000 kg. (Stipulation, Tr. 4).

10. Among the wastes stored on the premises were cyanide bearing wastes including spent stripping and cleaning bath solutions where cyanides were used in the process (F009). (Stipulation, Tr. 4).

11. On September 28, 1984, forty-nine 55-gallon drums of hazardous wastes containing wastewater treatment sludges from electroplating operations (F006) were hauled from the facility. (Complainant's Exh. 22; Tr. 273-274).

12. Sample results of materials identified as sludge from the basement revealed the following contaminants: cyanide, chromium, nickel. (Complainant's Exh. 6; Tr. 282).

13. Between November 19, 1980, and sometime in 1982, "chromic rain" from the first floor operations dripped into the basement, (Tr. 505); the "chromic rain" had a low pH indicating it was an acid (Tr. 231, 232, 297).

14. Cyanide will react with an acid to form hydrogen cyanide gas which can be lethal to humans upon inhalation. (Tr. 288, 289).

15. As of the September 15, 1983 IEPA inspections, the following violations were committed:

(a) A Part A application for a Hazardous Waste Management permit had not been submitted. (Stipulation, Tr. 4).

(b) A general waste analysis to obtain all the information which must be known to treat, store, or dispose of hazardous waste had not been conducted. (Complainant's Exh. 3, Attachment A; Tr. 508).

(c) The general facility inspection requirements of 35 Ill. Adm. Code § 725.115(b) and (d) had not been complied with. (Stipulation, Tr. 5).

(d) Personnel training to teach employees to perform their duties in a way that ensures the facility's compliance with 35 Ill. Adm. Code § 725 had not been conducted. (Complainant's Exh. 3, Attachment A, Tr. 34, 35).

(e) Records setting forth job titles and job descriptions had not been maintained; nor were records kept describing the type and amount of instruction that would be given a person filling a position listed

under 35 Ill. Adm. Code § 725.116(d)(1). (Complainant's Exh. 3, Attachment A; Tr. 34, 35).

(f) The facility was not equipped with spill control and emergency equipment. (Complainant's Exh. 3, Attachment A).

(g) Annual reports covering facility activities during the previous calendar year, including the information required in 35 Ill. Adm. Code § 725.175 had not been prepared. (Complainant's Exh. 3, Attachment A).

(h) Adequate aisle space as required by 35 Ill. Adm. Code § 725.135 was not maintained. (Complainant's Exh. 3, Attachment A; Tr. 35).

(i) Arrangements with organizations such as police, fire departments, and emergency response teams whose services might be needed in an emergency were not made. (Stipulation, Tr. 5).

(j) A contingency plan that described the actions that facility personnel must take in response to explosions or any unplanned sudden or non-sudden release of hazardous waste to the air, soil, or surface; and which identified an emergency coordinator had not been prepared. (Stipulation, Tr. 5).

(k) A written operating record containing a description of waste stored, quantities of waste stored, location of those wastes, records and results of inspections was not prepared nor maintained. (Stipulation, Tr. 6).

(l) A written closure plan identifying the steps necessary to completely or partially close the facility at any point during its intended operating life and to completely close the facility at the end of its intended operating life was not prepared. (Stipulation, Tr. 6).

(m) A written estimate of the cost of closing the facility was not developed. (Stipulation, Tr. 6).

(n) Neither financial assurance for the closure of the facility, nor financial responsibility for sudden and accidental occurrences had been demonstrated. (Stipulation, Tr. 6, 7).

(o) Hazardous waste was stored in open containers. (Complainant's Exh. 3, Attachment A; Tr. 43).

(p) Weekly inspections of the hazardous waste container storage area at the facility were not conducted. (Stipulation, Tr. 5).

(q) Hazardous wastes were stored in tanks that were leaking and/or corroded. (Complainant's Exh. 3, Attachment A; Tr. 43).

(r) At least two feet of freeboard was not maintained at uncovered hazardous waste tanks. (Complainant's Exh. 3, Attachment A; Tr. 40-41).

(s) Hazardous waste storage tanks were not inspected. (Stipulation, Tr. 5).

16. IEPA informed the Respondents of the violations listed in paragraph 18, in a Compliance Inquiry Letter dated September 21, 1983. (Stipulation, Tr. 7).

17. On January 24, 1984, representatives of the IEPA inspected Respondents' facility. As of January 24, 1984 the following violations were committed:

(a) A Part A application for a Hazardous Waste Management permit had not been submitted. (Stipulation, Tr. 7).

(b) A detailed physical and chemical analysis of the waste to obtain all the information all the information which must be known to treat, store, or dispose of hazardous waste had not been conducted. (Stipulation, Tr. 7).

(c) Facility inspections requirements of 35 Ill. Adm. Code § 725.115(b) and (d) were not complied with. (Stipulation, Tr. 7, 8).

(d) Certain aspects of the personnel training requirements had been corrected, however, respondents had not completely corrected all violations of 35 Ill. Adm. Code § 725.116. (Tr. 75).

(e) Spill control and emergency equipment was not listed in the contingency plan. (Complainant's Exh. 10, Attachment A; Tr. 75).

(f) Annual reports covering facility activities during the previous calendar year, including the information required in 35 Ill. Adm. Code § 725.175 were not prepared. (Complainant's Exh. 10, Attachment A; Tr. 75).

(g) Adequate aisle space as required by 35 Ill. Adm. Code § 715.135 was not maintained. (Complainant's Exh. 10, Attachment A; Tr. 77).

(h) Copies of a contingency plan were not submitted to local emergency authorities. (Complainant's Exh. 10, Tr. 74, 75).

(i) An evacuation plan was not included in the contingency plan. (Complainant's Exh. 10, Tr. 74, 75).

(j) A written operating record containing a description of the waste stored, location of those wastes, records and results of inspections, and all closure cost estimates was not kept. (Complainant's Exh. 10, Tr. 78).

(k) A written closure plan identifying the steps necessary to completely or partially close the facility at any point during its intended operating life and to completely close the facility at the end of its intended operating life was not developed. (Stipulation, Tr. 8).

(l) A written estimate of the cost of closing the facility was not developed. (Stipulation, Tr. 8).

(m) Neither financial assurance for the closure of the facility, nor financial responsibility for sudden and accidental occurrences had been demonstrated. (Complainant's Exh. 10, Tr. 75).

(n) Hazardous waste ws stored in ipen containers. (Complainant's Exh. 10, Tr. 77).

(o) Weekly inspections of the hazardous waste container storage area at the facility were not conducted. (Stipulation, Tr. 7).

18. IEPA infomed the Respondents of the violations listed in paragraph twenty in an Enforcement Notice Letter, dated February 22, 1984, and during an enforcement conference on March 7, 1984. (Stipulation, Tr. 8).

19. During the IEPA inspection on September 15, 1983, eight discontinued plating tanks containing listed hazardous waste F008 were located along the east wall of the main floor. (Complainant's Exh. 3).

20. As of August 6, 1984, at least a portion of the facility had been leased to new tenants, even though hazardous waste drums from Respondents' operations were scattered throughout the facility; the floor along the east side of the building was contaminated; reactive hazardous wastes were stored haphazardly in the chemical room; and the contaminated north plating line was still standing. The new tenants were located in the same areas of the building as the just described contaminant's. (Complainant's Exh. 21; Tr. 107).

21. A closure plan was not submitted to IEPA or EPA until March 13, 1985, when it was subsequently disapproved. (Complainant's Exh's. 23, 24; Tr. 373).

22. Additional work is necessary to completely dismantle and decontaminate the facility. (Tr. 494).

Discussion, Conclusions and Penalty

The dispute in this case centers not around the violations charged in the operation of the Aero Plating Works facility, but on the reasonableness of the proposed aggregate penalty of $80,000, and the personal liability of Mr. Maiorano, Sr., and Mr. Maiorano, Jr. for the penalty. The violations established by the record and the penalties proposed by the EPA for them are as follows:

Failure to submit a preliminary notification of operating as a hazardous waste storage facility as required by RCRA Section 3010. 5/	$ 6,500.00
Failure to file a Part A permit application as required by 35 Ill. Adm. Code § 703.150 and 703.153.	$10,500.00
Failure to develop and maintain a written operating record as required by 35 Ill. Adm. Code § 725.173.	$ 3,000.00
Failure to obtain a general waste analysis in accordance with a waste analysis plan as required by 35 Ill. Adm. Code § 725.113 (a) and (b).	$ 3,000.00
Failure to develop and maintain a written contingency plan as required by 35 Ill. Adm. Code §§ 725.151, 725.152(e) and (f), 725.153 and 725.155.	$10,500.00
Failure to maintain emergency equipment as required by 35 Ill. Adm. Code § 725.132(c).	$ 2,500.00

5/ State authorization did not dispense with the statutory requirement of filing a preliminary notification of hazardous waste activity under RCRA 3010. It merely meant that after state authorization, the notifications had to be filed with the State. See RCRA, Section 3010(a). The wastes handled by Aero Plating, D007, F006 and F009 first became subject to regulation on November 19, 1980. See 45 Fed. Reg. 33084 (May 19, 1980). Prior to Illinois receiving interim authority to administer its own RCRA program in May 17, 1982, Aero Plating was subject to the Federal program.

Failure to make arrangements with the local authorities as required by 35 Ill. Adm. Code § 725.137.	$ 3,000.00
Failure to conduct inspections of storage areas as required by 35 Ill. Adm. Code § 725.115(b) and (d).	$ 3,000.00
Failure to manage containers and tanks properly as required by 35 Ill. Adm. Code §§ 725.135, 725.273(a) and (b), 725.292.	$ 3,000.00
Failure to conduct personnel training as required by 35 Ill. Adm. Code § 725.116(a).	$ 2,500.00
Failure to prepare and submit an annual report are required by 35 Ill. Adm. Code § 725.175.	$ 3,000.00
Failure to develop a closure plan and to close the facility in accordance with an approval plan as required by 35 Ill. Adm. Code §§ 725.212 and 725.213.	$20,000.00
Failure to establish a cost estimate for closure; financial assurance for closure; and liability insurance as required by 35 Ill. Adm. Code §§ 725.242, 725.243 and 725.247.	$ 9,500.00
Total Proposed Penalty	$80,000.00

The Personal Liability of Louis Maiorano, Jr.

Aero Plating was involuntarily dissolved on December 1, 1980, for failure to file an annual report and pay the annual franchise tax required by state law. 6/ It was not reinstated until August 31, 1984. 7/ Respondents contend that during the period it was dissolved, Aero Plating operated as a de facto corporation so as to shield Mr. Maiorano, Jr., from any individual liability. The argument is without merit. Mr. Maiorano, Jr. is the sole stockholder of the corporation. 8/ It is clear from the

6/ Plaintiff's Exh. 26.

7/ Tr. 510.

8/ Tr. 455.

entire record in this proceeding that he not only made the decisions with respect to the operations of the company but also was very much involved in carrying them out. Mr. Maiorano, Jr. then is plainly an "operator" of the facility as defined in the RCRA regulations, and as such personally liable for the violations. 9/

The EPA also contends that even under Illinois law, reinstatment of the corporate charter would not absolve Mr. Maiorano, Jr. from personal liability, citing Estate of Plepel v. Industrial Metals, Inc., 450 N.E. 2d 1244 (1st App. Dist. 1983). 10/ The test therein enuniciated of whether an individual acting for a defective corporation becomes personally liable seems to depend on whether the party asserting liability intended to make the individual personally liable. 11/ Under such a test, if during the period that Aero Plating was not legally incorporated, the State and the EPA still dealt with Aero Plating as a corporate entity, Mr. Maiorano, Jr. presumably would be able to escape individual liability. The EPA appears to ignore that issue and rest its argument solely on the fact that the corporation had been involuntarily dissolved. In any event, Estate of Plepel was

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9/ "Operator" is defined to mean "the person responsible for the overall operation of a facility." 40 C.F.R. 260.10. This clearly fits Maiorano, Jr.'s relatonship to Aero Plating. Such administrative construction of a statutory term is, of course, entitled to great weight. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. _____, 81 L.Ed.2d 694, 703-04 (1984), Udall v. Tallman, 380 U.S. 1, 16 (1965). Since the Illinois program was approved as "substantially equivalent" to the Federal program (47 Fed. Reg. 21045 (May 17, 1982)), it is presumed that the Illinois regulations, although not always as specific, are to be construed the same as the Federal. See 35 Ill. Adm. Code 702.109. Certainly, I have found nothing to the contrary in the State regulations nor has any provision in the regulations or any case been cited to me to indicate otherwise.

10/ Estate of Plepel is attached to Complainant's response to motion to strike complaint filed November 15, 1984, in the pleadings file.

11/ Estate of Plepel, 450 N.E. 2d at 1247.

an action for debt and would not necessarily apply here because the liability involved, creating an environmentally hazardous condition, is more like a tort against the public, and the general rule appears to be that corporate officials who participate in a tort are jointly liable with the corporation for the injury caused. Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902, 907 (1st Cir. 1980), New York v. Shore Realty Corp, 759 F.2d at 1032, 1051 (2d Cir. 1985). 12/ Liability here, however, is predicated upon the provisions of RCRA and the regulations issued thereunder, and not upon general State law regarding the personal liability of officers of de facto corporations.

It is found, accordingly, that Mr. Maiorano, Jr. is personally liable for the violations, and for the penalty exacted for them.

The Personal Liability of Louis Maiorano, Sr.

Louis Maiorano, Sr. is the owner of the land on which Aero Plating was located and the building in which it was housed. As such he is an owner or at least part owner of the facility. 13/ The performance standards authorized by RCRA, Section 3004 (which includes the interim status requirements) apply to both owners and operators of facilities, as do also the

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12/ Respondents says Estate of Plepel is not applicable since the case imposes personal liability only where reinstatement would substitute worthless corporate liability for valuable personal liability, and that would not be true here since assertedly Maiorano, Jr. has no more assets than the corporation. Answer brief at 9. The evidence of Mr. Maiorano, Jr.'s financial condition does not support a finding that his financial resources are as limited as Respondents claim.

13/ See definition of "facility" in 40 C.F.R. 260.10, and definition of "Hazardous Waste Management Facility," 35 Ill. Adm. Code 702.110.

permitting requirements of RCRA, Section 3005. The EPA has construed these provisions as making the owner and operator of a facility jointly and severally responsible for carrying out the requirements of the hazardous waste regulations and for obtaining a permit. 14/ As an administrative construction it is again entitled to great weight. 15/ In short, Mr. Maiorano, Sr.'s personal liability does not rest upon the extent to which he actively participated in the operation of the facility or even knew of the violations, but on his ownership of the facility. 16/ The extent to which he actively participated in the facility's operation, however, is relevant in determining the appropriate penalty to be assessed against him. 17/

The Reasonbleness of the Penalty

The EPA has provided a detailed justification of how the penalty conforms with the EPA's RCRA Civil Penalty Policy, taking into account the seriousness of the violations, as determined by their potential harm and the extent they deviate from regulatory requirements. 18/

14/ See 47 Fed. Reg. 32039 (July 23, 1982), where the EPA explained why it requires the signature of both the owner and operator on a permit application. The only instance where the EPA would not hold the owner jointly and severally liable is where the owner holds only bare legal title for the purpose of providing security for a financing agreement. See 45 Fed. Reg. 74490 (November 10, 1980). There is no evidence here that Mr. Maiorano, Sr.'s ownership was of this nature.

15/ See supra at 14, n. 9.

16/ The case of Alton & Southern NY Co. v. Illinois Pollution Control Board, 12 Ill. App. 3d 319, 297 N.E. 2d 762 (5th App. Dist. 1973), relied on by Respondents is not in point because it does not deal with liability under RCRA.

17/ See infra at 20.

18/ Complainant's brief in support of proposed order at 16-40.

The potential harm created by the violations, surely a reasonable factor in determining the seriousness of the violation, is explained by Dr. Homer, an expert in the assessment of the risks associated with hazardous waste sites. 19/ What is missing, however, is some firm evidence showing precisely what quantities of hazardous waste were involved and for what periods of time. This is a factor which is also to be considered in the potential for harm. 20/ The notification of hazardous waste activity and Part A permit application are of primary importance to the regulatory purposes of RCRA, and the proposed penalty of $17,000 for failure to comply with these requirements should stand. I find, however, that the penalty for the remaining violations should be reduced to $19,500, making a total assessed penalty of $36,500. 21/

Respondents argue that there is no evidence establishing the duration of the violations charged. Drums of mud from the basement observed during the January 1984 inspection were found to contain cyanide, a hazardous constituent of F006 waste (waste water treatment sludges from electroplating operations) and F009 waste (spent stripping and cleaning bath solutions from electroplating operations). 22/ The evidence indicates

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19/ Tr. 283-303.

20/ RCRA Civil Penalty Policy, Plaintiff's Exh. 69, at 6.

21/ In effect this has meant placing all violations in the minor "potential for harm" category because of the failure of the record to show what actual quantities of hazardous waste have been involved. A penalty of $3,000 each is assessed for the two violations dealing with closing the facility and $1500 for each of the remaining violations.

22/ Tr. 274, 277; Plaintiff's Exh. 6 (Sample Nos. X107, X108, X109).

that this waste could have dated back to sludge from electroplating operations found on Aero Plating's basement floor in 1981. 23/ There is no credible evidence indicating it was all of recent origin. 24/ It is found, accordingly, that there have been continuing violations since 1981. 25/

Respondents presumably to show their good faith point out that the four discontinued plating tanks were triple rinsed in order to remove all plating waste before being disposed of, that Aero Plating had a contingency plan after the first inspection and that it also had a personnel training program. 26/ Respondents, however, produced no evidence, such as tests

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23/ See Plaintiff's Exhs. 49, 56.

24/ Respondents have been storing hazardous wastes since November 19, 1980, and proffered no evidence showing shipments of listed wastes prior to September 28, 1984. Respondents concede that not all of the shipment on September 28, 1984, was of current (less than 90 days) origin. See Finding of Fact No. 6; Plaintiff's Exhs. 22, 23. If the mud in the drums sampled by the State investigators was a mixture of a listed waste and other waste resulting from a spill instead of being solely a listed waste, it would still be hazardous waste the storage of which was subject to RCRA's requirements. See 40 C.F.R. 261.3(a)(2)(iv), 207.2(c)(3); 35 Ill. Adm. Code 721.103(b), 725.101(c)(11).

25/ A sample from the debris and sludge pile located in the basement was also found to contain cyanide. Plaintiff's Exh. 6 (Sample No. X118); Plaintiff's Exh. 11 (p. 2 and Photograph No. 12). The most logical explanation for the presence of the cyanide is that the debris and sludge became contaminated with spills and drippings of cyanide bearing materials from the first floor which were occurring as early as 1981. Tr. 225, 478. Maiorano, Jr.'s testimony to the contrary (Tr. 480, 505) is unpersuasive because he never did really explain how the waste pile and mud could have been contaminated with cyanide (see Tr. 484-85). Respondents' proposed finding that the pile of debris and sludge on the basement floor was not contaminated from discharges from the floor above (Answering brief at 1) is rejected for the same reason.

26/ Respondents' answer brief at 1-2. The tanks referred to by Respondents would appear to be those found during the inspection on August 28, 1984, which were discolored by various materials on the outside and which were observed to have sludge and fluid on the inside. See Plaintiff's Exh. 13 (Photograph No. 29); Plaintiff's Exh. 19A; Tr. 117-18.

of samples taken from the tanks and their surfaces, showing that the rinsing of the tanks was sufficient to decontaminate them. The contingency plan was also deficient in several respects. 27/ Thus, these instances do not add up to a persuasive showing of a conscientious effort to achieve full compliance with the requirements.

The remaining questions to be considered are whether any penalty is merited against Mr. Maiorano, Sr. since he assertedly did not know about the violations and had no control over the business of Aero Plating, and whether an adjustment should be made in the case of either Respondent because of his asserted inability to pay the penalty.

With respect to Mr. Maiorano, Sr., the records shows that aside from his ownership of the facility, he also worked as a "consultant" for Aero Plating, that he was present during the inspections of the facility and also at an enforcement meeting with the Illinois Environmental Protection Agency in May 1984. 28/ In addition, he called the State about the disposal of the drums of chromic acid which had been found on a trailer near the facility. 29/ The evidence shows, however, that Mr. Maiorano, Sr. did in good faith transfer the business to his son Louis Maiorano, Jr. in 1979, prior to the time the violations occurred. 30/ It is questionable, then, how much control Mr. Maiorano, Sr. really could exercise over the

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27/ Tr. 73-74.

28/ Tr. 63, 66, 111; Complainant's Exh. 13.

29/ Tr. 50-51. The drums of chromic acid, however, are not being questioned as constituting hazardous waste. Tr. 463.

30/ Tr. 413-20.

operations of the business during the time the violations arose, and to what extent he should really be held responsible for such violations. The penalty policy recognizes that lack of willfulness or negligence may justify a reduction in the gravity based penalty. 31/ It could be argued that such a defense is available only to the operator of the facility, and the owner is strictly liable for whatever penalty is assessed against the operator. This seems an unncesssarily harsh construction, however, and since it is not clear that this is what was intended by the penalty policy, it will not be followed here.

As to the failure to file a permit, the owner of the facility is equally responsible with the operator for complying with this requirement. Accordingly, a penalty of $10,500 is assessed against both. Mr. Maiorano, Sr. must also bear equal responsibility with Mr. Maiorano, Jr. for not properly closing the facility. Accordingly, a penalty of $6,000 is also assessed against both for these violations. 32/ As to the remaining violations, Mr. Maiorano, Jr. must really bear the primary responsibility for them. Accordingly, the penalty against Mr. Maiorano, Sr. for these violations is reduced to $2,000. A further reduction is not warranted because Mr. Maiorano, Sr. undoubtedly knew generally how the business was being operated and his relationship as owner of the property and creditor precludes assuming that he had no say whatever on on how the business was being operated. Thus, the penalty to be assessed against Mr. Maiorano, Sr.

31/ Plaintiff's Exh. 69 at 17-18.

32/ See *supra* at 17, n. 21.

for which he will be jointly and severably liable with Mr. Maiorano, Jr. is $18,500.

Also to be considered is the ability of Mr. Maiorano, Sr. to pay the penalty assessed herein. Contrary to what Respondents argue (answering brief at 8), the burden rests upon Respondent to establish his inability to pay. 33/ Since the Aero Plating operation has been closed, there is no concern here about whether the penalty assessed would put the company out of business. The evidence submitted by Mr. Maiorano, Sr. does not demonstrate that he would have insufficient assets and income to pay the $18,500 penalty, if not in one sum, than at least by installments or deferred payments, even assuming he will still have to pay closing costs in some unspecified amount. 34/

In the case of Mr. Maiorano, Jr., the only adjustment that would be warranted would be his asserted inability to pay the penalty. Mr. Maiorano, Jr., has furnished some financial data which is sufficient to merit a reduction of the penalty to $22,000 (a reduction of approximately 40%), having in mind that Mr. Maiorano, Jr. would also be jointly responsible for closing the facility. 35/

33/ See RCRA Penalty Policy, Plaintiff's Exh. 69 at 20. Placing the burden on Respondent is in accordance with the general rule that the burden should be borne by the one naturally possessed of the relevant evidence. Commonwealth of Puerto Rico v. Federal Maritime Commission, 468 F.2d 872, 881 (D.C. Cir. 1972), United States v. Continental Insurance Co., 776 F.2d. 962, 964 (11th Cir. 1985).

34/ Tr. 447-51, 452.

35/ Respondents Exh. 7. The information furnished in Respondents' prehearing exchange was also considered.

Finally, the EPA in its compliance order would require Respondents to account for their disposal of hazardous waste since November 19, 1980. It is doubtful whether Respondents really have the records that would enable them to do so, and, accordingly, the provision is stricken from the order.

ORDER 36/

Pursuant to the Solid Waste Disposal Act, as amended, Section 3008, 42 U.S.C. 6928, the following order is entered against Respondents, Louis J. Maiorano, Sr. and Louis J. Maiorano, Jr.:

I.(a) A civil penalty of $18,500 is assessed Mr. Maiorano, Sr. and Mr. Maiorano, Jr., for violations of the solid Waste Disposal Act found herein. Mr. Maiorano, Sr. and Mr. Maiorano, Jr. shall be jointly and severally liable for the payment of said penalty. An additional civil penalty of $3,500 is assessed against Mr. Maiorano, Jr. for said violations.

I.(b) Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order by submitting a certified or cashier's check payable to the United States of America and mailed to:

EPA - Region V
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, IL 60673

36/ Unless an appeal is taken pursuant to the Rules of Practice, 40 C.F.R. 22.30, or the Administrator elects to review this decision on his own motion, the Inital Decision shall become the final order of the Administrator. See 40 C.F.R. 22.27(c).

If prior to the due date of the payment of the penalty, the Regional Administrator has approved a delayed payment schedule or payment under an installment plan with interest for either Respondent, then payment by such Respondent shall be made according to the schedule or installment plan approved by the Regional Administrator.

II. The following compliance order is also entered against Respondents Louis J. Maiorano, Sr. and Louis J. Maiorano, Jr.:

1. Respondents shall within thirty (30) days of issuance of this Order cease all treatment, storage, or disposal of hazardous waste at the facility except in complete compliance with the Standards Applicable to Generators of Hazardous Waste and Owners and Operators of Hazarouds Waste Treatment, Storage and Disposal Facilities, 35 Ill. Adm. Code Part 725;

2a. Respondents shall submit to the EPA a closure plan for the facility which is approved by the EPA as meeting the standards for such plans contained in 35 Ill. Adm. Code § 725.210, and shall detail the activities to be accomplished and that have already been accomplished by the Respondents to remove and properly dispose of or otherwise handle the hazardous waste at the facility. Said plan must be submitted within thirty (30) days from service of this Order, unless additional time is allowed by the EPA.

b. Within 30 days of EPA approval of the closure plan, Respondents shall complete closure of the facility, in accordance with the approved closure plan and shall submit a certification of closure, as required by 35 Ill. Adm. Code § 725.215.

3. Respondents shall comply immediately with the following requirements:

a. Prepare manifests prior to the off-site transportaion of hazardous waste as required by 35 Ill. Adm. Code § 722.120(a).

b. Package hazardous wastes according to applicable Department of Transportation regulations (49 C.F.R. Parts 173, 178 and 179) prior to transportation off-site as required by 35 Ill. Adm. Code §722.130.

c. Label each drum of hazardous waste in accordance with applicable Department of Transportation regulations (40 C.F.R. Part 172) prior to transportation off-site as required by 35 Ill. Adm. Code §722.131.

d. Prior to shipping hazardous waste off-site mark each container of 110-gallon capacity or less with the following words as required by 35 Ill. Adm. Code § 722.132(b):

> "HAZARDOUS WASTE----Federal Law Prohibits Improper Disposal. If found, contact the nearest police or public safety authority or the U.S. Environmental Protection Agency.
>
> Generator's Name and Address _____.
> Manifest Document Number _____.

e. Offer the transporter placards according to Department of Transportation regulations (49 C.F.R. Part 172, Subpart F) as required by 35 Ill. Adm. Code § 722.133.

4. Respondents shall, within forty-five (45) days of entry of this Order, provide EPA with a full accounting of all hazardous waste disposed from the facility since November 19, 1980, including quantity and chemical composition of the waste, and identity of the hauler and disposal facility, if any.

Gerald Harwood
Administrative Law Judge

DATED: February 13, 1986
Washington, D.C.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Office of Administrative Law Judges

Mail Code A-110

February 21, 1986

OFFICE OF
THE ADMINISTRATOR

86 FEB 21 AM 10:30

Babette J. Neuberger, Esquire
Office of Regional Counsel
U.S. EPA, Region V
230 South Dearborn Street
Chicago, IL 60604

Bertram A. Stone, Esquire
Stone, Pogrund & Korey
221 N. LaSalle Street, 28th Floor
Chicago, IL 60601

Subject: Aero Plating Works
Docket No. V-W-84-R-071-R

To the Parties:

Enclosed please find revised page 24 of my Initial Decision dated February 13, 1986, omitting paragraph 4 on page 25. The provision requiring Respondent to account for their hazardous waste disposed from the facility since November 19, 1980, was improperly included in the order. See my Initial Decision at page 22. Please substitute page 24 for pages 24 and 25 included in my original decision.

Sincerely,

Gerald Harwood

Gerald Harwood
Administrative Law Judge

Enclosure

Certificate of Service

I hereby certify that the original of this letter was hand delivered to the Hearing Clerk, EPA Headquarters, and copies were sent to counsel for Complainant and Respondent in this proceeding, along with a copy to the Regional Hearing Clerk, U.S. EPA, Region V.

Dottie Woodward

Dottie Woodward
Secretary to Judge Harwood

3. Respondents shall comply immediately with the following requirements:

a. Prepare manifests prior to the off-site transportaion of hazardous waste as required by 35 Ill. Adm. Code § 722.120(a).

b. Package hazardous wastes according to applicable Department of Transportation regulations (49 C.F.R. Parts 173, 178 and 179) prior to transportation off-site as required by 35 Ill. Adm. Code §722.130.

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d. Prior to shipping hazardous waste off-site mark each container of 110-gallon capacity or less with the following words as required by 35 Ill. Adm. Code § 722.132(b):

> "HAZARDOUS WASTE----Federal Law Prohibits Improper Disposal. If found, contact the nearest police or public safety authority or the U.S. Environmental Protection Agency.
>
> Generator's Name and Address _____.
> Manifest Document Number _____.

e. Offer the transporter placards according to Department of Transportation regulations (49 C.F.R. Part 172, Subpart F) as required by 35 Ill. Adm. Code § 722.133.

_____
Gerald Harwood
Administrative Law Judge

DATED: February 13, 1986
Washington, D.C.