9/19/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Evanston Motor Company	)	Docket No. RCRA-(3008)-VIII-95-06
	)	
Respondent	)	

INITIAL DECISION

On August 19, 1996 I issued Rulings on Motions in this proceeding. The orders in those rulings dismissed Counts I and II of the Complaint with prejudice; granted accelerated decision on Count III and assessed a civil penalty of $100 for that violation; and dismissed Count IV without prejudice. The Complainant was allowed 30 days from receipt of the order to file a motion to amend the Complaint with respect to Count IV. The order further provided that if such a motion was not filed, an Initial Decision would be issued incorporating the findings of fact and conclusions of law in the rulings of August 19, 1996.

Complainant has not filed a motion to amend the Complaint as of this date, well over 30 days (including extra time for mailing) since its receipt of the order. Therefore, the attached Rulings on Motions, dated August 19, 1996, are incorporated as the Initial Decision in this proceeding.

Order

1. Respondent is assessed a civil penalty of $100.

2. Payment of the full amount of this civil penalty shall be made within 60 days of the service date of this order by submitting a certified or cashier's check in the amount of $100, payable to the Treasurer, United States of America, and mailed to:

EPA - Region 8
P.O. Box 360859M
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalties within the prescribed statutory time period, after entry of the final order, then interest on the civil penalty may be assessed.

5. Pursuant to 40 CFR §22.27(c) this Initial Decision shall become the final order of the Agency, unless an appeal is taken purusant to 40 CFR §22.30 or the Environmental Appeals Board elects, sua sponte, to review this decision.

Andrew S. Pearlstein
Administrative Law Judge

Dated: Washington, D.C.
October 7, 1996

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ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
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Respondent	)	

RULINGS ON MOTIONS

Proceedings

The Region 8 Office of the United States Environmental Protection Agency (the "Complainant," "EPA," or "the Region") commenced this action by filing a Complaint dated June 22, 1995, on the Evanston Motor Company (the "Respondent"). The Complaint charges Respondent with four counts of violations of the Resource Conservation and Recovery Act ("RCRA") and its implementing regulations with regard to Respondent's handling of used motor oil at its automobile service facility in Evanston, Wyoming. The Complaint seeks assessment of a civil penalty of $16,500 and implementation of a compliance order on Respondent. Respondent filed an Answer on July 17, 1995 in which it denied most of the material allegations of the Complaint and raised several affirmative defenses. Respondent requested a hearing and settlement conference on the charges.

The Complaint in this proceeding charges Respondent with four violations of RCRA regulations, based on an inspection of Respondent's facility on July 28, 1994. The alleged violations are as follows: Count I - failure to conduct a hazardous waste determination of the contents of two 55-gallon drums in violation of 40 CFR §262.11; Count II - failure to label or clearly mark two 55-gallon drums with the words "Used Oil" in violation of 40 CFR §279.22(c)(1); Count III - failure to label or clearly mark fill pipes used to transfer used oil into an underground storage tank with the words "Used Oil" in violation of 40 CFR §279.22(c)(2); and, Count IV - failure to gravity hot-drain non-terne plated used oil filters prior to disposal as required by 40 CFR §261.4(b)(13)(i-iv) in order to claim an exclusion from hazardous waste regulation. The Complaint seeks a total civil penalty of $16,250, with $2250 apportioned for each of Counts I - III, and $9500 apportioned to Count IV.

On December 18, 1995, before an Administrative Law Judge ("ALJ") was designated to preside in this matter, Complainant filed two motions: a Motion for an Accelerated Decision on Liability, and a Motion to Strike Affirmative Defenses. The undersigned ALJ was designated to preside in this proceeding on March 12, 1996. In a

Prehearing Order dated March 28, 1996 the ALJ set a schedule in which the Respondent was allowed until April 19, 1996 to respond to Complainant's motions. That order also established a schedule for the filing of prehearing exchanges pursuant to the EPA Rules of Practice, 40 C.F.R. §22.19. The order provided that, notwithstanding the possible continuing pendency of the Complainant's motions, the parties were to file initial prehearing exchanges by May 24, 1996, and reply exchanges by June 14, 1996.

The ALJ issued Cross Orders to Show Cause on June 28, 1996, in which both parties were directed to show cause why they should not be found in default for failure to submit the required responses and exchanges. Both parties submitted responses to the Orders to Show Cause.

Rulings on Orders to Show Cause

The Respondent was directed to show cause why it had not responded to Complainant's motions for accelerated decision on liability and to strike defenses. Respondent demonstrated that in fact it had timely filed responses to those motions with the Regional Hearing Clerk and Complainant, but did not send copies to the ALJ. That was remedied with the Respondent's submittal on July 12, 1996. Sufficient cause having been shown, the order to show cause is vacated, and Respondent's filings in opposition to Complainant's motions are accepted.

Both parties were also directed to show cause why they should not be found in default for failing to file prehearing exchanges as directed. Counsel for Complainant responded that the parties had agreed to jointly request an extension of time for such filing, with the request to be made by EPA counsel; however, she inadvertently failed to make that request to the ALJ. As no hearing date has yet been scheduled, and this interval will allow the ALJ to rule on the pending motions, the extension will be granted. Sufficient cause having been shown, the order to show cause is vacated. Since this ruling disposes of all charges, however, there is now no need to file any prehearing exchanges.

Summary of Rulings

The Region has moved for an accelerated decision on Respondent's liability on all four counts. Respondent does not contest the facts underlying the violations alleged in Counts I - III, but contends that the EPA is estopped from pursuing further enforcement in this proceeding, due to Respondent's satisfaction of EPA's prior expedited enforcement demands. Respondent does contest the facts underlying the violation alleged in Count IV.

In these rulings Counts I and II are dismissed with prejudice. Count IV is dismissed without prejudice. Complainant's motion for an accelerated decision is granted on Count III, and a civil

penalty of $100 is assessed.

FINDINGS OF FACT

The Region inspected Respondent's automobile service facility in Evanston, Wyoming on July 28, 1994. The lead inspector, Kris Shurr, noted the four alleged violations described above on her inspection report. During the inspection, Ms. Shurr spoke with Respondent's Service Manager, Larry Harvey.

Following the inspection, the Region sent two separate letters by certified mail, return receipt requested, to Respondent, dated October 26, 1994. One was captioned "WARNING LETTER" and addressed the violations concerning the two 55-gallon drums (which later became the subject of Counts I and II). The letter stated that the contents of the two unlabelled drums must be determined and disposed of in accordance with 40 CFR §261.5(g)(3). The letter directed Respondent to complete those compliance actions, and send the Region documentation and a certification of compliance within 30 days of Respondent's receipt of the letter. The letter further stated that "[f]ailure to provide the requested documentation or submittal of incomplete and/or false information may subject you to civil or criminal liability under Section 3008 of RCRA, (42 U.S.C. 6928)."[1]

Respondent's President, David D. Madia, then sent a letter dated November 29, 1994 to the Region stating that the two unlabeled drums had been disposed of according to law. He enclosed a copy of the receipt and manifest from the transporter which included a description of the contents ("gasoline/grease/used oil/water mix") and indicated it was accepted by H&M Oil Corp., a used oil recovery company. The EPA did not respond further with respect to the handling of the two unlabelled drums until it filed the Complaint on June 22, 1995.

The Region's other certified letter dated October 26, 1994, enclosed a document entitled "Expedited Enforcement Compliance Order & Settlement Agreement for Used Oil Violations" ("Expedited Order"). This document addressed the violations concerning the unlabelled used oil fill pipe (Count III), and the failure to gravity hot-drain non-terne plated used oil filters (Count IV). The cover letter and Expedited Order explained that, under the Region's pilot program, the Respondent could resolve "minor" violations by paying a relatively small penalty within 30 days, certifying that it was now in compliance, and waiving its right to a hearing. The Expedited Order listed the two above cited violations, and imposed a penalty of $100 for failing to label the fill pipe, and $250 for failing to always hot-drain non-terne

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[1] Copies of all the correspondence referred to are attached to Respondent's Answer.

plated used oil filters. The Expedited Order also explained that EPA would treat Respondent's failure to return the executed settlement agreement within 30 days as an indication that Respondent was not interested in pursuing this procedure. The offer for an expedited settlement would then be withdrawn, and EPA would have the option to pursue additional enforcement actions.

In a letter to the Region dated November 9, 1994, Respondent's President, Mr. Madia, stated he agreed to pay the $100 penalty for the fill pipe violation, but wished to contest the oil filter draining violation. He further described the methods used in his facility to drain used oil filters and explained why he believed his operation was consistent with the regulation. The EPA then responded in a letter dated January 26, 1995 in which Terry L. Anderson, Chief of the Hazardous Waste Branch, set forth EPA's interpretation of the requirements for the "hot-drained" oil filter exclusion, centered on the definition of "hot-draining" with reference to engine operating temperature. The letter also pointed out that Respondent had not paid the $350 penalty and extended the deadline for acceptance of the Expedited Order and payment until February 6, 1995. The letter stated that if that deadline were not met, the Region would issue an Administrative Order, with an opportunity to request a hearing.

Mr. Madia then wrote another letter to Mr. Anderson on January 31, 1995. He stated again that he was willing to pay the $100 penalty for the fill pipe violation, but continued his dispute over EPA's interpretation of the law and facts concerning the oil filter draining violation. Mr. Madia also stated that he was advised by representative of the EPA's staff not to pay the $100 for the fill pipe violation unless he was also willing to pay the $250 for the oil filter draining violation. The Region's next response was the filing of the administrative Complaint, Compliance Order and Notice of Opportunity for Hearing that gave rise to this proceeding.

DISCUSSION

Counts I and II

In its Answer and opposition filings, Respondent asserts a general defense to the charges in Counts I and II in the nature of estoppel. With respect to those counts, Respondent complied in a timely manner with the EPA's expedited enforcement Warning Letter. Respondent made a hazardous waste determination, properly disposed of the drums, and submitted appropriate documentation to the Region.

The Region's Warning Letter stated that failure to do so would subject Respondent to civil or criminal liability under RCRA §3008. This language must reasonably be interpreted as not a mere implication, but essentially a promise that the Region would forego

such further enforcement if Respondent complied. In common as well as legal discourse, a statement that failure to perform could lead to certain consequences also means the converse -- that performance will avoid those consequences. The Region never acknowledged receipt of Respondent's compliance documentation, but instead, seven months later, brought this civil penalty proceeding.

Complainant espouses the general rule that the doctrine of equitable estoppel can only be invoked against the United States in rare instances of affirmative misconduct by the government.[2] While the conduct of the Region here may not be characterized as egregious, it did constitute the direct breach of a promise not to pursue further enforcement. In the administrative context in the enforcement of minor violations, such as this case, such a breach of a promise may be considered affirmative misconduct. It is a matter of degree. This was a minor violation which the Respondent remedied as directed by EPA's initial enforcement response. Without so much as acknowledging that compliance, EPA then brought this formal enforcement proceeding seeking $4500 in penalties although it indicated previously that it would not do so if Respondent complied. This leading Respondent down the garden path is sufficient inconsistent conduct to be subject to estoppel in this proceeding.

Even if these circumstances do not comprise a classic case of equitable estoppel, the least we should expect from government is that it should keep its word. Here the Region said it would not prosecute if Respondent complied, but then did so anyway. At the administrative level, this Agency's Office of Administrative Law Judges should serve as a buffer against final agency action that is manifestly unfair. The ALJ is authorized to "decide questions of fact, law, or discretion" and to "dismiss an action . . . on . . . grounds which show no right to relief on the part of the claimant." 40 CFR §§22.04(c)(7), 22.20(a).

The issue here can also be framed in terms other than "estoppel." The EPA can be considered to have waived its right to further enforcement by its language in the Warning Letter, provided Respondent complied as directed. Respondent's compliance with the terms of that enforcement action embodied by the Warning Letter would then render the instant proceeding prosecuting the same violations moot.

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[2] The leading case of Federal Crop Ins. Corp. v. Merrill, 382 U.S. 380, 384 established the doctrine prohibiting the assertion of the defense of equitable estoppel against the government acting in its sovereign capacity, absent a showing of affirmative misconduct. See also, e.g., REW Enterprises, Inc. v. Premier Bank, N.A., 49 F.3d 163, 169 (5th Cir. 1995); and In the Matter of Wego Chemical and Mineral Corp., Docket No. TSCA-8(a)-88-0228 (Initial Decision, April 15, 1992, p.21).

This action is brought under RCRA §3008(a), 42 U.S.C. §6928(a), which authorizes the EPA to "issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both , . . ." The certified Warning Letter "advised" Respondent to come into compliance with regard to the two unlabelled drums, and that failure to do so "may subject you to civil or criminal liability under Section 3008 of RCRA (42 U.S.C. 6928)." Respondent did come into full compliance within the specified time period, and provided the requisite documentation to EPA. Now, in this proceeding, Respondent seeks, in addition to the assessment of a civil penalty, the issuance of a proposed Compliance Order (¶1 refers to the two unlabelled drums), although Respondent did comply seven months before issuance of the Complaint and Compliance Order. The mootness of this proceeding with respect to Counts I and II is seen by the fact that Respondent's compliance had already been achieved and documented long before issuance of the Complaint and Compliance Order under RCRA §3008.

This court has not been referred to any statute or regulation that authorizes the EPA to issue a "Warning Letter" requiring compliance in addition to, or instead of, the more formal order that appears contemplated by RCRA §3008(a). The letter avoids the use of the word "order" and instead "advises" Respondent to comply. The precise language is as follows:

> "You are hereby advised to complete, within thirty (30) calendar days of receipt of this letter, the actions necessary to bring Evanston Motors into full compliance with the hazardous waste regulations and to send us documentation detailing those actions . . . . . Failure to provide the requested documentation or submittal of incomplete and/or false information may subject you to civil or criminal liability under Section 3008 of RCRA (42 U.S.C. 6928)."

This language can only be reasonably interpreted by a respondent as a mandatory directive to comply in order to avoid additional enforcement under RCRA §3008. The Warning Letter of October 26, 1994 should be construed as the EPA's enforcement response under RCRA §3008(a). It would be manifestly unfair for the Region to devise various enforcement actions intended to be outside the authority of RCRA §3008(a), such as this Warning Letter, and then, despite a contrary notice to respondents in the letter, bring a more formal §3008 enforcement action after the initial enforcement action has been satisfied.

Further support for precluding EPA from this additional enforcement of Counts I and II is seen when the Warning Letter is read in conjuction with the cover letter accompanying the Expedited Order (which addressed the two alleged violations now the subjects of Counts III and IV). Both the Warning Letter and the Expedited

Order with cover letter were sent by certified mail to Respondent on the same date, October 26, 1994.[3] The cover letter stated, in pertinent part:

> "Under EPA Region VIII's pilot program, violations of the Used Oil regulations could receive one of several enforcement follow-up actions. You will either be receiving a Used Oil Citation/Settlement Agreement and Warning Letter for other than Used Oil violations discovered at your facility, or just a Used Oil Citation/Settlement Agreement. Once you have accepted and agreed to the Citation, signed and returned the Settlement Agreement and corrected the violation(s), EPA Region VIII will not take further enforcement action for the listed violation(s)."

This paragraph at least implies that the Warning Letter for other than used oil violations is treated in a parallel manner along with the Citation/Settlement Agreement for used oil violations. The Warning Letter is characterized as "one of several enforcement follow-up actions." This language certainly would bolster the reasonable belief of a recipient of both a Warning Letter and Expedited Order that the EPA will not take further enforcement action if Respondent complies with the directives in both enforcement follow-up actions.

Complainant asserts that a respondent's compliance after an inspection does not relieve the party from civil penalty liability. While ordinarily this is of course true, in the cases cited by Complainant the respondents had not already come into compliance in accord with a Warning Letter that "advised" such compliance actions in order to avoid further civil liability. Accordingly, Complainant should be precluded from seeking a further Compliance Order and civil penalty with respect to Counts I and II. Those two counts are dismissed with prejudice.

Count III

Respondent also timely responded to the Region's other initial enforcement action, the Expedited Order, with respect to Count III. Mr. Madia stated Respondent was willing to comply and pay the expedited penalty of $100 for the fill pipe labeling violation now alleged in Count III. Respondent did in fact comply by labelling

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[3] Apparently, the unlabelled drum violations were addressed separately since they did not technically involve violations of the used oil regulations, but of the general hazardous waste regulations.

the fill pipe,[4] and has offered repeatedly to pay the $100 penalty. Respondent has not actually paid that penalty only because EPA has never responded to that offer. Although Respondent did not sign and return the Order according to its terms, this was obviously because Mr. Madia wished to contest the filter draining violation.

Respondent's position was always crystal clear. Mr. Madia agreed to the expedited penalty for the fill pipe violation but wished to contest the alleged oil filter draining violation. The Expedited Order does list the violations separately and assesses separate penalties for each. This certainly implies, as in any other legal proceeding, that the two charges could be treated separately with respect to settlement.

The Expedited Order along with its cover letter, in contrast to the Warning Letter used in reference to Counts I and II, at least spells out clearly its intent, meaning, and consequences. The Expedited Order is, however, silent with regard to the bifurcating of multiple alleged violations. The Region never formally responded to Respondent's offer to treat the two alleged violations separately. This conduct must be held to bind Complainant to that portion of the expedited enforcement offer accepted by Respondent, and preclude Complainant from seeking a larger penalty in a subsequent action. Estoppel does not apply, since liability is found. EPA is simply bound by its proposed penalty offer which was accepted by Respondent. This conclusion is further bolstered by that fact that, as discussed below, the alleged oil filter draining "violation" does not state a valid claim for relief.

Respondent admitted the fill pipe violation and agreed to pay the expedited penalty in a timely manner. In these circumstances, granting of accelerated decision on Count III is appropriate, but the civil penalty must be limited to that proposed and accepted in the expedited procedure -- $100.

Count IV

At first glance Count IV seems ripe for holding an evidentiary hearing. There are genuine issues of material fact raised in the evidentiary materials concerning whether Respondent's oil filter draining practices satisfy the requirements for the hazardous waste exclusion for non-terne plated used oil filters set forth in 40 CFR §261.4(b)(13).

However, an examination of the allegations of the Complaint on this Count reveals that they fail to state a cause of action. The Complaint (¶33) alleges that "Respondent failed to gravity hot-

[4] A photograph showing the labelled fill pipe is attached to Respondent's Answer.

drain non-terne plated used oil filters prior to disposal in accordance with 40 CFR §261.4(b)(13)(i-iv)." The next paragraph (¶34) then alleges that this "is a violation of section 3001 of RCRA, 42 U.S.C. §6921." These allegations do not allege that Respondent engaged in any conduct in violation of the regulations.

The failure to properly drain used oil filters in accord with §261.4(b)(13) is not itself a violation, but would only operate to prevent Respondent from claiming that the non-terne plated used oil filters are not hazardous waste. Non-terne plated used oil filters are listed under §261.4(b) as "solid wastes which are not hazardous wastes," provided they are properly drained. The Complaint does not then allege that the oil filters were improperly disposed of or otherwise improperly managed under the hazardous waste regulations. Thus, the Complaint does not provide a "statement of the factual basis for alleging the violation" as required by the EPA Rules of Practice, 40 CRF §22.14(a)(3).

The citation to a violation of RCRA §3001 does not fill the gap. There remains no factual basis for the alleged violation. In addition, the reference to RCRA §3001 is hardly specific as required by the Rules of Practice, 40 CFR §22.14(a)(2). Section 3001 of RCRA, 42 U.S.C. §6921, entitled **Identification and listing of hazardous waste**, consists of subsections (a) through (h), addressing myriad aspects of the regulatory scheme. It is impossible to tell from the Complaint which provision in RCRA §3001 Respondent is charged with violating. Therefore, Count IV of the Complaint must be dismissed.

However, the dismissal of Count IV will be without prejudice. Complainant will be granted leave to file a motion to amend the Complaint. The Environmental Appeals Board has ruled that leave to amend a complaint should be freely given in EPA proceedings, in accord with the policy expressed in the Federal Rules of Civil Procedure, §15(a). In the Matter of Asbestos Specialists, Inc., 4 EAD 819, 830 (1993). This practice promotes the objective of the Agency's rules to reach the actual merits of a controversy. Dismissal of a complaint with prejudice should be reserved for those rare occasions when the complainant is acting in bad faith; a more carefully drafted complaint would still be unable to state a claim for relief; or the respondent would be unduly prejudiced. Id. at 828.

In this case, there is enough of an indication in the Complaint of the actual alleged violative conduct to allow Complainant a chance to amend its Complaint to state a valid claim with respect to Count IV. The Complaint alleges that Respondent failed to properly drain the used oil filters "prior to disposal." This reference is sufficient to allow EPA, if it has actual knowledge of Respondent's disposal of the filters, to move to amend the Complaint. However, any such motion will be carefully scrutinized. Respondent will of course also have an opportunity to

respond, under the EPA Rules of Practice, in opposition to any motion to so amend the Complaint.

Summary of Rulings

1. Counts I and II of the Complaint are dismissed with prejudice on the ground that the EPA has waived such further enforcement due to Respondent's compliance with the terms of the Warning Letter directives on those same charges.

2. Accelerated decision is granted on Count III, in that Respondent violated 40 CFR §279.22(c)(2) by failing to label or clearly mark a used oil fill pipe. The penalty for this violation is assessed at $100, the amount accepted by Respondent under the earlier Expedited Order procedure.

3. Count IV of the Complaint is dismissed without prejudice for failure to state a cause of action.

4. These rulings render moot any more particular discussion regarding Complainant's motions for accelerated decision and to strike defenses.

Order

1. Counts I and II of the Complaint are dismissed with prejudice.

2. Accelerated Decision is granted on Count III, finding Respondent liable, and assessing a civil penalty of $100.

3. Complainant may file a motion to amend the Complaint with respect to Count IV within 30 days after receipt of these rulings. Respondent may file a response to that motion in accord with the procedure set forth in 40 CFR §22.16.

4. If Complainant does not file such a motion, or the motion is denied, an Initial Decision will be issued incorporating the findings of fact and conclusions of law in these rulings.

Andrew S. Pearlstein
Administrative Law Judge

Dated: August 19, 1996
Washington, D.C.

In the Matter of Evanston Motor Company
Docket No. RCRA-(3008)-VIII-95-06

CERTIFICATE OF SERVICE

I certify that the foregoing Rulings on Motions, dated August 19, 1996, were sent by regular mail to the addressees listed below:

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Dated: August 19, 1996
Washington, D.C.