UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
DEARBORN REFINING COMPANY,	)	Docket No. RCRA-05-2001-0019
RESPONDENT	)	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION

Background

This civil administrative penalty proceeding arises under the authority of Section 3008(a) of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6928(a). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On September 28, 2001, the United States Environmental Protection Agency, Region V ("Complainant") filed a Complaint against Dearborn Refining Company ("Respondent"), alleging violations of RCRA and its implementing regulations for the management of used oil found in Michigan Administrative Code Rules 299.9101 *et seq.* and 40 C.F.R. Part 279.[1] Respondent filed an Answer on October 29, 2001, denying or claiming to have no knowledge of the allegations made by Complainant.

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[1] Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), the Administrator of the U.S. Environmental Protection Agency granted the State of Michigan final authorization to administer a state hazardous waste program in lieu of RCRA on October 16, 1986. 51 Fed. Reg. 36804 (October 16, 1986). The State of Michigan's rules for the regulation of used oil became federally effective on June 1, 1999. 64 Fed. Reg. 10111 (March 2, 1999).

After the parties engaged in a prehearing information exchange, I issued a Prehearing Order setting November 25, 2002 as the deadline for filing pre-trial motions. On November 22, 2002, Complainant filed a Motion for Accelerated Decision ("Motion"), along with a Motion to Strike Defenses,[2] Motion to Compel Discovery Related to Respondent's Inability to Pay Defense, and on November 25, a Motion to Strike Respondent's Witnesses and Documents. In its Motion, Complainant argues that there are no genuine issues as to any material facts related to the violations alleged in the Complaint, and that Respondent's pleadings fail to establish any facts in controversy or that support any defense. In support of its Motion, Complainant submitted declarations from Sue Rodenbeck Brauer and Erin White Newman dated November 22, 2002, as well as a summary of the deposition of Dearborn Refining Company President Aram Moloian taken by Complainant on December 8-10, 1999.

Respondent filed its Response to Complainant's Motion for Accelerated Decision ("Response") on December 11, 2002. Respondent contends that the motion should be denied because genuine issues of material fact exist for each count in the Complaint and for each ground asserted by Complainant in its motion. In addition, Respondent asserts that the declarations of Sue Rodenbeck Brauer and Erin White Newman are based on speculation and inference rather than fact.

Complainant then filed a Reply to Respondent's Response to Complainant's Motion for Accelerated Decision on December 23, 2002, asserting that Respondent's arguments are inaccurate, irrelevant, unsupported by any evidence, and fail to demonstrate the existence of a genuine issue of material fact.

Standard for Accelerated Decision

Section 22.20(a) of the Rules of Practice authorizes the Presiding Officer[3] to "render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as

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[2] Complainant's Motion to Strike Defenses was denied by the undersigned in an Order issued January 3, 2003.

[3] The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer. 40 C.F.R. §§ 22.3(a), 22.21(a).

affidavits, as he may require, if *no genuine issue of material fact exists* and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a) (emphasis added).

As both parties have noted, motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP").[4] *See, e.g., In re BWX Technologies*, RCRA (3008) Appeal No. 97-5, 2000 EPA App. LEXIS 9 at *34-35 (EAB, April 5, 2000); *In the Matter of Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (ALJ, September 11, 2002). Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue of any material fact* and that the moving party is entitled to a judgment as a matter of law" (emphasis added). Therefore, federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision. *See CWM Chemical Service*, TSCA Appeal 93-1, 6 E.A.D. 1 (EAB, May 15, 1995).

The United States Supreme Court has held that the burden of showing that no genuine issue of material fact exists is on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59; *see also Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526, 528 (10th Cir. 1994). Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In assessing materiality for summary judgment purposes, the Supreme Court has determined that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson*, 477 U.S. at 248; *Adickes*, 398 U.S. at

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[4] The FRCP are not binding on administrative agencies, but many times these rules provide useful and instructive guidance in applying the Rules of Practice. *See Oak Tree Farm Dairy, Inc. v. Block*, 544 F.Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); *Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, 4 E.A.D. 513 at 13 n. 10 (EAB, February 24, 1993).

158-159. The substantive law involved in the proceeding identifies which facts are material. *Id.*

The Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the nonmoving party. *Id.* In determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the nonmoving party under the evidentiary standards in a particular proceeding. *Anderson*, 477 U.S. at 252. In other words, when determining whether or not there is a genuine factual dispute, the judge must make such inquiry within the context of the applicable evidentiary standard of proof for that proceeding.

Once the party moving for summary judgment meets its burden of showing the absence of genuine issues of material fact, Rule 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. Under Rule 56(e), "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." The Supreme Court has found that the nonmoving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First National Bank of Arizona v. Cities Service Company*, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment, as Rule 56(e) requires the opposing party to go beyond the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *22 (ALJ, September 9, 2002). A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at 22-23; *see In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (ALJ, November 28, 1994).

The Supreme Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex*, 477 U.S. at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position. Of course, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. *Adickes*, 398 U.S. at 156.

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. Thus, in determining whether or not there is a genuine factual dispute, I, as the judge and finder of fact, must consider whether I could reasonably find for the nonmoving party under the "preponderance of the evidence" standard.[5] In addressing the threshold question of the propriety of a motion for accelerated decision, my function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for an evidentiary hearing. *See Anderson*, 477 U.S. at 249.

Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. In this regard, the moving party must demonstrate, by a preponderance of the evidence, that no reasonable presiding officer could not find for the nonmoving party. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. Even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound

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[5] Under the governing Rules of Practice, an Administrative Law Judge serves as the decisionmaker as well as the fact finder. *See* 40 C.F.R. §§ 22.4(c), 22.20, and 22.26.

judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

Discussion

To date, I have found most of Respondent's pleadings in this proceeding to be deficient under the Rules of Practice governing this matter. For example, Section 22.15(b) provides that the answer "shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge...The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds of any defense" and "the facts which respondent disputes..." 40 C.F.R. § 22.15(b).

However, Respondent's Answer contained little more than the words "no knowledge" or "deny" in response to each of the paragraphs in the Complaint, unsupported by any statement of circumstances, arguments, or factual challenges. In another section of the Answer entitled "Disputed Facts," Respondent simply stated that it "disputes all facts alleged in the complaint except as specifically admitted." Similarly, Respondent provided eleven "Defenses and Basis for Opposing Relief" without any factual or legal assertions to support such defenses. As suggested by Section 22.15(b), one purpose of the answer is to identify the points in dispute through Respondent's statement of such circumstances, arguments, and factual challenges. Without such a statement by Respondent, issue cannot be joined on any points in dispute, and a tribunal lacks a basis upon which to adjudicate the case. *See In the Matter of Wooten Oil Company*, Docket No. CAA-94-H001, 1996 EPA ALJ LEXIS 119 at *4-5 (ALJ, January 31, 1996).

Similarly, Respondent's December 11, 2002 Response to Complainant's Motion for Accelerated Decision relied almost exclusively on Exhibit 11 from Respondent's prehearing information exchange, which consisted of a September 12, 2000 unsigned letter from Dearborn Refining Company President Aram Moloian to Joseph M. Boyle, Chief of the Enforcement and Compliance Assurance Branch for the Complainant ("RPE #11"). As Complainant has pointed out, many of the statements made in that letter are unsupported by any additional factual evidence and tend to misrepresent the allegations made by Complainant.

Nonetheless, I still find that genuine issues of material fact exist on all counts in the Complaint, except Count II, that can only be properly adjudicated following a full evidentiary hearing. For example, Count I of the Complaint alleges that Respondent has stored used oil without sufficient secondary containment in violation of MAC Rule 299.9813(3) (40 C.F.R. § 279.54(d)).[6] Complainant has provided ample evidence to support its contention that Respondent's secondary containment system lacked dikes, berms, or retaining walls and a floor as required by MAC Rule 299.9813(3) (40 C.F.R. § 279.54(d)(1)(i)-(ii)), and that the secondary containment system is not sufficiently impervious to used oil as required by MAC Rule 299.9813(3) (40 C.F.R. § 279.54(d)(2)). Respondent has countered with evidence in the form of statements by Mr. Moloian and a 1982 Hydrogeological Study to establish that the design of its facility provides an "equivalent secondary containment system" in accordance with MAC Rule 299.9813(3) (40 C.F.R. § 279.54(d)(1)(iii), and that its system is sufficiently impervious in accordance with MAC Rule 299.9813(3) (40 C.F.R. § 279.54(d)(2)). On this Count, both parties have been somewhat misleading by failing to address the entire regulatory provision, and granting accelerated decision at this stage in the proceeding would be inappropriate.[7]

Count VIII of the Complaint alleges that Respondent has violated MAC Rule 299.9502(1) by failing to have an operating license for the storage and disposal of hazardous waste, based on sampling results from the facility that show several tanks with a total halogen concentration greater than 1000 ppm and soils with a lead concentration greater than 5 mg/l. Respondent contests the validity of the sampling methods used by Complainant, and

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[6] MAC Rule 299.9813(3) provides that "[a]n owner or operator of a facility that processes used oil shall comply with the provisions of 40 C.F.R. §§279.51, 279.52, 279.54, 279.55, 279.56, 279.57, and 279.58, except §279.54(a)."

[7] 40 C.F.R.§ 279.54(d)(1) provides that:
"The secondary containment system must consist of, at a minimum:
(i) Dikes, berms or retaining walls; and
(ii) A floor. The floor must cover the entire area within the dike, berm, or retaining wall except areas where existing portions of the tank meet the ground; or
(iii) An equivalent secondary containment system."

argues in the Response that it has met the rebuttable presumption regarding total halogens in "40 C.F.R. 279.54(c)" by showing that its used oil does not contain significant concentrations of halogenated hazardous constituents. As noted by Complainant in its Motion, the rebuttable presumption regarding total halogens in the Code of Federal Regulations is found in Section 279.53(c). However, neither party has observed that Section 279.53(c) is not incorporated by MAC Rule 299.9813(3), but is addressed instead by MAC Rules 299.9813(4) and 299.9809(2)(b). Without a clear statement on the law applicable to this count, Complainant's Motion for Accelerated Decision must be denied.

In Counts III-VII, Complainant alleges that Respondent has stored used oil in tanks and containers in poor condition in violation of MAC Rule 299.9813(3) (40 C.F.R. § 279.54(b)), operated a facility with inadequate communication devices in violation of MAC Rule 299.9813(3) (40 C.F.R. § 279.52(a)(4)), had an inadequate contingency plan in violation of MAC Rule 299.9813(3) (40 C.F.R. § 279.52(b)), inadequately maintained emergency equipment in violation of MAC Rule 299.9813(3) (40 C.F.R. § 279.52(a)(3)), and failed to have a written analysis plan in violation of MAC Rule 299.9813(3) (40 C.F.R. § 279.55). Although the simple denials of liability in Respondent's Answer fail to demonstrate the existence of a genuine issue of material fact, the Response and RPE #11 do provide significant evidentiary information that places the Complainant's evidentiary material in question and raises a genuine question of fact for an adjudicatory hearing. See *Strong Steel Products*, 2002 EPA ALJ LEXIS at *22-23.

In this connection, I note that under the standard for adjudicating motions for accelerated decision, the evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences from the evidentiary material must be drawn in favor of the nonmovant. At the very least, conflicting inferences may be drawn from the evidence presented as to facts material to Respondent's liability, and a number of issues appear to warrant further discussion. *See Rogers Corp.*, 275 F.3d at 1103. I emphasize that in making this threshold determination, I have not weighed the evidence and determined the truth of the matter, but have simply determined that Respondent has adequately raised genuine issues of material fact for evidentiary hearing and that Complainant has not established that it is entitled to judgment as a matter of law. I also note that Respondent would be well advised to understand that in order to

adequately defend itself against the charges and the assessment of the proposed penalty, it must present credible and probative evidence at the hearing on this matter to corroborate the statements made in its Response and RPE #11.

Count II of the Complaint alleges that the used oil storage tanks and containers at Respondent's facility were not labeled with the words "Used Oil" during the Complainant's multi-media inspection on June 15-17, 1999 in violation of MAC Rule 299.9813(3) (40 C.F.R. § 279.54(f)(1)). In support of this allegation, Complainant first provided evidence to demonstrate that Respondent was a "used oil processor/re-refiner" as defined by MAC Rule 299.9109(z), and that Respondent owned "used oil aboveground tanks" and "containers" as defined by MAC Rules 299.9109(q) and 299.9102(o) that were used to store or process used oil.[8]

Along with the Motion, Complainant offered the November 22, 2002 Declaration of Sue Rodenbeck Brauer ("Declaration"), who participated in the June 1999 inspection and stated that "[n]one of the tanks (including sumps) or containers (including drums, totes, and buckets) at the Dearborn facility were labeled with the words "Used Oil" when I inspected the facility." Declaration ¶57. Complainant also provided photographs of tanks and containers taken during the June 1999 inspection to show Respondent's failure to label its used oil storage tanks and containers with the words "Used Oil." Complainant's Prehearing Information Exchange Exhibit #6.

In its Response, Respondent stated:

> As shown in the September 12, 2000 letter (Dearborn Refining's prehearing exchange exhibit 11), Dearborn Refining substantially complied with the regulation and when informed of the regulation, promptly marked the containers 'used oil.' Thus, there is either a question of fact or the arguments of complainant are moot.

In RPE #11, Mr. Moloian explained:

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[8] Respondent does not dispute that it is subject to the Environmental Protection Agency's jurisdiction under the cited regulations governing an owner or operator of a facility that processes or re-refines used oil.

> We have always labeled our used oil storage tanks as Dearcut 8 or Dearcut 10 which accurately describes these to our employees as to whether they contain finished (for sale) reclaimed oil or partially reclaimed used oil which contains tied up water and is not ready for sale...I was aware that The law required them to be identified on sales and shipping documents (which we complied with), but I was not aware of the requirement to label storage containers 'Used Oil.' After we were made aware by an EPA person, we stenciled our storage tanks 'USED OIL.'

Later in the letter, Mr. Moloian stated:

> [W]e were aware that labeling was required and our tanks were labeled with our names for the particular materials in them but we were not aware (even after perhaps three dozen regulatory inspections including many RCRA inspections that the words 'used oil' was required to be on all tanks. We have since stenciled 'used oil' on all tanks.

Respondent offered no additional evidence on this issue.

Based upon my review of the evidentiary material in this matter, I find that Complainant's Motion for Accelerated Decision is granted on Count II. Complainant has met its burden of showing the absence of genuine issues of material fact as to whether Respondent's used oil tanks and containers were labeled with the words "Used Oil" during the multi-media inspection on June 15-17, 1999 as required by MAC Rule 299.9813(3) (40 C.F.R. § 279.54(f)(1)), and Respondent has failed to offer any probative evidence to support a contrary finding. In fact, Mr. Moloian stated twice that he was "not aware" that the words "Used Oil" were required to be on tanks and containers used to store and process used oil, and no evidence has been presented to raise a genuine issue of material fact on this issue. Respondent's claims that it "substantially complied" with the regulation and that "the arguments of complainant are moot" are unavailing as to the question of its liability as charged in Count II.[9]

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[9] RCRA is a strict liability statute, and Respondent's claim that it "was not aware" of the requirement to label tanks and containers with the words "Used Oil" is not relevant to the issue of its liability for violating the statute. *See In re Bil-Dry Corp.*, RCRA

Order

Complainant's Motion for Accelerated Decision is Denied on Counts I and III-VIII, and Granted on Count II.

Barbara A. Gunning
Administrative Law Judge

Dated: January 17, 2003
Washington, DC

(3008) Appeal No. 98-4, 2001 EPA App. LEXIS 1 at *74 (EAB, January 18, 2001).

In the Matter of Dearborn Refining Company, Respondent
Docket No. RCRA-05-2001-0019

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Complainant's Motion for Accelerated Decision,** dated January 17, 2003, was sent this day in the following manner to the addressees listed below.

Mary Keemer
Legal Staff Assistant

Dated: January 17, 2003

Original and One Copy by Pouch Mail to:

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