UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
Capozzi Custom Cabinets,	)	Docket No. RCRA-5-2000-005
	)	
Respondent	)	

ORDER

The U.S. Environmental Protection Agency ("EPA") moves for accelerated decision *i.e.*, summary judgment, on each of the six counts at issue in this case. 40 C.F.R. 22.20. Each of these six counts alleges a violation of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6901 *et seq*. EPA's motion is opposed by respondent Capozzi Custom Cabinets ("Capozzi"). For the reasons set forth below, EPA's motion is *denied* as to Counts 1, 2, 3, and it is *granted* as to Counts 4, 5, and 6.

Counts 1, 2, and 3 share some common problems that preclude giving EPA the requested relief. First, the prehearing exchange documents relied upon by complainant as support for its motion are not yet in the record. Because these proposed exhibits are not yet evidence they can not be used as a basis to award summary judgment. Second, even assuming that the answers offered by Capozzi do not constitute an unambiguous denial of certain allegations made in the complaint, the fact of the matter is that the record here is insufficient to allow for a clear understanding as to exactly what happened. Finally, respondent should be given the opportunity to explain its statute of limitations argument and how it is relevant, if at all, to this case.

Insofar as Counts 4, 5, and 6 are concerned, Capozzi made several critical admissions in its amended answer. For instance, respondent admitted in ¶ 19 that it generated wastes as defined in 40 C.F.R. 261.2. In ¶ 20, Capozzi admitted that it specifically generated acetone and toluene, both of which are hazardous wastes as defined in 40 C.F.R. 261.3(a). Also, in ¶ 21 Capozzi admitted that the hazardous waste which it generated included spent solvents and thinners which were listed hazardous wastes, including F003 and F005, as defined in 40 C.F.R. Parts 261, Subparts C and D.

Against this background, in ¶ 51 Capozzi admitted that from at least March 10, 1994, through on or about May 23, 1996, it employed one or more persons in a position relating to hazardous waste management and to which hazardous waste management procedures were relevant. Capozzi went on to admit in ¶ 55, that for a specified period of time, it did not maintain initial or annual hazardous waste training records for the employees referenced in ¶ 51. Accordingly, as EPA alleges in Count 4, Capozzi failed to comply with the hazardous waste training records provisions of 40 C.F.R 265.16(d)(4).

In Count 5, EPA alleges that Capozzi failed to have a contingency plan designed to minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water. EPA charges that this failure constitutes a violation of 40 C.F.R. 265.51(a). In ¶ 60, Capozzi admits that it did not have a contingency plan for the period of June 30, 1995, through October 26, 1995. Accordingly, building up the admissions cited above, this additional admission is sufficient to support awarding EPA summary judgment as to Count 5.

In Count 6, EPA alleges that respondent violated 40 C.F.R. 265.112(a), because it did not have a written closure plan for its facility. Capozzi admits in ¶ 64 that it did not have a written closure plan for the period from June 30, 1995, through October 26, 1995. Given this admission, EPA is awarded summary judgment as to Count 6.

The civil penalty to be assessed for the violations found in Counts 4, 5, and 6, will be determined by the evidence received at the hearing scheduled in this matter for November 15-16, 2000. That hearing will also involve Counts 1, 2, and 3, to which EPA was not awarded summary judgement. The parties are reminded that EPA bears the burden of proof as to both the civil penalty and liability issues.

Carl C. Charneski
Administrative Law Judge

Issued: November 9, 2000
Washington, D.C.