UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Strong Steel Products, LLC	)	Docket Nos. RCRA-05-2001-0016,
	)	CAA-05-2001-0020 & MM-05-2001-
	)	0006
Respondent	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON COUNTS VII AND VIII

ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON COUNTS III, IV, V, VI, AND IX

ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT'S MOTION FOR ACCELERATED DECISION ON COUNT V

ORDER DENYING RESPONDENT'S MOTION FOR ACCELERATED DECISION ON COUNTS VI AND IX

Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended.

This proceeding involves Cross-Motions for Accelerated Decision. Complainant filed a Motion for Accelerated Decision for Counts III-IX of the Complaint pursuant to Section 22.20(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32 (2000). The Complaint alleges seven violations of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 ("RCRA"), the authorized Hazardous Waste Management Regulations of the State of Michigan, Mich. Admin. Code ("MAC") § 299 et seq., and the Federal Hazardous Waste Management Regulations, 40 C.F.R. Parts 260-279. For these alleged RCRA violations, Complainant seeks $155,650 in civil penalties and a Compliance Order pursuant to § 3008(a)(1) of RCRA, 42 U.S.C. § 6927(a)(1), and Section 22.37(b) of the Rules of Practice, 40 C.F.R. § 22.37(b). Respondent filed a Motion for Accelerated Decision on Counts V, VI, and IX, contending that there is a lack of evidence in the record to support Complainant's allegations and

opposed Complainant's Motion as to the remaining Counts alleging genuine issues of material fact which preclude Accelerated Decision. **Held**: Based upon the conclusion that no genuine issue of material fact exists, and that Complainant is entitled to judgment as a matter of law, its Motion for Accelerated Decision is **GRANTED** for Counts VII and VIII. Based upon the conclusion that no genuine issue of material fact exists, and that Respondent is entitled to judgment as a matter of law, its Cross-Motion for Accelerated Decision on Count V is **GRANTED**, in part. Based upon the conclusion that there exist genuine issues of material fact, Complainant's Motion for Accelerated Decision is **DENIED** for Counts III, IV, V, VI, and IX. Based upon the conclusion that there exist genuine issues of material fact, Respondent's Motion for Accelerated Decision for Counts VI and IX is **DENIED**.

Before: Stephen J. McGuire Date: September 9, 2002
Administrative Law Judge

Appearances:

For Complainant:

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I. INTRODUCTION

Complainant ("EPA" or "Complainant") initiated this administrative enforcement proceeding on September 28, 2001, by filing an Administrative Complaint and Compliance Order against

Respondent, Strong Steel Products, LLC, ("Respondent" or "Strong Steel"). The Complaint was originally comprised of nine counts, two of which were for violations of the Clean Air Act ("CAA"), 42 U.S.C. § 7401 et seq. In an Order dated August 13, 2002, the undersigned granted Respondent's Motion to Dismiss these two CAA counts.

The remaining seven counts allege violations of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA") of 1976, as amended. Three of the seven counts, Counts III-V, allege violations of the used oil regulations, codified at 40 C.F.R. Part 279, and the authorized Michigan regulations codified at Mich. Admin. Code ("MAC") § 299.9809 et seq. The remaining four counts, Counts VI-IX allege violations of Sections 3005 and 3010 of RCRA, 42 U.S.C. §§ 6925 and 6930, its implementing regulations codified at 40 C.F.R. Parts 260, 262, 268, and 270, and the authorized Michigan regulations codified at MAC §§ 299.9502 and 299.9311. Respondent filed an Answer on October 29, 2001, in which Respondent denied or claimed to have no knowledge of most material factual allegations in the Complaint. The Complainant brings this administrative enforcement action pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a). For these alleged violations, Complainant is seeking a civil penalty of $155,650.

The Court issued an Amended Prehearing Order on December 19, 2001, establishing the amended prehearing exchange schedule. Pursuant to this Order, Complainant filed its initial prehearing exchange on February 28, 2002,[1] and a rebuttal prehearing exchange on April 19, 2002. Respondent filed its prehearing exchange on April 2, 2002. Pursuant to the Amended Prehearing Order Respondent filed its Motion for Accelerated Decision on Count VI of the Complaint on May 16, 2002. Complainant subsequently filed its Motion for Accelerated Decision on May 23, 2002. Respondent filed an Opposition to Complainant's Motion for Accelerated Decision and Cross-Motion for Accelerated Decision on Counts V and IX ("Respondent's Opposition to Complainant's Motion for Accelerated Decision")on June 7, 2002. Subsequently, the parties filed a flurry of responsive memoranda with the Court.

Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, the Administrator of the Environmental Protection Agency

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[1] Complainant filed the exhibits to its prehearing exchange on March 1, 2002. Hereinafter, the Exhibits attached to Complainant's prehearing exchange will be referred to as Complt's Ex. _____.

("Administrator") may authorize a state to administer the RCRA hazardous waste program in lieu of the federal program when the Administrator deems the state program is equivalent to, consistent with, and no less stringent than the federal hazardous waste program. See RCRA § 3006(b). Michigan initially received final authorization on October 16, 1986, effective October 30, 1986 to implement a state hazardous waste program in lieu of the federal RCRA hazardous waste program. See 51 Fed. Reg. 36804 (Oct. 16, 1986). Michigan subsequently achieved federal authorization for its RCRA used oil management standards on June 1, 1999. See 64 Fed. Reg. 10111 (Mar. 2, 1999). Accordingly, Michigan regulations govern the generation, transportation, treatment, storage, and disposal of hazardous waste and the management of used oil in this enforcement proceeding.

Respondent is a Michigan corporation and owner of 9.1 acres of real property located at 6464 Strong Street, Detroit, Michigan (the "site"). See Answer ¶ 14. On this property Respondent processes scrap metal. See Answer ¶¶ 16. Respondent purchases scrap metal products from private corporations, municipalities, and private individuals, and shreds the scrap metal to recover the metallic content. See Complaint ¶ 17; Answer ¶ 17. Specifically, Respondent receives and shreds junked automobiles. See Answer ¶¶ 18, 21, 47. There are five buildings located on Respondent's property, which house, *inter alia*, a receiving area, a shredder, and a finished products area. See Answer ¶¶ 21-24. Located in the finished products area, is a 250 gallon above-ground storage tank ("AST") which contains used oil. See Answer ¶¶ 26, 108, 110; Complt's Ex. 64 (Respondent's SPCC Plan). Also in this area are smaller containers, such as drums. See Complt's Ex. 64 at 10. Respondent uses these drums to transport used oil to the 250 gallon AST. Id.

On July 21, 1999, the Michigan Department of Environmental Quality ("MDEQ") inspected Respondent's scrap metal operation for compliance with Michigan's scrap tires regulation. See Complt's Ex. 38 (Letter from Vogen of MDEQ to Beaudoin of Strong Steel regarding the July 21, 1999 MDEQ Inspection). At the time of the inspection, MDEQ did not find any scrap tires located at the site but noted a "strong gasoline odor."[2] See id. at 1. Strong Steel employees informed MDEQ inspectors that "occasionally gasoline

[2] MDEQ stated in its letter to Respondent that, "[g]asoline is considered a hazardous waste, which is regulated by Part 111, Hazardous Waste Management, of the NREPA [Natural Resources and Environmental Protection Act], MCL 324.11101 et seq." See Complt's Ex. 38 at 1.

will spill on the ground during the process of removing the gas tanks from the [junked] vehicles." Id. MDEQ ordered Strong Steel to "clean up the spills of gasoline, as well as any soil contaminated by the gasoline, properly characterize and dispose of any wastes generated from the clean up, document how such spills will be prevented in the future, document how the [site] plans to handle gasoline in the future in accordance with Part 111 of the NREPA, and identify the amount of hazardous waste (gasoline and all other hazardous waste) generated by the [site] per calendar month". Id. at 2. MDEQ gave Strong Steel until August 30, 1999, to comply with this letter and submit documentation of such compliance. Id. On September 13, 1999, Respondent sent MDEQ a letter documenting the actions it had taken in response to the MDEQ inspection. See Complainant's Reply to Respondent's Opposition to Complainant's Motion for Accelerated Decision Ex. 4 (Letter from Beaudoin to Vogen of 9/13/99).

On July 22, 1999, EPA conducted a multimedia inspection at Respondent's property for compliance with CAA, RCRA, TSCA, and CWA. See Complaint ¶ 32, Answer ¶ 32; Powers Aff. ¶ 10. This inspection, in conjunction with Respondent's subsequent samples of soil on its property, serve as the basis for the alleged RCRA violations in this proceeding.

EPA Inspector George Opek performed the RCRA portion of the compliance inspection. Unfortunately, at the present time, Mr. Opek is indisposed due to injuries he sustained in an automobile accident. See Beedle Aff. ¶ 1. EPA Inspector Ross Powers performed the SPCC portion of the inspection. He also assisted Mr. Opek with the RCRA inspection by taking photographs, included as exhibits in Complainant's prehearing exchange. See Powers Aff. ¶¶ 10-12; Complt's Ex. 1. Through his affidavit, Mr. Powers has authenticated the photographs in the prehearing exchange as being taken on July 22,1999, at Respondent's property during the multimedia inspection.[3]

At the site on July 22, 1999, Mr. Powers observed "flattened", "crushed" and "non-crushed" automobiles. Powers Aff. ¶¶ 12, 13. According to Mr. Powers, near the crushed and non-crushed automobiles, which were in piles on the ground, were puddles of "what appeared to be automotive fluids such as gasoline and crankcase oil." Powers Aff. ¶ 13. These puddles

[3] Respondent proffered photographs in its prehearing exchange but did not offer any evidence as to when these pictures were taken. See Respondent's prehearing exchange Ex. 4.

were allegedly located on a dirt area. Id. The dirt was "moist" and "appeared to be caused by a mixture of fluids from the automobiles (e.g. used oil, transmission oil, gasoline, antifreeze and brake fluids)." Id. Mr. Powers also noted that "automotive gasoline tanks were torn open and gasoline on the ground nearby." Powers Aff. ¶ 15 (citing Complt's Ex. 1, Nos. 8-12). Mr. Powers also claimed to have observed "a car with leaking antifreeze and oil and with what appeared to be a battery in it", "automobile engine oil pans with motor oil on the ground near them," and "oil stored in drums that were leaking." Powers Aff. ¶¶ 15, 17.

On August 2, 1999, Mr. Powers returned to the Strong Steel property with an EPA contractor from Ecology and Environment, Inc. ("E&E") to collect samples from some of the areas that he and Mr. Opek observed during the July 22, 1999 multimedia inspection. See Powers Aff. ¶ 22. The E&E contractor collected three samples from three separate areas at the property and photographed the three locations where the samples were collected. Powers Aff. ¶ 24. The samples consisted of two soil samples (SS1, SS3) and one liquid sample (SS2). The liquid sample, SS2, was allegedly collected from a "puddle" located near the crushed automobiles, and directly underneath one junked car. Id.

The E&E contractor prepared a "Letter Report" of the findings based on the samples taken from Respondent's property on August 2, 1999. See Complt's Ex. 16. E&E, at the request of EPA, tested the samples for analyses of "volatile organic compounds, F-listed solvents, semivolatile organic compounds, PCBs, TCLP, flash point, BTU, oil and grease, bottom solids and water, and total halogens. Id. Included in the report, as attachments C and D, are the analytical results of the tests. The E&E Letter Report does not interpret these results nor is there an affidavit from the contractor or an expert averring to any factual conclusions about the samples based upon these results.

On the day that E&E collected soil samples at the site, Respondent also collected soil samples from a "battery storage area"[4] and "two areas of the asphalt with significant

[4] This sample was identified in Respondent's analytical data as SS2. See Complt's Ex. 18 Attach. A. Respondent, in its Answer, denied both that it has a battery storage area and that SS2 was collected from a battery storage area. See Answer ¶¶ 36, 54.

deterioration."[5] See Complt.'s Ex. 18 (CRA Report). Respondent sent these samples to Novi Analytical Laboratories, Inc. ("Novi") on August 3, 1999. Novi prepared an "Analytical Report" for each of the three samples analyzed. See id. Attachs. A-B.

The EPA issued to Respondent an information request pursuant to Section 3007 of RCRA, 42 U.S.C. § 6927 ("RCRA Information Request") on March 15, 2000. See Compl't Ex. 17. In response to Questions 6 and 9 of the RCRA Information Request, Respondent provided a report prepared by Conestoga-Rovers & Associates ("CRA").[6] Respondent employed CRA to prepare a summary of the environmental data associated with the site and the environmental activities conducted at the site, including the soil sampling, site excavation and remediation activities, and the off-site shipment and storage of hazardous waste. See Complt's Ex. 18 (CRA Report at 1). Respondent's sample results for the liquid sample, identified as SS2 in the Novi lab report, provide the following: 1) the sample flashed at 70 degrees Fahrenheit, 2) the sample had the following chemical concentrations, all of which are above the regulatory limit for toxicity; Benzene (559 mg/l), Chlorobenzene (2969 mg/l), 1,2-Dichloroethane (36 mg/l), Tetrachloroethylene (6.2 mg/l), Trichloroehtylene (3.6 mg/l), and Lead (27 mg/l).[7] See Complt's Ex. 18 Attach. A. See also MAC §§

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[5] These two areas were identified as SS1 and SS3 in Respondent's analytical data. See Complt's Ex. 18 Attach. B.

[6] Question 6 read as follows: "On or about July 22, 1999, representatives of the U.S. EPA observed used oil and waste gasoline scattered on-site by the crushed cars storage area. Please provide a hazardous waste determination and a copy of all chemical analyses conducted for the used oil and waste gasoline which was scattered on the ground at Strong Steel Products facility. Provide all information on the source of that used oil and waste gasoline." Respondent's Answer to this question stated "without admitting or denying what USEPA claims they saw on the ground at Strong Steel's facility, see Exhibit A."
Question 9 read as follows: "From June 22, 1996, to the present describe all the efforts conducted by or on behalf of Strong Steel to clean-up soil contaminated with used oil, gasoline, or other hazardous substances. Provide a copy of all sampling analyses conducted on such contaminated soil, manifests and similar documents used for off-site shipment." Respondent's Answer to this question stated "See Exhibit A."

[7] The copy of the results in Complainant's prehearing exchange for 1,4-Dichlorobenzene was illegible.

299.9212(1),(4) ("A waste exhibits the toxicity characteristic if, using the toxicity characteristic leachate procedure . . . , the extract from a representative sample of the waste contains any of the contaminants listed by the Administrator or Director and identified in table 201(a) and table 201(b) of these rules at a concentration equal to or greater than the respective values given in the tables.").

On April 11, 2000, Strong Steel employed Inland Waters Pollution Control, Inc., ("IWPC") to remediate contaminated soil on the property. See Complt's Ex. 18 (CRA Report at 1). The remedial activity included excavation and removal of approximately 1 cubic yard of soil from the location CRA referred to as the "battery storage area" which was placed in three 55 gallon drums. See id. CRA collected confirmatory soil samples from the battery storage area and presented the results in Attachment C of its Report. See id. at 1-2; Attach. C (samples S-10874-041100-JL-005 and S-10874-041100-JL-006).[8] Respondent also performed a Waste Characterization Report for the three drums of soil removed from the "battery storage area" describing the waste name as "soil and gasoline" generated by "gas spilled on soil." See Complt's Ex. 18 (CRA Report at 2). See also Complt's Ex. 18 Attach. G ("Waste Characterization Report") (identifying the following wastes and concentrations: Lead (D008) 27 mg/L; Benzene (D018) 559 mg/L; Chlorobenzene (D021) 2969 mg/L; 1,4-Dichlorobenzene (D027) 967 mg/L; 1,2-Dichloroethane (D028) 36 mg/L; Tetrachloroethylene (D039) 6.2 mg/L; Trichloroethylene (D040) 3.6 mg/L). The soil contained in the 55 gallon drums was shipped off-site for disposal on April 18, 2001. See Complt's Ex. 37 (Hazardous Waste Manifest MI8200480 listing the following hazardous waste codes: D008, D018, D021, D027, D028, D039, D040).

IWPC also excavated and removed soil from the asphalt area, which was placed into four 20 cubic yard roll-off boxes. See Complt's Ex. 18 (CRA Report at 2). The soil excavated from the asphalt area, contained in the four 20 cubic yard roll-off boxes, was shipped off-site for disposal, using hazardous waste manifests on April 19-20, 2000. See Complt's Ex. 18 Attach. D. CRA collected confirmatory soil samples from one of the asphalt

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[8] The sample results identified the following concentrations of metals and volatile organics above the regulatory limits:

Sample S-10874-041100-JL-005:

Lead (D008) 8.65 mg/L; Chromium (D007) 10.4 mg/L.

Sample S-10874-041100-JL-006:

Lead (D008) 8.08 mg/L; Chromium (D007) 16 mg/L; Arsenic (D004) 6.15 mg/L.

area excavation sites but "no confirmatory soil samples were collected from the second excavation [site] since there was a concrete slab approximately 1-foot below grade." See Complt's Ex. 18 (CRA Report at 2). CRA attached the analytical results from the confirmatory soil samples to its Report. See Complt's Ex. 18 Attach. C (samples S-10874-041100-JL-001, S-10874-041100-JL-002, S-10874-041100-JL-003, and S-10874-041100-JL-004).[9] Respondent used the analytical results from the 1999 soil samples, see Complt's Ex. 18 Attach. B, for its disposal approval of the soils contained in the roll-off boxes. See Compl't Ex. 18 (CRA Report at 2).

Based upon this factual evidence, Complainant seeks accelerated decision for the seven counts in the Complaint. Respondent's Motion for Accelerated Decision seeks judgement in its favor on Counts V, VI, and IX, and otherwise opposes Complainant's Motion for Accelerated Decision on the remaining counts. As a preliminary matter, before turning to the substance of the parties' arguments, the Court will address peripheral issues raised by the parties' legal memoranda in support of or in opposition to Accelerated Decision.[10]

Liability for violations beyond what was alleged in the

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[9] The sample results identified the following concentrations of metals and volatile organics above the regulatory limits:

Sample S-10874-041100-JL-001:
Lead (D008) 6.77 mg/L; Benzene (D018) 71 mg/L.

Sample S-10874-041100-JL-002:
Lead (D008) 63 mg/L ; Chromium (D007) 18 mg/L; Arsenic (D004) 5.67 mg/L.

Sample S-10874-041100-JL-003:
Lead (D008) illegible; Chromium (D007) 270 mg/L; Arsenic (D004) 6.34 mg/L; Barium (D005) 225 mg/L; Cadmium (D006) 10.7 mg/L; Benzene (D018) 5.7 mg/L.

Sample S-10874-041100-JL-004:
Lead (D008) illegible; Chromium (D007) 37.7 mg/L; Benzene (D018) 5.5 mg/L.

[10] The parties filed a plethora of responsive memoranda in this proceeding which, in turn, raised various substantive and procedural issues. The undersigned has chosen to address the parties' arguments that are dispositive and will not address other arguments which ultimately had no basis in rendering this Order. The parties should be advised that their filings, at times, not only failed to support the arguments made, but created more confusion then clarity on the issues presented to this Court.

Complaint.

For purposes of this Order, the undersigned did not consider any evidence or new allegations of violations which are beyond what Complainant alleged in the Complaint and subsequently sought in its Motion for Accelerated Decision. Such evidence or allegations includes the "unlabelled" drums which were alleged to contain used oil and the violation for storage of hazardous waste without a permit. To do otherwise would be violative of Respondent's right to due process.

Use of Complainant's Ex. 73, the Compliance Inspection Report, to support Complainant's Motion for Accelerated Decision and the exhibits attached to Complainant's Reply to Respondent's Opposition to Complainant's Motion for Accelerated Decision.

This Order does not rely on the observations or statements made by Mr. Opek in the RCRA portion of the Compliance Inspection Report, included in Complainant's prehearing exchange Exhibit 73, as a basis for granting accelerated decision in favor of Complainant.[11] The undersigned found Respondent's objections regarding the reliability of Mr. Opek's report persuasive at this early stage in the proceeding. Complainant has failed to sufficiently authenticate this inspection report as it appears in Complainant's prehearing exchange.

Complainant's affiant, Mr. Gahris, may ultimately provide a proper foundation for the authenticity of Mr. Opek's portion of the Compliance Inspection Report, should Mr. Opek remain indisposed. However, again, the undersigned was persuaded by Respondent's objection to the use of Mr. Gahris' affidavit, in addition to the other exhibits Respondent opposed in its Motion to Strike Certain Exhibits to Region V's Reply Memoranda in Support of Region V's Motion for Accelerated Decision.[12] Therefore, the Court grants Respondent's Motion and will strike from the record the exhibits Respondent Opposed in its memorandum, to the extent that these documents were not part of Complainant's prehearing exchange. Furthermore, the admissibility and weight of the RCRA inspection report will be considered at the forthcoming hearing and/or addressed in this court's Initial

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[11] But see n.36, infra.

[12] Respondent did not, however, move to strike Exhibit 4 (Letter from Beaudoin to Vogen of 9/13/99 regarding MDEQ Inspection).

Decision.

II. DISCUSSION

Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a), authorizes the Administrative Law Judge ("ALJ") 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 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." See 40 C.F.R. § 22.20(a). A long line of decisions by the Office of Administrative Law Judges ("OALJ") and the Environmental Appeals Board ("EAB"), has established that this procedure is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See e.g., In re CWM Chem. Servs., Inc., 6 E.A.D. 1 (EAB May 15, 1995). As recently articulated by the D.C. Circuit Court of Appeals, "the movant is entitled to an accelerated decision only if it presents 'evidence so strong and persuasive that no reasonable [fact finder] is free to disregard it.'" Rogers Corp. v. EPA., 275 F.3d 1096, 1103 (D.C. Cir. 2002) (quoting BWX Technologies, Inc., RCRA Appeal No. 97-5 (EAB, Apr. 5, 2000).

The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. See Cone v. Longmont United Hospital Ass'n, 14 F.3d 526, 528 (10th Cir. 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. 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. See In re Bickford, Inc., Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (EPA ALJ, Nov. 28, 1994).

"Bare assertions, conclusory allegations or suspicions" are insufficient to raise a genuine issue of material fact precluding summary judgment. Jones v. Chieffo, 833 F. Supp. 498, 503 (E.D. Pa. 1993), aff'd, 22 F.3d 301 (3rd Cir. 1994) (mem.). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits and other evidentiary materials submitted in support or opposition to the motion. See

Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); 40 C.F.R. § 22.20(a) (2000); FED. R. CIV. PRO. 56(c).

In the case at bar, the parties have filed cross motions for accelerated decision as to three of the counts, Count V, VI, and IX. Thus, for these three counts, both parties assert that there is no genuine issue of material fact. Yet, that does not mean that accelerated decision must be granted in favor of one of the parties for the aforementioned three counts. The undersigned "must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Taft Broadcasting Co. v. United States, 929 F. 2d 240, 248 (6th Cir. 1991). "A fact-finder may be entitled, on cross motions for accelerated decision, to decide among reasonable inferences where the evidence is fully developed." Rogers, supra, at 1105-06.

With regard to Respondent's burden for its Motion for Accelerated Decision, Respondent must aver "an absence of evidence to support the nonmoving party's case," thereby shifting the burden of production to Complainant. See In re Peter C. Varrasso, 37 F. 3d 760, n.1 (citing Celotex, supra, at 325). "To avoid accelerated decision in Respondent's favor, Complainant must come forth with evidence that would be sufficient, if all reasonable inferences were drawn in its favor, to find for Complainant on that issue at trial. See In re Consumers Recycling, Inc., Docket Nos. CAA-5-2001-002, CWA-5-2001-006, RCRA-5-2001-008, MM-5-2001-001 (ALJ, Apr. 12, 2002) (citing Azrielli v. Cohen Law Offices, 21 F. 3d 512, (2nd Cir. 1994).

Upon review of the evidence in a case, even if a judge believes that summary judgment is technically proper, sound 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).

A. VIOLATIONS OF USED OIL REGULATIONS

COUNT III

Count III of the Complaint alleges that Respondent failed to stop, contain, or clean up releases of used oil that the EPA inspectors observed during the July 22, 1999 inspection. The EPA and Michigan regulations require a used oil generator "upon detection of a release of used oil to the environment . . . [to] perform the following cleanup steps: (1) stop the release; (2) contain the released used oil; (3) clean up and manage properly

the released used oil and other materials; and (4) if necessary, repair or replace any leaking used oil storage containers or tanks prior to returning them to service." 40 C.F.R. § 279.22(d); MAC § 299.9810(3). Used oil is defined broadly to include "any oil which has been refined from crude oil, or any synthetic oil, which has been used and which as a result of the use, is contaminated by physical or chemical impurities." MAC § 299.9109(o). See also 40 C.F.R. § 279.1. (Defining used oil as "any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities."). A used oil generator is "any person, by site, whose act or process produces used oil or whose act first causes used oil to become subject to regulation." MAC § 299.9109(w); 40 C.F.R. § 279.1.

Respondent has admitted that it stores used oil at its site. See Answer ¶¶ 108, 110; Complt's Ex. 64 (Respondent's SPCC Plan). Additionally, Complainant proffers the affidavit of Sue Rodenbeck-Brauer, RCRA Used Oil Expert, to aver that automobiles contain used oil. See Rodenbeck-Brauer Aff. ¶ 4. Automotive used oil includes fluids used for crank case lubrication, brake and power steering mechanisms, and automatic transmission. See 50 Fed. Reg. 49164, 49174 (Nov. 29, 1985) ("Used oils include the following: (1) Spent automotive lubricating oils (including car and truck engine oil), transmission fluid, brake fluid, and off-road engine oil . . .").

Complainant argues that the puddles of liquid and saturated soils that were *observed* on the ground during the July 22, 1999 inspection, came from the automobiles being recycled at Respondent's scrap processing operation. Complainant relies upon the observations of the inspectors to assert that the liquids on the ground were liquids that had come from the automobiles. See Complt's Ex. 1 (No. 14), Complt's Ex. 16 at 5. Complainant cites to the results of the samples taken on August 2, 1999, as proof that the oil on the ground was "used" because of the "various chemical contaminants" that were detected. Thus, Complainant contends, there was a release of used oil to the environment that was not stopped, contained or cleaned up upon detection because the EPA inspectors observed the release on July 22, 1999, and Respondent did not address the release until April 2000, thereby violating 40 C.F.R. § 279.22(d).

Respondent challenges the classification of the liquid observed on its property as "used oil." Respondent proffers two reasons to challenge such a classification: 1) a liquid can not be identified as used oil based solely on the observations of the two EPA inspectors, and 2) the analytical results of the samples

taken on August 2, 1999, do not, without expert testimony, support the conclusion that the liquid was used oil. See Respondent's Opposition to Complainant's Motion for Accelerated Decision at 20. Moreover, Respondent proffered its own expert to aver that the sample results do not support the conclusion that the liquid sample was used oil. See Ring Aff. ¶¶ 10-13.

The undersigned agrees with Respondent that Complainant has failed to establish, as to this count, that there is no genuine dispute of material fact. One such example of a genuine, factual dispute is whether the liquid that was sampled on August 2, 1999 is "used oil." Complainant does not provide any expert interpretation in the form of an affidavit or otherwise, that the results of the tests are indicative of "used oil." Rather, Complainant asks the court to infer that because various metals, volatile, and semi-volatile organic chemicals were detected in the samples, that such findings definitively prove the liquid is "used" oil. Although the evidence might ultimately prove the proposition, at this stage of the proceeding, the Court is not prepared, without more, to draw such a conclusion. Nor is the Court compelled to simply take judicial notice of this fact without corroborative technical analysis and/or testimony.

Alternatively, Complainant asks the Court to infer that the puddles of liquids near the crushed automobile, as observed by the inspectors, contained used oil merely because automobiles are generally known to contain used oil. Without more evidence than a mere affidavit of an observation which has not been subject to cross-examination, for the undersigned to make such an inference that the puddle underneath the automobile was, in fact, used oil would amount to arbitrary fact-finding. Rather, due process requires that Respondent have the opportunity to try this factual dispute at an evidentiary hearing. Therefore, Complainant's Motion for Accelerated Decision as to this count of the Complaint is **DENIED**.

COUNT IV

Count IV of the Complaint alleges that Respondent failed to properly store used oil. The applicable Michigan regulation states that a "used oil generator shall not store used oil in units other than containers or tanks." MAC § 299.9810(4). Complainant alleges that Respondent, by accumulating puddles of used oil on the ground, was in essence "storing" the used oil on the ground and therefore storing used oil in a unit other than a container or a tank, in violation of the regulation. Respondent, as it asserted with Count III, contends that there is a genuine issue of material fact regarding whether the liquid puddles on

the ground contained used oil. As with Count III, Complainant has failed to establish that there is no genuine issue that the liquid on the ground was, in fact, used oil. Therefore, for the reasons previously stated, Complainant's Motion for Accelerated Decision as to Count IV of the Complaint is **DENIED**.

Respondent further asks the Court to merge Count IV with Count III because, according to Respondent, this count is "nothing more than a repetition of Count III with slightly different words." Respondent's Opposition to Complainant's Motion for Accelerated Decision at 22. The undersigned is not inclined to merge these counts for the reasons stated below.

First, Respondent provided scant legal authority for merging the Counts. The undersigned is not persuaded by Respondent's mere citations, without any legal analysis, to Blockburger v. United States ("Blockburger"), 284 U.S. 299 (1932), and In re Consumers Recycling, Inc. ("Consumers"), Dockets Nos. CAA-5-2001-002; CWA-5-2001-006; RCRA-5-2001-008; MM-5-2001-001, 2002 EPA ALJ LEXIS 18 (Order on Cross-Motions for Accelerated Decision, Apr. 12, 2002). See Respondent's Opposition to Complainant's Motion for Accelerated Decision at 23. Moreover, the case law Respondent cited for this proposition does not support its contention.

In Blockburger, the Supreme Court held that where the same action or transaction violated two different statutory provisions, the test of whether that act constituted two criminal offenses is whether each offense required proof of an additional element. See Blockburger, supra, at 304. Counts III and IV are not criminal charges, but allege civil violations and Complainant seeks civil penalties. The fact that these counts are presently being adjudicated in this administrative forum makes them civil *per se.* See Hudson v. United States, 522 U.S. 93, 103 (1997) (holding that because authority for imposing a sanction was conferred upon a Federal agency, Congress intended for the sanction to be a civil and not criminal action). Inasmuch as the present case is for civil penalties and not punishment for a criminal offense, Blockburger and its application of the double jeopardy clause of the Fifth Amendment is not appropriate.

In Consumers, ALJ Nissen merged two counts in the Complaint not based upon the double jeopardy clause but rather based upon the unit of violation. The Respondent in Consumers was alleged to have violated two CAA regulations, 40 C.F.R. §§ 82.156(f)(2) and 82.166(i). Section 82.156(f)(2) relates to the verification that refrigerant has been recovered from certain air conditioner units, whereas Section 82.166(i) relates to the maintenance of

records, which includes verifying that refrigerant has been recovered. See 40 C.F.R. §§ 82.156(f)(2); 82.166(i). Judge Nissen noted that the "recordkeeping requirements . . . are triggered by, and are completely dependent upon, compliance with Section 82.156(f)(2)." See Consumers, supra, at *34 (citing McLaughlin Gormley King Co., FIFRA Appeal Nos. 95-2 - 95-7, 6 E.A.D. 339 (EAB 1996). Thus, Judge Nissen concluded that "[t]he unit of violation" was the Respondent's "failure to verify that the refrigerant had been evacuated from each appliance prior to disposal." See Consumers, supra, at 36-37. As such, it was held that the Respondent's failure to verify could not result in multiple counts for the same appliance.

In the case at bar, the violations alleged in Counts III and IV are wholly independent violations and the "unit of violation" analysis in Consumers is not appropriate. Although the two violations may require proof that Respondent is a used oil generator, the other elements of Complainant's prima facie case as to these violations are independent and distinct.[13]

COUNT V

Count V of the Complaint alleges that Respondent failed to properly label containers of used oil including the 250 gallon AST, the automobiles at the site, and their engine oil pans. The applicable Michigan regulation states that "a used oil generator shall comply with the provisions of 40 C.F.R. § 279.22." MAC § 299.9810(3). The EPA regulations, in turn, state that "[c]ontainers and above ground tanks used to store used oil at generator facilities must be labeled or marked clearly with the words 'Used Oil.'" 40 C.F.R. § 279.22(c). Complainant relies upon the photographs in exhibit 1 of its prehearing exchange as unequivocal proof that Respondent failed to label the 250 gallon AST, the automobiles at the site, and the automobiles' engine

[13] However, it is part of Complainant's prima facie case to prove that Respondent was "storing" used oil on the ground. Respondent has not asked this Court to dismiss Count IV (nor will the Court now entertain such a motion), however there appears to be little, if any legal basis to support the alleged violation. The undersigned therefore remains skeptical that Complainant will be able to prove that Respondent was in fact "storing", as that term is defined by applicable regulation, used oil on the ground.

oil pans.[14]

Respondent asserts that it is entitled to Accelerated Decision on Count V because, according to Respondent, there is a "complete absence of evidence to support" the count.[15] See Respondent's Opposition to Complainant's Motion for Accelerated Decision at 7. First, Respondent notes that Complainant failed to submit any documentary proof that the 250 gallon AST was not labeled. As such, Respondent has successfully averred an absence of evidence to support the allegation that the 250 gallon AST was

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[14] In its Motion for Accelerated Decision, Complainant sought liability under this count for Respondent's alleged failure to label 6 drums containing used oil. Yet, Complainant failed to allege this evidence in the Complaint. Respondent, in its Cross-Motion for Accelerated Decision, also sought accelerated decision as to these drums, arguing that even though the 6 drums were not pled in the Complaint as part of the violation substantiating Count V, that there is a complete absence of evidence in the record to support liability for the drums. The court can conceive no benefit to the proper adjudication of this enforcement proceeding if the undersigned were to address the allegation of the 6 drums in this Order. Thus, to the extent that this Order addresses Count V, it does so only as to the 250 gallon AST, the automobiles, and the engine oil pans.

[15] EPA challenges the timeliness of Respondent's Cross-Motion for Accelerated Decision on Counts V and IX because it was filed on June 10, 2002, several weeks beyond the date set in the amended Prehearing Order for the parties to file dispositive motions. Thus, as a procedural matter, EPA claims that the Court should deny the Motion. The Amended Prehearing Order states that all dispositive motions "shall be filed no later than 30 days after the prehearing exchange has been completed." EPA's rebuttal prehearing exchange was received by the Regional Hearing Clerk on April 19, 2002, although the Prehearing Order gave EPA until April 22, 2002 to submit its rebuttal prehearing exchange. EPA filed its Motion for Accelerated Decision on May 22, 2002 - which appears to be more than 30 days after the filing deadline in the Amended Prehearing Order because the 30 days was triggered by the date EPA filed its rebuttal prehearing exchange. If the Court were to apply this reasoning to Respondent's Cross-Motion for Accelerated Decision it would equally apply to Complainant's Motion for Accelerated Decision. The undersigned has therefore chosen to reject this argument as a basis for denying Respondent's Cross-Motion for Accelerated Decision.

not labeled. Thus, Respondent has shifted the burden to Complainant to come forward with evidence that would be sufficient, if all reasonable inferences were drawn in its favor, to find for EPA on this issue at trial.

The undersigned concludes, however, that Complainant has met its burden to defeat Respondent's Motion for Accelerated Decision. EPA claims that Mr. Opek's testimony is the only evidence that it has to support its allegation that the 250 gallon AST was not labeled. Given the unfortunate predicament of Mr. Opek, the undersigned will deny Respondent's Motion as to the AST. It would be premature at this point in the proceeding to preclude Complainant the opportunity to offer Mr. Opek's testimony about the AST at the hearing. Should Mr. Opek fail to testify, however, it appears that Complainant would have no other evidence in the record to substantiate a violation for failing to label the 250 gallon AST. Therefore, Respondent's Cross-Motion for Accelerated Decision on the 250 gallon AST is **DENIED**.

Additionally, Respondent argues, as a matter of law, that it was not required to label the automobiles and engine oil pans because these are not "containers" as defined by the regulation. The undersigned agrees with Respondent that it had no legal obligation to label either the automobiles or the engine oil pans.

Assuming arguendo that the automobiles and the engine oil pans at Respondent's site contained used oil, the undersigned can find no legal support for Complainant's allegation that these objects are in fact, "containers" thereby triggering an obligation by Respondent to label them "Used Oil." As quoted above, the EPA regulation governing labeling requires that containers and above-ground storage tanks be clearly marked with the words "used oil." See 40 C.F.R. § 279.22(c)(1). Used oil generators can only store used oil in tanks, containers, or other units subject to regulation under Parts 264 or 265. Automobiles and engine oil pans are clearly neither tanks nor other units subject to regulation under Parts 264 and 265.[16] Thus, this inquiry turns on whether automobiles and engine oil pans at Respondent's site are containers.

The term "container" is defined as "any portable device in which material is stored, transported, treated, disposed of, or

[16] Such other units include surface impoundments, waste piles, landfills, drip pads, and incinerators. See 40 C.F.R. Part 265 Subparts K-X.

otherwise handled." 40 C.F.R. § 279.1. Containers that are used to store used oil must be "in good condition (no severe rusting, apparent structural defects, or deterioration); and not leaking (no visible leaks)." 40 C.F.R. § 279.22(b). When EPA promulgated the Used Oil regulations, it specifically "establish[ed] controls on the storage of used oil in . . . containers to minimize the potential releases from these units." 57 Fed. Reg. 41566, 41576 (Sept. 10, 1992). EPA designed the used oil management standards to "address the potential hazards associated with improper storage and handling of used oil." Id. In fact, EPA explicitly rejected the "storage of used oil in lagoons, pits, or surface impoundments" because "such units do not provide adequate protection of human health and the environment against potential releases and damages." Id. at 41586.

Thus, in order for the Court to legally conclude that automobiles and engine oil pans are "containers", it must be satisfied that they are in fact, storage units... which will provide adequate protection of human health and the environment against potential releases and damage. The Court can come to no such conclusion.

EPA did not envision that automobiles and engine oil pans would constitute proper storage units under the Used Oil Management regulations. Although these objects may literally be portable devices, they are not containers. The automobiles at Respondent's site are "junked" and typically arrive flattened and crushed. Thus, these objects could never satisfy the requirements of § 279.22(b) regarding the condition of storage units which requires, *inter alia*, that the containers have "no apparent structural defects." 40 C.F.R. § 279.22(b)(1).

Moreover, support for this conclusion comes directly from EPA's hazardous waste regulations. EPA, when it promulgated the Used Oil Management regulations, indicated that the terms used in the used oil regulations would have the same meaning as provided in § 260.10, which defines terms for the hazardous waste regulations. See 50 Fed. Reg. 49212,49221 (Nov. 29, 1985) (Proposed Rule). Thus, Part 260 identically defines "container" as "any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled." 40 C.F.R. § 260.10. The container management standards, codified at 40 C.F.R. §§ 264.170 and 265.170, apply not only to owners and operators of hazardous waste facilities but also to generators of hazardous waste under 40 C.F.R. § 262.32(a)(1)(i).

For purposes of Parts 264 and 265, EPA has identified

containers to include such things as drums, buckets, tanker trucks, and rail cars. See RCRA Orientation Manual, EPA 530-R-00-006, Section III-58 (June 2000). Junked automobiles and their engine oil pans do not have the structural integrity akin to these portable devices. Additionally, the automobiles and engine oil pans at Respondent's site would not provide adequate protection of human health and the environment against potential releases of used oil and associated damages. Therefore, Respondent's Cross-Motion for Accelerated Decision on Count V regarding its obligation to label the automobiles and engine oil pans is **GRANTED**.

B. VIOLATIONS OF HAZARDOUS WASTE REGULATIONS

COUNT VI

Count VI of the Complaint alleges that Respondent "fail[ed] to notify of hazardous waste activity and fail[ed] to have an EPA identification number." Complaint at 22. The latter portion of this allegation, i.e., that Respondent failed to have an EPA identification number, which alleges a violation of MAC § 299.9303, has been withdrawn because Respondent did obtain an identification number. In 1997, Respondent filed a Notification of Hazardous Waste Activity ("1997 Notification") with Michigan's Department of Environmental Quality ("MDEQ"). See Complt's Ex. 30. This 1997 Notification, which Respondent used to obtain an EPA identification number, identified Respondent as a Large Quantity Generator[17] ("LQG") of Cadmium (D006) and Lead (D008). Id.

The remaining alleged violation comprising Count VI is an allegation that Respondent violated Section 3010(a) of RCRA, 42 U.S.C. § 6930(a), by failing to notify of hazardous waste activity. Section 3010(a) of RCRA states that "any person generating or transporting [a hazardous waste] or owning or operating a facility for treatment, storage, or disposal shall file with the Administrator (or with States having authorized hazardous waste permit programs) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person." RCRA § 3010(a).

Complainant alleges that Respondent violated this statutory

[17] A Large Quantity Generator ("LQG") accumulates greater than 1,000 kilograms per month. See Notification of Regulated Waste Activity Form, Section VIII, Line 1a.

provision for failing to "properly notify of its hazardous waste activity" and seeks liability for one violation of Section 3010(a) of RCRA. Complainant's Motion for Accelerated Decision at 34; Complaint ¶ 131. Complainant maintains that in order to meet its prima facie case as to Count VI of the Complaint it must demonstrate that "Respondent was a person who generated hazardous waste; that Respondent treated, stored or disposed of hazardous waste; and that Respondent either failed to notify of the hazardous wastes it generated or failed to notify of its storage or disposal of hazardous wastes."[18] Complainant's Motion for Accelerated Decision at 35.

Before turning to a legal analysis of Respondent's liability for this Count, as a threshold matter, Complainant must establish that Respondent generated the hazardous wastes that were found on its property or that the hazardous wastes Respondent generated were disposed of on its property. If Complainant cannot establish that Respondent was a generator of the hazardous waste found on its property, the inquiry need go no further. After establishing that Respondent was the generator of the hazardous waste, Complainant must also establish that Respondent disposed of the hazardous waste in order to make its prima facie case for Respondent's failure to notify of its disposal activity.

Respondent generated the hazardous waste found in the soil on its property.

This Court can conclude that Respondent generated the hazardous wastes that were found in the soil on its property based upon the following evidence: Respondent's admission that it does, in fact, receive automobiles containing various automotive fluids; Respondent's Answer to the Complaint ¶¶ 61-66; Respondent's Notification of Regulated Waste Activity form submitted to MDEQ in 1997 and 2001; Respondent's Response to the

[18] The Complaint generally alleges that Respondent generated all of the wastes found on its property, and alleges that Respondent disposed of such hazardous waste on its property. However, the Complaint in Count VI does not specifically allege that Respondent stored hazardous waste at the site thereby triggering an obligation to notify of its "storage activity." Thus, the undersigned will not consider this allegation, which Complainant raises in its Motion for Accelerated Decision, as a proper ground to grant accelerated decision against Respondent under Count VI. See also, supra, at 32-33 (discussing Respondent's alleged liability for illegally storing hazardous waste without a permit).

RCRA Information Request, and supporting documentation, i.e., the CRA Report, Respondent's Waste Characterization Report, and Respondent's Hazardous Waste Manifests; and an EPA Federal Register notice providing test results of petroleum sampled and analyzed for the presence of Toxicity Characteristic constituents. See Complt's Exs. 1, 16, 18, 30, 41; Powers Aff. ¶¶ 9-24; Rodenbeck-Brauer Aff. ¶ 9; 56 Fed. Reg. 48000, 48009-11 (Sept. 23, 1991). Although in a Motion for Accelerated Decision all reasonable inferences are to be drawn in favor of the non-moving party, Respondent has provided this court with nothing by which to draw an inference in its favor.

The Complainant alleges that Respondent generated hazardous waste by its act of "plac[ing] on the ground automobile gasoline and batteries."[19] Complaint ¶ 125-129. Complainant also alleges that Respondent allowed used oil to drain from crushed automobiles onto the ground. See Complaint ¶¶ 48-49. Pursuant to Michigan regulation, a generator is "any person, by site, whose act or process produces hazardous waste identified or listed in Part 2 or whose act first causes a hazardous waste to become subject to regulation." MAC § 299.9104(a). "Waste" is any discarded material that is "abandoned by being disposed of." MAC § 299.9202(1)(a). "Disposal", in turn, means "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous waste into or on land or water in such a manner that the hazardous waste or a constituent of the hazardous waste might enter the environment, be emitted into the air, or discharged into water, including groundwater." MAC § 299.9102(v). "Hazardous waste" is any waste that "exhibits any of the characteristics of hazardous waste identified in MAC § 299.9212" or "is listed in MAC § 299.9213 or MAC § 299.9214 and has not been excluded from the lists pursuant to MAC 299.9211." MAC § 299.9203(1)(a)-(b).

Based solely upon Respondent's sample results from August 2, 1999, Complainant can establish that soil at Respondent's site

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[19] The undersigned acknowledges that an automobile contains the following materials which may be or are subject to regulation under RCRA; gasoline, used oil (which includes, crank case oil, brake fluid, power steering fluid, and transmission fluid), batteries, and antifreeze. Used oil is generally not managed as a hazardous waste under RCRA because of a regulatory presumption that used oil will be recycled. See 40 C.F.R. § 279.10(a). However, used oil that is mixed with hazardous waste or which is disposed of must be managed pursuant to RCRA regulations. See 40 C.F.R. §§ 279.10(b), 279.81.

was contaminated with substances identified by the waste codes D001 (ignitable), D008 (Lead), D018 (Benzene), D021 (Chlorobenzene), D027 (1,4-Dichlorobenzene), D028 (1,2-Dichloroethane), D039 (Tetrachloroethylene) and D040 (Trichloroethylene) above the regulatory toxicity level. See Complt's Ex. 18 Attachs. A-B; MAC § 299.9212(4), Table 201(a). Based on Respondent's sample results from April 11, 2000, Complainant can establish that soil at Respondent's site was also contaminated with substances identified by the waste codes D004 (Arsenic), D005 (Barium), D006 (Cadmium), and D007 (Chromium) above the regulatory toxicity level. See id. Attachs. C, D, G.

Respondent admits that automobiles arrive at its site containing automotive fluids such as used oil and gasoline, and intact batteries.[20] See Complt's Ex. 18 (Answer 1); Respondent's Opposition to Complainant's Motion for Accelerated Decision at 24; Respondent's Reply to Complainant's Opposition to Respondent's Motion for Accelerated Decision on Count VI at 6; Carroll Aff. ¶ 6. Respondent contends that "[i]t has always been [its] policy that its suppliers remove gasoline tanks and batteries from automobiles before bringing them to the site." See id. This statement is seemingly contradicted by Respondent's September 13, 1999 letter to MDEQ stating that "the facility *will now only accept* pre-processed vehicles or vehicles which have previously had the tank removed." (Letter from Beaudoin to Vogen of 9/13/99) (emphasis added). Yet regardless of when this policy was implemented, Respondent admitted that suppliers "violate this policy" thereby establishing that automobiles that Respondent accepts at its site are not always free of hazardous constituents.

Moreover, Respondent admits that it places automotive batteries on the ground but does not aver that each battery was structurally sound, i.e., not cracked or leaking acid. See Respondent's Reply to Complainant's Opposition to Respondent's Motion for Accelerated Decision on Count VI at 6; Carroll Aff. ¶ 6. Furthermore, Respondent tells the undersigned nothing about its management practices for the gasoline that arrives at its

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[20] Generally, before automobiles are sent to a shredding operation such as Respondent's, an automobile scrappage/disassembly operation drains and removes all hazardous and recyclable fluids. See EPA Sector Notebook: Profile of the Motor Vehicle Assemble Industry at 33. The process of dismantling and removing automotive fluids or the process of crushing automobiles containing fluids generates a waste stream which may be hazardous.

site, i.e., how it removes the gasoline from the automobiles and how it disposes of that fluid.[21]

Respondent has not come forward (as to this count)with any evidence to raise a factual dispute regarding Complainant's contention that fluids drained from the vehicles at Respondent's site onto and into the soil. The undisputed evidence shows that hazardous waste was found on Respondent's property. The undisputed evidence shows that despite Respondent's policy, Respondent accepts automobiles at its site carrying various automotive fluids and batteries. Respondent's own samples provide the basis for Complainant's allegations.[22] Respondent's samples detected various listed constituents above the regulatory toxicity levels in the soil at its property – constituents consistent with those found in an automotive waste stream. See Complt's Ex. 18 (CRA Report and Attachments); Rodenbeck-Brauer Aff. ¶ 9.

Based upon the foregoing evidence, the undersigned can draw a "reasonably probable inference" that fluids which arrived in the automobiles at Respondent's site contaminated the soil on Respondent's property. Rogers, supra, at 1103 (quoting BWX, supra). Based upon this inference, the undersigned can conclude that these materials were solid wastes because they were

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[21] MAC § 299.9306(1)(f) requires "[h]azardous waste accumulation" [to be] conducted so that hazardous waste or hazardous waste constituents cannot escape by gravity into the soil, directly or indirectly . . ." On July 7, 1999, the General Industry Safety Division of the Michigan Department of Consumer and Industry Services inspected Respondent's property for compliance with the Michigan Occupational Safety and Health Act. See Complt's Ex. 39. The inspectors noted several "serious violations" and fined Strong Steel a total of $4,200 for six violations. Id. Two of the six violations were for the following conduct: 1) allowing its employees to put automobiles in its shredder with fuel tanks which contained gasoline and with intact batteries which contain acid; 2) improper extraction of gasoline tanks from vehicles. Id.

[22] Interestingly, Respondent's 2001 Notification describes Respondent as a LQG of D008, D018, D021, D028, D039, D040. See Complt's Ex. 41. This Notification does not indicate that it was submitted as a "temporary waste generation". See id. at Section VIII, Line 6. Thus, this document serves as an admission that Respondent, at the very least, generates the above-referenced hazardous wastes.

discarded by virtue of being abandoned. See 54 Fed. Reg. 48372, 48494, (Nov. 22, 1989) ("the materials are solid wastes immediately upon being spilled because they have been abandoned"). These solid wastes exhibit the Toxicity Characteristic above the regulatory limits. Therefore, Respondent is the generator of this hazardous waste because it was Respondent's act of allowing these materials to drain from the automobiles onto the ground that first caused these hazardous wastes to be subject to regulation.

To put into question its status as the generator of the hazardous waste, Respondent offers a theory for the contamination – that it was caused by preceding ownership. However, Respondent does not proffer any evidence to support this theory. Rather, by Respondent's own account, it cannot provide any documentation of the existence of hazardous contaminants on its property prior to its acquisition because Respondent does not have a "pre-acquisition study." See Complt's Ex. 18 (Answer 10). Therefore, Respondent's theory can be characterized as a "bare assertion, conclusory allegation or suspicion."

Having ascertained that Respondent is the generator of the hazardous waste at the site, the undersigned will now turn to Respondent's liability under Count VI of the Complaint.

Liability for failing to notify of all hazardous waste handled by Respondent at its site.

Although Respondent notified Michigan in 1997 that it was an LQG of D008 (Lead) and D006 (Cadmium), Complainant argues that Respondent's 1997 Notification was deficient or incomplete because the 1997 Notification failed to identify Respondent as a generator of D001 (ignitable), D004 (Arsenic), D005 (Barium), D007 (Chromium), D018 (Benzene), D021 (Chlorobenzene), D027 (1,4-Dichlorobenzene), D028 (1,2-Dichloroethane), D039 (Tetrachloroethylene), and D040 (Trichloroethylene). See Complainant's Motion for Accelerated Decision at 40-41. Complainant acknowledges that Respondent "partially corrected" the 1997 Notification in 2001 when Respondent submitted a Notification to MDEQ identifying itself as an LQG of D008, D018, D021, D028, D039, and D040. See id. at 42. See also Complt's Ex. 41. However, Complainant contends that the 1997 Notification was deficient and remains deficient notwithstanding the partial correction in 2001.

Complainant somewhat confuses matters because it states that "Respondent, from at least August 2, 1999 to April 18, 2001 failed to notify that it generated waste with the hazardous waste

codes D001 (ignitability), D004 (Arsenic), D005 (Barium), D007 (Chromium), D018 (Benzene), D021 (Chlorobenzene), D027 (1,4-Dichlorobenzene), D028 (1,2-Dichloroethane), D039 (Tetrachloroethylene), and D040 (Trichloroethylene)." See Motion for Accelerated Decision at 42. This seems to suggest that Respondent can be held liable for failing to *renotify* MDEQ that it was generating additional hazardous wastes not listed on the 1997 Notification. However, Complainant's previous allegation that Respondent's 1997 Notification was deficient seems to suggest, albeit contradictorily, that Respondent should be found liable under Section 3010(a) of RCRA for its initial, incomplete 1997 Notification.[23]

Respondent challenges its liability under Count VI of the Complaint. First, Respondent argues that Complainant is seeking liability under a new theory than what was alleged in the Complaint. The undersigned disagrees. Specifically, ¶ 131 of the Complaint seeks liability for Respondent's failure to notify "as required by Section 3010(a) of RCRA." This is broad enough to include an allegation that Respondent failed to properly notify of all the wastes handled at its site. Respondent also asserts that its 1997 Notification "did indeed notify MDEQ of its hazardous waste activity." Respondent's Motion for Accelerated Decision on Count VI at 5. Respondent maintains that it was not obligated to subsequently amend or update the 1997 Notification because it would be too onerous for a "facility like Respondent's, which receives a somewhat unpredictable flow of materials from a wide variety of sources, some of which may not always comply with Respondent's policies and limitations on what Respondent will accept." Respondent's Reply to Complainant's Opposition to Respondent's Motion for Accelerated Decision on Count VI at 4. The undersigned agrees with Respondent that it was not obligated to file a subsequent notification identifying newly generated hazardous wastes.

In the preamble to the promulgated "Notification of Hazardous Waste Activity, Form 8700-12," the EPA directly addressed a "person's" obligation to renotify. See 45 Fed. Reg. 12746, 12747 (Feb. 26, 1980).

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[23] Liability under Section 3010(a) of RCRA for failing to initially notify of all the hazardous wastes handled by a person is not a novel issue. See In re Willis Pyrolizer Company, RCRA Docket No. 83-H-002, 1983 EPA ALJ Lexis 9, (Dec. 5, 1983); In re Kuhiman Diecasting Co., RCRA Docket No. 83-H-004, 1983 EPA ALJ LEXIS 10 (Nov. 7, 1983).

> Persons who have provided proper notification of hazardous waste activity may later begin to handle additional hazardous wastes not included in the original notification. In the administration of this program, EPA will not require these persons to file a new notification under Section 3010 with respect to those wastes. Such a requirement would be costly to both EPA and the regulated community with no corresponding benefit.[24]

45 Fed. Reg. at 12747.[25]

Complainant argues that Respondent was "obligated to submit a subsequent or amended notification when it changed its

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[24] Of course, this case is governed by Michigan law and an obligation under Michigan law to renotify would be controlling. In a compliance manual, MDEQ states that a common notification error includes "failure to notify when you generate hazardous wastes not previously listed." See Environmental Guidebook for the Michigan Vehicle Service Industry at 2-13. This statement could refer to one of two things: it could refer to a hazardous waste not previously listed on a Notification of Regulated Waste Activity; or it could refer to a waste newly listed by the Administrator of EPA. See RCRA § 3010(a) authorizing the Administrator when "revising any regulation under section 6921 of this title identifying additional characteristics of hazardous waste or listing any additional substance as hazardous waste subject to this subchapter" to "require any person referred to in the preceding provisions to file with the Administrator (or with States having authorized hazardous waste permit programs under Section 6926 of this title) the notification described in the preceding provisions." The undersigned was unable to locate Michigan statutory or regulatory law discussing an obligation to renotify for additional generation of hazardous waste. As such, this vague statement will not be used to sustain Respondent's liability.

[25] It is important to note, however, that although generators are not required to renotify when they generate additional hazardous waste streams, they are not absolved of their obligation under 40 C.F.R. § 262.11 to make a hazardous waste determination, and the ancillary obligations which flow from such a determination. Thus, through the RCRA reporting requirements, authorized states and/or EPA would have information regarding the new hazardous waste stream. See 40 C.F.R. § 262 Subpart D, "Recordkeeping and Reporting".

regulated waste activity." See Complainant's Reply to Respondent's Motion for Accelerated Decision on Count VI at 14. In support of this proposition, Complainant relies upon the instructions to the Notification of Regulated Waste Activity Form 8700-12, which states that a subsequent notification is required for changes in ownership, changes in location, changes in contact person, and "if the type of regulated waste activity you conduct changes." Id. Complainant then asserts that this language is consistent with the instructions to the equivalent Michigan Notification of Regulated Waste Activity Form EQP5150, which requires a subsequent notification for "status change, new owner, or remove/add a site activity, such as universal waste large quantity handler."

The language that Complainant quotes does not support the legal conclusion that Respondent was obligated to file a subsequent notification for newly generated hazardous wastes not listed on its 1997 Notification. Reliance on such phrases as "change in regulated waste activity" or "status change" do not necessarily include generation of additional hazardous waste not listed on a prior Notification. The term "Waste activity" used in the instructions appears to refer to such activities identified in Section VIII of the Notification form as "Hazardous Waste Activity", "Used Oil Activities", and "Universal Waste". See Complt's Ex. 41. See also, EPA Notification of Regulated Waste Activity Form 8700-12 (revised 12/99) (identifying the following activities; "Hazardous Waste Activities", "Universal Waste Activities", and "Used Oil Management Activities"). Respondent has not changed its "activity", it is still a generator of hazardous waste. The term "status change," as discussed in the Michigan Notification form instructions, refers to an entities "regulatory status" as either LQG, SQG, or CESQG. See Michigan Site Identification Form EQP5150 and Directions. Respondent's status as a large quantity generator, similarly, has not changed.

Assuming *arguendo* that Respondent properly complied with the Section 3010(a) Notification requirement when it notified in 1997,[26] Respondent was not legally obligated to file a subsequent

[26] In Section X of the "Notification of Hazardous Waste Activity" form that Respondent signed, the signatory certified that all of the information provided on the form was "true, complete, and accurate." See Complt's Ex. 30. Interestingly, the preamble also states that "[a]ny hazardous wastes handled during the three-month period immediately prior to the date of filing the notification must be included. Notifiers may also include

notification when it began handling additional hazardous waste not included on the 1997 Notification and thus would not have violated Section 3010(a). See 45 Fed. Reg. at 12747. However, it is a factual question whether in 1997 Respondent was generating hazardous wastes that were not listed on its 1997 Notification. In order for Respondent to be found liable for violating Section 3010(a) of RCRA under this theory of liability, Complainant must prove that in 1997 Respondent was handling all of the wastes that were subsequently found in 1999/ 2000 on Respondent's property thereby establishing that Respondent's original Notification was not proper. Thus, accelerated decision under Count VI for failing to notify of all hazardous waste handled at Respondent's site is **DENIED**.

Liability for Failing to Notify that it Disposed of Hazardous Waste at its property.

Complainant also contends that Respondent can be found liable for violating Section 3010(a) of RCRA by failing to notify that it was disposing of hazardous waste at its site. Section 3010(a) of RCRA states, in pertinent part, "any person . . . owning or operating a facility for treatment, storage, or disposal of [hazardous waste] shall file with the Administrator (or with States having authorized hazardous waste permit programs under Section 6926 of this title) a notification stating the location and general description of such activity and the identified or listed hazardous wastes handled by such person." RCRA § 3010(a). In Respondent's 1997 Notification to MDEQ, Respondent identified itself as a generator of hazardous waste – Respondent did not, and has not, identified itself as a facility which disposes of hazardous waste.

Complainant posits that Respondent not only generated hazardous waste at its site but also was a treatment, storage, and disposal facility ("TSDF"), and failed to notify Michigan that it was disposing of hazardous waste on its property. Complainant bases its allegation of disposal on the fact that the hazardous wastes were present in the soil, thus giving rise to the conclusion that the wastes were disposed of (i.e., released, spilled, discharged, dumped) at the site. Section 1004 of RCRA defines disposal as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the

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other wastes which they anticipate they will be handling." 45 Fed. Reg. at 12748.

environment or be emitted into the air or discharged into any waters, including ground waters." RCRA § 1004(3).

Complainant is able to establish that Respondent disposed of hazardous waste on its property based upon the sampling evidence, the Hazardous Waste Manifests, and the Waste Characterization Report. Without any evidence to demonstrate that the contamination was the result of previous ownership, and because Respondent admits that automobiles arrive at its property containing constituents that can produce a hazardous waste stream, the court can reasonably infer that the hazardous constituents in the soil came from automobiles that Respondent accepted at its site. The evidence supports a conclusion that hazardous automotive constituents were discharged, i.e., spilled, leaked, etc., into the soil at Respondent's site. Thus, Respondent "disposed" of hazardous waste because the automotive waste stream was discharged, dumped, spilled, or leaked, etc., into or on the land in such a manner that the hazardous waste entered the soil at Respondent's property.

Respondent's contention that its employees did not intend to dispose of these wastes does not alter this conclusion. Although Respondent "acknowledges that it [is] a generator of hazardous waste, it disputes [Complainant's] claim that it disposed of hazardous waste on the site." Respondent's Reply to Complainant's Opposition to Respondent's Motion for Accelerated Decision at 6. Respondent denies that the automobile batteries were disposed of by being placed on the ground. Rather, Respondent's employees "temporarily place [batteries] on the asphalt pad pending further handling." Id. See also Carroll Aff. ¶ 6. Respondent also contends that the soil sample referred to as "SS2" came from the "asphalt area" rather than from an area identified as the "battery storage area".

First, it is important to recognize that RCRA is a strict liability statute. See In re Bil-Dry Corp., 9 E.A.D.___, slip op. at 47, RCRA Appeal No. 98-4 (EAB Jan. 18, 2001). Therefore, the intent of Respondent's employees is not dispositive. Secondly, Respondent presumably alleges that SS2 came from the asphalt area to demonstrate that any hazardous constituents that may have leaked from the batteries did not reach the ground, but rather the asphalt, and thus, were not released into the environment. Assuming *arguendo* that SS2 came from the asphalt area, and that Strong Steel's employees temporarily place the batteries on the ground, the undersigned can still conclude that Respondent "disposed of" these hazardous wastes because the soil samples confirm that wastes above the regulatory limits for the toxicity characteristic were found in the soil and that the

asphalt area, according to Respondent, was in disrepair. See Letter from Beaudoin to Vogen of 9/13/99 (admitting that the asphalt area of the site needed improvement); Carroll Aff. ¶ 6; Beaudoin Aff. ¶ 5 ("cleanup and restoration activity [of the asphalt pavement] . . . involved removal of soils, verification sampling, replacement of disturbed asphalt pavement, and restoration of deteriorated asphalt pavement"); Complt's Ex. 18 (CRA Report at 1) (stating that the "best management practice issue included significant deterioration of two areas of the asphalt" and that only one of the asphalt excavation sites had a "concrete slab approximately 1-foot below grade".).

Having concluded that Respondent disposed of hazardous waste on its property, the next factual inquiry is whether Respondent is the owner or operator "of a facility for the treatment, storage, or disposal" of hazardous waste. RCRA § 3010(a). The EPA regulations implementing RCRA define facility as "all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste." 40 C.F.R. § 260.10. The regulations also provide a more specific definition for a disposal facility – "disposal facility means a facility or part of a facility at which hazardous waste is intentionally placed into or on any land or water, and at which waste will remain after closure." Id.

Although Respondent may have been disposing of hazardous waste on its property, it is unclear, as a matter of fact, whether Respondent operates a "facility" that subjects it to the notification requirements of Section 3010(a) of RCRA and its implementing regulations. Complainant failed to allege in the Complaint that Respondent operates a "facility" as defined by RCRA, 40 C.F.R. § 261.10, or MAC § 299.9103(l). Because of this factual and jurisdictional omission, the undersigned cannot conclude that there is no genuine issue of material fact. Thus, Complainant has again not met its burden for accelerated decision under this theory of liability and consequently, accelerated decision for Count VI is **DENIED**.

COUNT VII

Count VII of the Complaint alleges that Respondent violated Section 3005 of RCRA and MAC § 299 Part 5. When enacted by Congress, Section 3005(a) of RCRA required the Administrator to promulgate regulations requiring "each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit." RCRA §

3005(a). Yet, Section 3005(a) of RCRA concomitantly prohibits the "the treatment, storage, or disposal of any such hazardous waste . . . except in accordance with such a permit." Id. Thus, it is a violation of RCRA to dispose of hazardous waste without a permit.

The federal regulations which implement the Section 3005 permit requirement, codified at 40 C.F.R. Part 270, embody the basic prohibition against the "treatment, storage, or disposal of hazardous waste by any person who has not applied for or received a RCRA permit." 40 C.F.R. § 270.1(b). Michigan's permit regulations are codified at MAC § 299 Part 5. MAC § 299.9502 requires an operating license for the treatment, storage, and disposal of any hazardous waste. MAC § 299.9502(1); see also 40 C.F.R. § 270.1(c) (requiring a permit for the treatment, storage, or disposal of any hazardous waste as identified or listed in Part 261). Again, the term "disposal" is defined as the "discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous waste into or on land or water in such manner that the hazardous waste or a constituent of the hazardous waste might enter the environment, be emitted into the air, or discharged into water, including groundwater." MAC § 299.9102(v). Complainant alleges that Respondent disposed of hazardous waste by its act of allowing the automotive fluids to drain onto the ground. Complainant contends that Respondent did not have a permit for this disposal. Thus, according to Complainant, Respondent violated the aforementioned statutory and regulatory provisions by disposing of hazardous waste on the ground without a permit for such disposal.

In Complainant's Motion for Accelerated Decision, Complainant seeks liability for illegally storing hazardous waste without a permit. Such an allegation seeks liability beyond what was pled in the Complaint for Complainant only alleged liability for illegally disposing of hazardous waste without a permit. See Complaint ¶¶ 132-135. The Complaint is pled broadly enough to put Respondent on notice that EPA considered it to have stored hazardous waste without a permit. See Complaint ¶¶ 60, 63-66, 133. However, it would be unfair to Respondent to grant Accelerated Decision on an allegation not conspicuously pled in the Complaint.[27] This matter is somewhat complicated by the fact

[27] In two sentences in its Motion for Accelerated Decision, Complainant peripherally touches upon the storage violation. See Complainant's Motion for Accelerated Decision at 46 ("Complainant has shown that Respondent stored hazardous waste in drums and disposed of hazardous waste on the ground at its facility.

that Respondent addressed the storage issue in its memoranda. Yet, the Court does not consider this issue properly before it and thus, will not address Respondent's alleged liability for "illegally storing hazardous waste."

Respondent opposes accelerated decision as to this count, arguing that the types of spills that may have occurred at its property do not constitute the kind of disposal which requires a permit. In support of this proposition, Respondent states that "both EPA rules and Michigan rules provide that when a spill occurs at a generator's facility, a generator is required to clean up the spill. Neither EPA nor Michigan rules provide that a generator-only facility on which a spill has occurred is converted into a TSDF and is required to have an operating license or submit a new notification." Respondent's Reply to Complainant's Opposition to Respondent's Motion for Accelerated Decision at 6.

Respondent is correct that, by regulation, generators who spill hazardous waste on site do not automatically become subject to permit requirements. For instance, small quantity generators, that is, generators who generate more than 100 kg but less than 1000 kg of hazardous waste in a calendar month, must, in the event of a spill "contain the flow of hazardous waste to the extent possible, and as soon as is practicable, clean up the hazardous waste and any contaminated materials or soil." 40 C.F.R. § 262.34(d)(5)(iv)(B). However, Respondent is not a small quantity generator of hazardous waste, but rather, has identified itself as a large quantity generator. See Complt's Ex. 41 (Respondent's 2001 Notification of Hazardous Waste Activity). Large quantity generators are required, *inter alia*, to comply with the Contingency Plan and Emergency Procedures regulations for interim status treatment, storage, and disposal facilities. See 40 C.F.R. § 262.34(a)(4); 40 C.F.R. Part 265 Subparts C, D. Section 265.56 requires an "emergency coordinator to take all reasonable measures necessary to ensure that fires, explosions, and releases do not occur, recur, or spread to other hazardous

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Complainant has demonstrated that there is no dispute of material fact that Respondent stored and disposed of hazardous waste at its facility without a permit.") Yet, by the terms of the allegation, Complainant's Motion for Accelerated Decision sought liability for "Disposal of Hazardous Waste without a Permit." It wasn't until Complainant's Reply to Respondent's Opposition to Complainant's Motion for Accelerated Decision that Complainant reworded Count VII to allege "Storage or Disposal of Hazardous Waste without a Permit."

waste at the facility" and "must include collecting and containing released waste." 40 C.F.R. § 265.56(e). Moreover, the emergency coordinator must "provide for treating, storing, or disposing of recovered waste, contaminated soil or surface water, or any other material that results from a release, fire, or explosion at the facility." 40 C.F.R. § 265.56(g).

To the extent that an immediate response to a spill does not occur, the aforementioned provisions do not apply. See In re Morrison Brothers Co., Docket No. RCRA VII-98-H-0012 (Aug. 31, 2000) (holding that Respondent violated § 262.34(d)(5)(iv)(B) for not cleaning up a spill of hazardous waste until several hours after it had occurred). Cf., OSWER Faxback 13296, Letter from Lowrance to Powell of 5/15/89 (stating that 40 C.F.R. § 265.1(c)(11)(i) "applies only to situations involving an immediate response to discharges for hazardous waste. To the extent that such an immediate response action has not occurred and is not occurring at the facility, none of the provisions of this subsection would apply.") The record in this case demonstrates that Respondent did not immediately undertake a cleanup – the soil was sampled on August 2, 1999 yet Respondent did not begin cleanup activities until April 11, 2000. Thus, Respondent cannot take refuge under this provision.[28]

Moreover, the regulations addressing the standards for owners and operators of treatment, storage, and disposal facilities codified in Parts 264-265, as well as the RCRA permit regulations codified in Part 270 also speak to this issue. The regulatory requirements of Parts 264 and 265, Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities,"do not apply to . . . a person engaged in treatment or containment activities during immediate response to any of the following situations . . . A discharge of a material which, when discharged, becomes a hazardous waste." See 40 C.F.R. §§ 264.1(g)(8)(i)(C), 265.1(c)(11)(i)(C). However, the requirements of Parts 264/265 do apply to "any person who continues or initiates hazardous waste treatment or containment activities after the immediate response is over." See 40 C.F.R. §§ 264.1(g)(8)(iii); 265.1(c)(11)(iii). See also OSWER Faxback 12748, Letter from Porter to Hansen of 9/29/86("RCRA regulations

[28] However, Respondent may put on evidence at the hearing regarding these "occasional spills" to mitigate the ultimate penalty for this violation. See In re M.A. Bruder & Sons, Inc., Docket No. RCRA-99-005 (Oct. 25, 2001) (ALJ found Respondent liable as a TSDF for technically violating RCRA but imposed a reduced penalty).

in Parts 264 and 265 Subparts C and D require immediate actions to minimize hazards to human health and the environment from any unplanned, sudden or non-sudden releases of hazardous waste or hazardous constituents. Extended responses which are not judged to be immediate in nature may result in . . . an enforcement action for illegal disposal.")

Additionally, the Hazardous Waste Permit Program, codified at Part 270, specifically states that "a person is not required to obtain a RCRA permit for treatment or containment activities taken during immediate response to . . . a discharge of a material which, when discharged, becomes a hazardous waste" but is otherwise subject to all applicable requirements of Part 270 when such "person continues or initiates hazardous waste treatment or containment activities after the immediate response is over." See 40 C.F.R. § 270.1(c)(3)(i), (iii). Again, as discussed above, inasmuch as Respondent did not initiate an immediate response to the discharges of hazardous waste on its property, none of the provisions which could otherwise shield Respondent from liability, apply. Thus, the undersigned is unpersuaded by Respondent's argument against its liability under this count.

The Court has already concluded that the Respondent disposed of the hazardous waste on its property. Thus, the threshold inquiry here is whether Respondent had a permit or operating license for this disposal. Respondent has admitted that it did not have an operating license for the disposal of hazardous waste on its property. See Answer ¶ 135. Because Respondent did not have a permit to dispose of hazardous waste on its property it is consequently liable for disposing of hazardous waste without a permit. See In re Capozzi Custom Cabinets, Docket No. RCRA-5-2000-005, 2002 EPA ALJ LEXIS 8, *17-22 (Initial Decision, Feb. 11, 2002) (holding that Respondent's action of dumping hazardous waste on its property without a permit violated Section 3005(a) of RCRA). As such, Complainant's Motion for Accelerated Decision as to this count is **GRANTED**.

COUNT VIII

Count VIII of the Complaint alleges that Respondent land disposed hazardous waste without treating that waste prior to disposal. The applicable Michigan regulation, MAC § 299.9311, states that "generators of hazardous waste shall comply with the applicable requirements and restrictions of 40 C.F.R. Part 268. Part 268, in turn, "identifies hazardous wastes that are restricted from land disposal." 40 C.F.R. § 268.1(a). Part 268 applies to "persons who generate or transport hazardous waste and

owners and operators of hazardous waste treatment, storage, and disposal facilities." 40 C.F.R. § 268.1(b).

"Land disposal" means "placement in or on land . . . and includes, but is not limited to, placement in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, underground mine or cave, or placement in a concrete vault, or bunker, intended for disposal purposes." 40 C.F.R. § 268.2. A characteristic hazardous waste can be land disposed provided that the waste is treated in accordance with the treatment standards of Part 268 Subpart D. Complainant argues, using Respondent's soil sample results, that the characteristic hazardous wastes disposed at Respondent's site did not meet the regulatory treatment standards for land disposal. Respondent again asserts that there is a genuine issue of material fact as to whether it "disposed" hazardous waste at its site, or that Respondent engaged in "land disposal" because the hazardous waste on Respondent's property was found in soil on top the "asphalt or concrete pad." See Respondent's Opposition to Complainant's Motion for Accelerated Decision at 27.

The undersigned has already concluded that Respondent disposed of hazardous waste on its property, and that that waste was disposed of on the ground, including the land.[29] Thus, germane to this inquiry is wether Respondent "land disposed" those hazardous wastes in violation of Part 268.

As quoted above, "land disposal" as that term is defined by EPA regulations, refers to the placement of hazardous waste "in or on the land . . . " 40 C.F.R. § 268.2. This is a very broad definition which includes Respondent's disposal of hazardous waste on the deteriorated asphalt pad at its property. See In re Globe Aero Ltd., Inc., and the City of Lakeland, Florida, Docket No. RCRA-89-07-R (June 4, 1996) (stating that "[i]t is clear, and warrants no extended discussion, that this definition encompasses the placement of waste on the ground surrounding the concrete pad

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[29] See supra, at 29 (citing Letter from Beaudoin to Vogen of 9/13/99 (admitting that the asphalt area of the site needed improvement); Carroll Aff. ¶ 6; Beaudoin Aff. ¶ 5 ("cleanup and restoration activity [of the asphalt pavement] . . . involved removal of soils, verification sampling, replacement of disturbed asphalt pavement, and restoration of deteriorated asphalt pavement"); Complt's Ex. 18 (CRA Report at 1)(stating that the "best management practice issue included significant deterioration of two areas of the asphalt").

and placement of waste in the swale at the end of the pipe leading from the sump"); In re Everwood Treatment Co., Inc. and Cary W. Thigpen, Docket No. RCRA-IV-92-15-R (July 7, 1995), reversed on other grounds, In re Everwood Treatment Co., Inc, 6 E.A.D. 589 (EAB Sept. 27, 1996) ("RCRA § 3004(k) equates "land disposal" with "placement" of hazardous waste in specified land-based units and § 268.2 broadens this definition to include any "placement in or on the land . . ."). Therefore, Respondent land disposed the hazardous waste as that term is defined by EPA regulations. Yet, the inquiry does not cease here.

Characteristic hazardous wastes, e.g., the types of wastes found in Respondent's soil, can only be land disposed if "the waste complies with the treatment standards under subpart D of [Part 268]." 40 C.F.R. § 268.9(c). Part 268 Subpart D, entitled Treatment Standards, establishes the criteria that hazardous wastes must meet before being land disposed. See 40 C.F.R. § 268.40(a). These treatment standards can either be concentration levels for hazardous constituents that the waste must meet or treatment technologies that must be performed on the waste before it can be disposed.[30] Thus, the treatment standards either appear as a numeric value for concentration-based standards or a five-letter code representing a specific technology-based standard. See 40 C.F.R. § 268.40. See also 40 C.F.R. § 268.48 ("Universal Treatment Standards" Table which "identifies the hazardous constituents, along with the nonwastewater and wastewater treatment standards levels, that are used to regulate most prohibited hazardous wastes with numerical limits. Compliance with these treatment standards is measured by an analysis of grab samples, unless otherwise noted . . .").[31]

As discussed above, the concentration of the chemicals identified in Respondent's soil samples were greater than the regulatory limit established for these chemicals in MAC § 299.9212, Table 201(a). The soils were contaminated with wastes exhibiting the toxicity and ignitability characteristics thereby making them hazardous wastes as defined by the applicable

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[30] Respondent did not dispute Complainant's contention that, at the relevant time in question, Respondent did not have any of the treatment technologies necessary to achieve a technology-based standard.

[31] Some characteristic hazardous wastes must be examined for underlying hazardous constituents. Any underlying hazardous constituents must be treated in order to meet contaminant-specific levels.

regulations.[32] See MAC § 299.9212; 40 C.F.R. §§ 261.3, 261.21, 261.24. Based upon the concentrations of the hazardous constituents found in the soil, the undersigned can conclude that these wastes were land disposed without meeting the requisite regulatory treatment standard.[33] Thus, Respondent land disposed hazardous wastes in violation of Part 268 for failing to treat the hazardous wastes prior to land disposal. As such, Complainant's Motion for Accelerated Decision at to this count is **GRANTED**.

COUNT IX

Count IX of the Complaint alleges that Respondent failed to retain waste analysis records of its determination that the hazardous wastes were restricted from land disposal. The applicable Michigan regulations require generators of hazardous waste to comply with 40 C.F.R. Part 268. See MAC § 299.9311. The EPA regulations, in turn, require "generators of hazardous waste [to] determine if the waste has to be treated before it can be land disposed." 40 C.F.R. § 268.7(a). Generators make this determination by using the treatment standards in 40 C.F.R. §§ 268.40, 268.45, or 268.49, and either test the waste or use their knowledge of the waste. Sections 268.7(a)(6) and (a)(8) require generators to retain all data used to make the land disposal determination on-site in the generator's files for three years. See 40 C.F.R. §§ 268.7(a)(6),(8).

Complainant alleges that during the July 22, 1999

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[32] The characteristic hazardous wastes found in Respondent's soil have the following hazardous waste codes: D001, D004, D006, D007, D008, D018, D021, D027, D028, D039, and D040.

[33] 40 C.F.R. § 268.40 provides the following concentration or treatment standards for nonwastewaters:

D001, DEACT and meet § 268.48 standards; or RORGS; or CMBST
D004, 5.0 mg/L TCLP and meet § 268.48 standards
D005, 21 mg/L TCLP and meet § 268.48 standards
D006, .11 mg/L TCLP and meet § 268.48 standards
D007, .60 mg/L TCLP and meet § 268.48 standards
D008, .75 mg/L TCLP and meet § 268.48 standards
D018, 10 mg/kg and meet § 268.48 standards
D021, 6.0 mg/kg and meet § 268.48 standards
D027, 6.0 mg/kg and meet § 268.48 standards
D028, 6.0 mg/kg and meet § 268.48 standards
D039, 6.0 mg/kg and meet § 268.48 standards
D040, 6.0 mg/kg and meet § 268.48 standards

inspection, Respondent was unable to produce or provide any records of its determination that its hazardous wastes were restricted from land disposal. In the inspection report, Inspector Opek indicates that during the post-inspection interview Respondent "could not provide any documents, records, inspection logs, or information on the solid waste disposal." Complt's Ex. 73 at 6. Thus, Complainant contends, Respondent violated MAC § 299.9311 and 40 C.F.R. § 268.7(a)(6).

Respondent is also seeking an Accelerated Decision as to this count, arguing either that Inspector Opek never asked Respondent for any records on the day of the inspection or in the alternative, that Inspector Opek never asked Respondent to specifically produce hazardous waste land disposal documentation but rather, asked for records regarding "solid waste disposal." See Respondent's Opposition to Complainant's Motion for Accelerated Decision at 10 (referring to Complainant's Ex. 73). Thus, Respondent alleges that the EPA inspectors never asked Respondent to specifically produce records regarding the land disposal determination for hazardous wastes pursuant to 40 C.F.R. § 268.7(a)(6).[34]

Respondent maintains that when an EPA inspector has not requested to see specific documents, the regulated entity cannot be held accountable for not producing them. See Respondent's Opposition to Complainant's Motion for Accelerated Decision at 9-10. Respondent cites two administrative law cases in support of this proposition. See id. (citing In re S&S Landfill, Inc., Docket No. CAA-III-002 (Sept. 22, 1994); In re Spang and Co., 3 E.A.D. 709 (EAB 1994). Moreover, Respondent argues that the only evidence the EPA has to substantiate this count is the RCRA Inspection Report authored by Mr. Opek. The undersigned has already concluded that this Report will not be used as evidence to support Complainant's Motion for Accelerated Decision. Yet, Respondent refers to the Report as proof that Mr. Opek did not request copies of documents required by 40 C.F.R. § 268.7 because he broadly states that Respondent could not produce documents relating to "solid waste disposal." Id. at 10. Respondent also

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[34] Respondent also noted that Count IX could be read to mean that EPA is seeking liability for failing to determine if Respondent's solid waste was hazardous waste pursuant to 40 C.F.R. § 262.11. Complainant, in its Rebuttal Prehearing Exchange, states that "[t]he Complaint clearly states in ¶ 157 that it is seeking penalties for one violation of 40 C.F.R. § 268.7(a)(6) not § 262.11." Complainant's Rebuttal Prehearing Exchange at 6 (footnote omitted).

proffers affidavits from two Strong Steel employees who allege that they were present during the exit interview and that Mr. Opek never asked for any records regarding land disposal or hazardous waste determinations. See Respondent's Opposition to Complainant's Motion for Accelerated Decision at 10-11; Benacquisto Aff. ¶ 2; Beaudoin Aff. ¶ 6.

Complainant contends that the case law Respondent cites is not dispositive. However, in S&S Landfill, one of the cases cited by Respondent, the ALJ denied Cross-Motions for Accelerated Decision on a similar count where an EPA official averred that he had asked for specific records and Respondent's affiant claimed that EPA had not asked for those specific records.

To grant accelerated decision for this count in favor of either party the Court would first have to determine, as a matter of fact, that Complainant's Inspector did or did not ask for all records related to solid waste disposal. Complainant proffers the Inspection Report in support of its allegation that Inspector Opek asked for the requisite documents and that Respondent did not retain the records.[35] Respondent proffers the affidavits of two employees who aver that Complainant's inspector never asked for the records. Thus, a "genuine" issue exists because there is sufficient evidence supporting the claimed factual dispute to require a choice between the parties' differing versions of the truth at trial. Therefore, Accelerated Decision as to this Count of the Complaint is **DENIED**.

An appropriate civil penalty will therefore be assessed for the violations found in Counts VII and VIII of the Complaint. Such penalty will be determined by the evidence received at the hearing that will be scheduled in this matter. That hearing will also adjudicate Counts III-VI, and IX, to which EPA has not been awarded accelerated decision. The parties are reminded that EPA bears the burden of proof as to both the civil penalty and liability issues. See 40 C.F.R. § 22.24.

ORDER

Pursuant to Section 22.20 of the Rules of Practice:

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[35] The undersigned will rely upon Complainant's Ex. 73 (Multimedia Inspection Report) to the extent that it establishes a genuine issue of material fact even though the undersigned has excluded this exhibit as a basis to support Complainant's Motion for Accelerated Decision.

Complainant's Motion for Accelerated Decision on Counts VII and VIII is **GRANTED**; Respondent's Cross-Motion for Accelerated Decision on Counts V is **GRANTED,** in part, and **DENIED,** in part; and Complainant's Motion for Accelerated Decision on Counts III-VI, and IX, and Respondent's Motion for Accelerated Decision on Counts VI and IX are **DENIED**.

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Stephen J. McGuire
Administrative Law Judge

September 9, 2002
Washington, DC