UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Summit, Inc.,	)	**Docket No. RCRA-05-2014-0006**
	)	
Respondent	)	Dated: July 24, 2015

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION

I. Procedural Background

This proceeding was initiated on March 17, 2014 by the Director, Land and Chemicals Division, Region 5 ("Complainant") of the United States Environmental Protection Agency ("EPA"), filing a Complaint against Summit, Inc. ("Respondent" or "Summit") under Section 3008(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act ("RCRA" or "the Act"), 42 U.S.C. § 6928(a). Respondent is an automobile scrap recycling business located in Gary, Indiana. The Complaint charges Summit in seven counts with violating various provisions of Indiana's federally authorized regulations governing hazardous waste, used oil, and universal waste. Counts 1 through 4 allege that Respondent failed to determine whether contents of 39 drums and an accumulation tank were hazardous waste, offered hazardous waste from the drums and tank for transportation without an EPA identification number, shipped it without a hazardous waste manifest, and stored it without a permit. Counts 5 and 6 charge Summit with storing used oil in unmarked containers, and failure to stop releases of used oil and contain, clean up and properly manage it. Count 7 alleges that Respondent failed to manage used automotive batteries in a way to prevent releases, failed to demonstrate the length of time they were accumulated, and failed to have a training program for employees who handle or manage them. For these violations, the Complainant proposes a civil penalty of $263,375 and an order to maintain and certify compliance with the regulations cited in the Complaint.

Respondent filed an Answer to the Complaint, enclosing some documents and denying the alleged violations. Subsequently, a Prehearing Order was issued, setting the schedule for a prehearing exchange of information. Complainant timely filed its prehearing exchange on July 18, 2014. After Respondent was granted an extension of time to file prehearing information, Respondent filed a three-page prehearing exchange on September 9, 2014, listing witnesses and

incorporating by reference the documents attached to its Answer, without any additional documents or exhibits. The Complainant responded with a Rebuttal Prehearing Exchange on September 19, 2014.

On October 21, 2014, the Complainant filed a Motion for Accelerated Decision ("Motion"), seeking accelerated decision in its favor with respect to the Respondent's liability on all seven counts alleged in the Complaint. To date, Respondent has not filed any response to the Motion.

II. Standards for Accelerated Decision

The applicable procedural rules, 40 C.F.R. Part 22 ("Rules of Practice" or "Rules"), provide that:

> The Presiding Officer may at any time 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.

40 C.F.R. § 22.20(a). The standard for accelerated decision under 40 C.F.R. § 22.20 is similar to that of summary judgment under Rule 56 of the Federal Rules of Civil Procedure (FRCP). *Puerto Rico Aqueduct and Sewer Authority v. U.S. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) ("Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment.").

The role of summary judgment is "to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." *Wynne v. Tufts University School of Med.*, 976 F.2d 791, 794 (1st Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993). The party moving for summary judgment bears the initial burden of showing that there is no genuine issue of material fact to be decided with respect to any essential element of the claim, and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330-31 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.4 (1986). The movant who bears the burden of proof at trial must show that a material fact cannot be genuinely disputed by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the . . . presence of a genuine dispute." FRCP 56(c)(1). It is inappropriate to grant the motion unless a reasonable factfinder "'would be compelled to find its way on the facts needed to rule in its favor on the law,'" and "'if there is a chance that a reasonable factfinder would not accept a moving party's necessary propositions of fact,' summary judgment is inappropriate." *United States v. Donovan*, 661 F.3d 174, 185 (3d Cir. 2011) (quoting *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 238 (3d Cir. 2007) (footnote omitted)). Under FRCP 56, the use of affidavits is not required to support a motion for summary judgment; reliance on other materials is permissible. 73 Am. Jur. 2d Summary Judgment § 23 (2d ed.); *Celotex*, 477 U.S. at 323.

Once the movant's burden is met, to defeat summary judgment, the nonmoving party

must show that a material fact is genuinely disputed by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence...of a genuine dispute." FRCP 56(c)(1). The non-movant must "set out specific facts showing a genuine issue for trial." *Nolen v. FedEx TechConnect Inc.*, 971 F.Supp. 2d 694, 700 (W.D. Tenn. 2013) (quoting *Viergutz v. Lucent Techs., Inc.*, 375 Fed. App'x 482, 485 (6th Cir. 2010)). It must do more than "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477 U.S. at 249-250; *Newell Recycling Co., Inc.*, 8 E.A.D. 598, 624, 1999 EPA App. LEXIS 28, at *59 (EAB 1999) (countervailing evidence must be sufficiently probative to create a genuine issue of material fact). An issue of fact may not be raised by merely referring to proposed testimony of witnesses. *King v. Nat'l Indus., Inc.*, 512 F.2d 29, 33-34 (6th Cir. 1975) (affidavit saying what the attorney believes or intends to prove at trial is insufficient to oppose summary judgment); *Ricker v. Zinser Corp.*, 506 F. Supp. 1, 2 (E.D. Tenn. 1978), *aff'd sub nom. Ricker v. Testilmaschinen GmbH*, 633 F.2d 218 (6th Cir. 1980) (affidavit of counsel containing ultimate facts and conclusions, referring to proposed testimony and stating what the attorney intends to prove at trial, is insufficient to show there is a genuine issue for trial); *see also* 73 Am. Jur. 2d Summary Judgment § 34 (defendant's resistance to a motion for summary judgment must be supported by sworn statements of a person having knowledge of the facts sufficient to sustain a valid defense to the action.)

"In determining whether a genuine issue of material fact exists, a court must view the facts in the light most favorable to the non-moving party and make all reasonable inferences in that party's favor." *Gentile v. Nulty*, 769 F. Supp. 2d 573, 577 (S.D.N.Y. 2011); *Liberty Lobby*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."). "A fact is 'material' for purposes of summary judgment if proof of that fact would establish or refute an essential element of the cause of action or defense." *Bruederle v. Louisville Metro Gov't*, 687 F.3d 771, 776 (6th Cir. 2012). A factual dispute is "'genuine' if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248. The judge "must view the evidence presented through the prism of the substantive evidentiary burden." *Id.* at 255. In the present proceeding, the evidentiary standard is a preponderance of the evidence. 40 C.F.R. § 22.24(b).

When conflicting inferences may be drawn from the evidence and a choice among them would amount to fact finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Ultimately, "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249.

Significant to the disposition of the EPA's pending motion for accelerated decision, "[a]ny party who fails to respond [to a motion] within the designated period waives any objection to the granting of the motion." 40 C.F.R. § 22.16(b). The Federal Rules of Civil Procedure provide that "[i]f a party . . . fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the

motion" or "grant summary judgment if the motion and supporting materials -- including the facts considered undisputed -- show that the movant is entitled to it." FRCP 56(e)(3).

When the non-moving party has asserted an affirmative defense, the moving party must show that there is an absence of facts present in the record to support the defense. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (*quoting BWX Techs. Inc.*, 9 E.A.D. 61, 78 (EAB 2000)). If the moving party does show an absence of facts supporting the defense, the non-moving party must identify "specific facts" from which a reasonable fact finder could find in its favor by a preponderance of the evidence in order to preserve its defense. *Id.*

III. Statutory and Regulatory Background

Congress passed the Resource Conservation and Recovery Act in 1976 in response to findings that the country's increased industrial, commercial, and agricultural operations had generated "a rising tide of scrap, discarded, and waste materials" that presented communities with "serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes . . . ."[1] 42 U.S.C. § 6901(a). Congress was further concerned that "disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment"; that "alternatives to existing methods of land disposal must be developed" due to a shortage of suitable disposal sites; and that methods to extract usable materials and energy from solid waste were available. 42 U.S.C. § 6901(b)-(d).

In light of these issues, Congress designed RCRA to include two foundational programs: one governing "solid waste," the framework for which is set forth in Subtitle D of the Act, and one governing "hazardous waste," the framework for which is set forth in Subtitle C, Sections 3001 – 3024 of RCRA, 42 U.S.C. §§ 6921-6939g. Subtitle C was crafted "to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) (quoting 42 U.S.C. § 6902(b)). To achieve this goal, RCRA "empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C... ." *City of Chicago v. Envtl. Defense Fund*, 511 U.S. 328, 331 (1994).

The EPA promulgated regulations under RCRA, codified at 40 C.F.R. Parts 260 through 279, governing persons or facilities that generate, transport, treat, store or dispose of hazardous waste, used oil, or certain other types of waste referred to as universal waste. Under Section 3006 of RCRA, 42 U.S.C. § 6926, the EPA authorized states to administer and enforce their own hazardous waste programs in lieu of the federal program if they meet certain conditions. The EPA authorized the hazardous waste program of the State of Indiana in 1986, and Indiana's regulations that govern generators of hazardous waste are codified at 329 IAC § 3.1-7-1 *et seq.* Indiana: Final Authorization of State Hazardous Waste Management Program, 51 Fed. Reg. 3778, 3953 (Jan. 31, 1986). A violation of any regulation promulgated under a state program authorized under Section 3006 of RCRA constitutes a violation of RCRA and is subject to

[1] RCRA amended the existing Solid Waste Disposal Act of 1965.

assessment of civil penalties and compliance orders under RCRA Section 3008, 42 U.S.C. § 6928. The EPA has authority to enforce such state regulations by issuing orders for compliance and assessing a civil penalty for a violation of such regulation, under Section 3008 of RCRA, 42 U.S.C. § 6928, which provides, ". . . whenever . . . the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both . . . ." *See*, 51 Fed. Reg. 3953 (Jan. 31, 1986) ("U.S. EPA retains the right to conduct inspections under section 3007 of RCRA and to take enforcement actions under sections 3008 . . . of RCRA.").

A. Solid Waste

For a material to constitute a "hazardous waste," it must first qualify as a "solid waste" under the statutory definition of hazardous waste at Section 1004(5) of RCRA. 42 U.S.C. § 6903(5). Under Section 1004(27) of RCRA, "solid waste" is "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities..." 42 U.S.C. § 6903(27). As it pertains to hazardous waste regulation, EPA and the State of Indiana have further defined "solid waste" as "any discarded material" not subject to other specific regulatory exclusions.[2] 40 C.F.R. § 261.2(a)(1); 329 I.A.C. § 3.1-4-1(a); 329 I.A.C. 3.1-6-1(b).[3]

"Discarded material" includes any material that has been "recycled" as defined in 40 C.F.R. § 261.2(c), which in turn provides that "spent materials," scrap metal and certain other materials are solid wastes when they are recycled, or accumulated, stored or treated before recycling, by being: (1) applied to or placed on land in a manner than constitutes disposal, (2) burned to recover energy or "[u]sed to produce a fuel or are otherwise contained in fuels," (3) reclaimed, or (4) accumulated speculatively. 40 C.F.R. §§ 261.2(a)(2)(ii), 261.2(c) & Table 1; 329 I.A.C. § 3.1-4-1(a); 329 I.A.C. 3.1-6-1(b).

A "spent material" is "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." 40 C.F.R. § 261.1(c)(1); 329 I.A.C. § 3.1-4-1(a); 329 I.A.C. 3.1-6-1(b).

A material is "reclaimed" when it is processed to recover a usable product or if it is

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[2] Excluded materials include those that "are not solid wastes" according to 40 C.F.R. § 261.4(a) and any materials excluded by variance granted under §§ 260.30 and 260.31 or non-waste determinations under §§ 260.30 and 260.34.

[3] The Indiana Administrative Code adopts and incorporates by reference the definitions contained in 40 C.F.R. § 260 through 40 C.F.R. § 270. 329 I.A.C. § 3.1-4-1(a). It also incorporates by reference 40 C.F.R. part 261 with certain exceptions and additions set out in 329 I.A.C. 3.1-6-2. 329 I.A.C. 3.1-6-1(b).

regenerated. 40 C.F.R. § 261.1(c)(4); 329 I.A.C. § 3.1-4-1(a); 329 I.A.C. 3.1-6-1(b).

Materials are *not* regulated as solid waste, however, "when they can be shown to be recycled by being . . . (ii) [u]sed or reused as effective substitutes for commercial products; or (iii) [r]eturned to the original process from which they are generated . . . ." 40 C.F.R. § 261.2(e)(1)(ii) and (iii); 329 I.A.C. § 3.1-6-1(b).

B. Hazardous Waste

The term "hazardous waste" means:

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may –
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5). A solid waste is regulated as a "hazardous waste," where not specifically excluded by regulation, when it either: (a) exhibits a certain characteristic of hazardous waste, namely ignitability, corrosivity, reactivity, or toxicity, defined in subpart C of part 261, or (b) is specifically listed in subpart D of part 261 as a hazardous waste. 40 C.F.R. §§ 261.3(a), 261.20 - 261.24; 329 I.A.C. § 3.1-6-1(b); 329 I.A.C. § 3.1-4-1(a).

Once a material qualifies as "hazardous waste," it is subject to the applicable requirements imposed by Subtitle C of RCRA, 42 U.S.C. §§ 6921 - 6939g, and implementing regulations. A "generator" of hazardous waste is defined as "any person, by site, whose act or process produces hazardous waste identified or listed in part 261 of this chapter or whose act first causes a hazardous waste to become subject to regulation." 40 C.F.R. § 260.10; 329 I.A.C. § 3.1-4-1(a); see, 42 U.S.C. § 6903(6). Indiana's rules for hazardous waste generators, codified at 329 I.A.C. § 3.1-7, incorporate by reference, with certain exceptions and additions, EPA's standards governing generators of hazardous waste, which are codified at 40 C.F.R. Part 262.

A person who generates a solid waste must determine if that waste is hazardous through a multi-step process. 40 C.F.R. § 262.11; 329 I.A.C. § 3.1-7-1 (incorporating by reference 40 C.F.R. part 262, with certain exceptions and additions). Before a hazardous waste is treated, stored, disposed of, transported, or offered for transportation, the generator must have an EPA identification number. 40 C.F.R. § 262.12; 329 I.A.C. § 3.1-7-2(1). Prior to the waste being transported, the generator must prepare a hazardous waste manifest. 40 C.F.R. § 262.20(a); 329 I.A.C. § 3.1-7-1.

The treatment, storage, or disposal of hazardous waste is prohibited without a permit or application for a permit. 40 C.F.R. § 270.1(c); 329 I.A.C. § 3.1-13-1[4]; *see also* 42 U.S.C. §

[4] This section of the Indiana Administrative Code incorporates by reference 40 C.F.R. part 270.

6925(a). However, generators of hazardous waste are exempt from permit requirements if they comply with certain conditions, set out in 40 C.F.R. § 261.5 for conditionally exempt small quantity generators or in part 262 for other generators, depending on the amount of hazardous waste generated or accumulated.

C. Used Oil

In 1980, Congress adopted the Used Oil Recycling Act ("UORA"), supplementing the basic requirements for hazardous waste regulation in RCRA's Subtitle C with special provisions for used oil. *See* Used Oil Recycling Act of 1980, Pub. L. No. 96-463, 94 Stat. 2055-59 (1980) (codified as amended in scattered sections of 42 U.S.C. §§ 6901-6992k). Added to the statute by UORA and later amended by the Hazardous and Solid Waste Amendments of 1984, Section 3014(a) of RCRA directs EPA to develop regulations necessary to protect the public health and the environment from hazards associated with recycled oil but "ensur[ing] that such regulations do not discourage the recovery or recycling of used oil," consistent with such protection. 42 U.S.C. § 6935(a). EPA subsequently promulgated regulations governing the management of used oil which is to be recycled, codified at 40 C.F.R. part 279. The State of Indiana adopted similar regulations at 329 I.A.C. §§ 13-1-1 *et seq.*

The term "used oil" is defined broadly 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." 40 C.F.R. § 279.1; 329 I.A.C. § 13-2-19; *see also* 42 U.S.C. § 6903(36). Used oil that is recycled and which is also a hazardous waste solely because it exhibits a hazardous characteristic, is not subject to the requirements for hazardous wastes, but instead is subject to the regulations for used oil. 40 C.F.R. §§ 261.6(a)(4), 279.10(a); 329 I.A.C. §§ 13-1-1(a), 13-3-2. On the other hand, used oil that is mixed with hazardous waste is subject to regulation as hazardous waste or as used oil, depending on certain criteria. 320 I.A.C. § 13-3-1(b); 40 C.F.R. § 279.10(b).

IV. Factual Background

On April 2, 2008, EPA inspectors including Spiros Bourgikos, the lead inspector, and Sue Brauer, conducted an inspection of Respondent's automobile scrap recycling facility at 6901 West Chicago Avenue, Gary, Indiana (the "Site"), to evaluate compliance with used oil and hazardous waste regulations. Motion, Exhibits ("CX") 6, 7; Motion, Attachment 1, Declaration of Sue Brauer ("Brauer Decl."); Motion, Attachment 2, Declaration of Spiros Bourgikos ("Bourgikos Decl."). On March 18, 2009, they inspected the Site again to determine compliance with RCRA, review progress or changes at the facility since the April 2 inspection, and collect samples for analysis. Bourgikos Decl. ¶ 7.

They observed that Respondent operated two vehicle crushers at the Site, and that a vehicle shredder was on the Site on March 18, 2009. They noted that before automobiles were placed in the crusher, Respondent removed the gasoline from them in a "gasoline recovery shed," but engine and crankcase oils, anti-freeze, transmission and power steering fluid and

windshield wiper fluid ("used automotive fluids") were collected as and after the vehicles were crushed. The collected fluids were then transferred to containers including drums. Brauer Decl. ¶ 3, 7; Bourgikos Decl. ¶¶ 8, 9.

Mr. Bourgikos observed automotive liquids collected and stored in various unmarked containers such as buckets, totes, and drums. Bourgikos Decl. ¶¶ 10, 14. The inspectors observed automotive fluids on the ground, between stacks of crushed vehicles and areas near the gasoline recovery shed. Bourgikos Decl. ¶¶ 10, 21; Brauer Decl. ¶ 8; CX 14, p. 6 and photos 23-32. Near the gasoline recovery shed on a concrete pad they observed dirt which appeared to be saturated with oil, and they saw a pool of water with an oil sheen between the crushed cars and the shredder. Bourgikos Decl. ¶ 21; Brauer Decl. ¶ 9, 10; CX 14 pp. 6, 7. They also observed puddles that appeared to contain automotive liquids. Bourgikos Decl. ¶ 11; Brauer Decl. ¶ 9; CX 14, photo 30.

During the March 18, 2009 inspection, east of Crusher #1, they saw an unmarked metal box, covered with a plastic tarp, containing a brownish liquid with an oily sheen, and two unmarked 55-gallon drums. They observed a large green tank, smaller red tank, and 39 drums which appeared to be filled with liquids, in the gasoline recovery shed. Bourgikos Decl. ¶¶ 15, 17; Brauer Decl. ¶¶ 10, 13. The green tank was in a steel box containing over one foot of a reddish color liquid, and there was a gasoline or diesel fuel smell near it. Bourgikos Decl. ¶¶ 14, 15, 17; Brauer Decl. ¶ 10; CX 14 p. 4, 6, and photos 2, 5-9. Respondent's employees informed the inspectors that the drums contained liquids from the crushed automobiles. Brauer Decl. ¶ 11.

Mr. Bourgikos observed a steel box without a top, filled with car batteries, several of which were broken with lead plates exposed. Bourgikos Decl. ¶ 16; CX 14 p. 6, photos 20-23.

Samples were taken from four of the 39 drums, and analysis of the samples revealed that they contained benzene concentrations far exceeding the regulatory level of 0.5 mg/L for the hazardous waste characteristic of toxicity. 40 C.F.R. § 261.24, table 1. One sample had a flash point of 76.9 degrees Fahrenheit, which is within the range for the hazardous waste characteristic of ignitability. Bourgikos Decl. ¶¶ 17-19; 40 C.F.R. § 261.21.

Respondent submitted responses to information requests sent by EPA. In its responses Summit admitted that the wastes it generated included used oil, antifreeze, and other fluids from the car crushing operations, and that the waste streams were collected in various containers and transferred to above-ground storage tanks and then taken off site by Beaver Oil Co., Inc. ("Beaver Oil"), using a bill of lading. Bourgikos Decl. ¶¶ 13; CX 13, answers 16, 20. In the response dated October 6, 2009, Respondent admitted that the 39 drums contained waste oils from the drain pad, which were pumped into a tank on-site and picked up by Beaver Oil, using a bill of lading. Bourgikos Decl. ¶ 20; Brauer Decl. ¶ 16, 17; CX 16, answers 7 and 8.

Respondent did not have a hazardous waste permit and had not submitted a Hazardous Waste Notification Form. Bourgikos Decl. ¶ 22.

V. Discussion, Findings and Conclusions as to Counts 1 through 4

Count 1 of the Complaint charges Respondent with failure to comply with the waste determination requirements of 329 I.A.C. § 3.1-7-1 and 40 C.F.R. § 262.11 for the 39 drums and tank into which Respondent mixed the contents of the drums.

Count 2 alleges that Summit offered hazardous waste, from the 39 drums and accumulation tank, for transportation without having received an EPA identification number, which "violated 329 I.A.C. §§ 3.1-7-1, 3.1-7-10, 3.1-7-11, 3.1-7-12 and 3.1-7-13 [40 C.F.R. § 262.12(a)]." Complaint p. 17. There is apparently a typographical error in the citations to the Indiana Administrative Code, in that the digit "7" should instead be "1," as sections 3.1-7-10, 3.1-7-11, 3.1-7-12 and 3.1-7-13 were repealed. Sections 3.1-1-10, 3.1-1-11(c), 3.1-1-12 and 3.1-1-13 of Title 329 provide, respectively, that generators, transporters and owners or operators of hazardous waste facilities are required to submit notification of hazardous waste activities unless exempt as a small quantity generator, that any person who transports or offers for transport a hazardous waste must obtain an identification number, that any person who becomes a generator must obtain an identification number, and that the identification numbers are issued by the EPA. The facts alleged in the Complaint, with the correct citation to 40 C.F.R. § 262.12(a), prohibiting, *inter alia,* a generator from transporting or offering for transportation hazardous waste without receiving an EPA identification number, gave Respondent adequate notice of the charges of violation in Count 2.

Count 3 alleges that Respondent failed to ship the hazardous waste contained in the 39 drums and accumulation tank on a required hazardous waste manifest, EPA Form 8700-22, in violation of 329 I.A.C. § 3.1-7-1 and 40 C.F.R. § 262.20(a).

In Count 4, Respondent is charged with failure to comply with conditions, codified at 40 C.F.R. §§ 261.5(g) and 262.34(g), that are necessary for a generator to qualify for an exemption from the permit requirements, and therefore stored hazardous waste without a hazardous waste permit, in violation of 40 C.F.R. § 270.1(c) (incorporated by 329 I.A.C. §§ 3.1-13-1).

Counts 1 through 4 allege that Respondent violated regulations codified at 40 C.F.R. part 262, that apply to generators of hazardous waste. 40 C.F.R. § 262.10(a). To establish these violations, Complainant must show that Respondent is a "person" who is a "generator" of "hazardous waste," and thus also a "solid waste," within the regulatory definitions. As a corporation, Respondent is a "person" as defined by RCRA regulations. 40 C.F.R. § 260.10; 329 I.A.C. § 3.1-4-20.

A. Solid Waste

The first step is to determine whether the contents of the 39 drums and accumulation tank are "solid waste." Complainant points out that in its Request for Information dated September 15, 2009, Respondent was requested to provide information about the contents of the drums from which EPA collected samples, located in the Gasoline Recovery Area, and about liquids removed from the Site on or after March 19, 2009. In its October 6, 2009 response, Summit

stated that the contents were "waste oil" which came from the drain pad and were pumped into the drums from March 5, 2009 through March 18, 2009, from which they were then pumped into a holding tank, and picked up by Beaver Oil, and that Beaver Oil picked up 3,000 gallons of oil on March 21, 2009 and recycled it at Beaver Oil's facility. Motion at 13, 15; CX 16. Complainant further points out that Beaver Oil's driver wrote on the receipt, attached to Respondent's response, that the shipment was from the pump out of 48 drums and overflow containment boxes.[5] *Id.* ; Brauer Decl. ¶ 17. Complainant notes that water was removed from the liquid by treatment at Beaver Oil and a usable oil product was recovered. Motion at 16. Complainant argues that Respondent's admission that the contents of the drums were waste oil means that they are "used oils" and "spent materials," contaminated with impurities, which were then stored at Respondent's facility prior to being "recycled" by being "reclaimed" at the Beaver Oil facility, and therefore they are "solid waste." Motion at 16.

The Declarations submitted with the Motion show that during the March 2009 inspection, the inspectors observed automotive liquids draining from the vehicles from the crushing process and being collected into containers. Bourgikos Decl. ¶¶ 9, 10; Brauer Decl. ¶ 7. Respondent admitted in its response, dated September 18, 2013, to EPA's information request that residual fluids that leak out of vehicles during Respondent's crushing process include transmission oil, power steering fluid, brake fluid, residual gas, and windshield wiper fluid. CX 13, Responses 16, 20. Ms. Brauer stated in her Declaration that during the March 2009 inspection, drums of the liquids collected from the crushing process were stored in the gasoline recovery shed. Brauer Decl. ¶¶ 7, 11. She also stated that the shipping ticket indicates that the liquids from the drums and accumulation tank were mixed at the Summit facility and shipped off-site as a mixture. Brauer Decl. ¶¶ 17 (citing CX 16; Complainant's Prehearing Exchange Exhibit 18 ("CX 18")). Thus, the documents submitted by Complainant show that the contents of the 39 drums and accumulation tank were used oil that included transmission oil, power steering fluid, brake fluid, residual gasoline, and windshield wiper fluid. Ms. Brauer stated in her Declaration that automatic transmission fluid, engine oil, brake fluid and gear oil are produced from refined crude oil and when used in automobiles, become contaminated with chemical and physical impurities such as gasoline, metals, sediments, water and antifreeze. Brauer Decl. ¶ 3.

She asserted that she is familiar with Beaver Oil through inspections at its Hodgkins, Illinois facility that she participated in. Brauer Decl. ¶ 4. She stated that Beaver informed her that the 3,000 gallons picked up from Respondent's facility on March 21, 2009 was pumped into Tank 32 at the Beaver Oil facility and recycled. Brauer Decl. ¶ 18. She determined from her review of Beaver Oil documents that that Tank 32 separates water from oil by heat, and "[t]he oil is then transferred to on-site fuel tanks or is processed further before transfer to fuel tanks." *Id.* She stated that Beaver Oil treats and discharges the aqueous portion, and resultant sludge is shipped off site for land disposal, and that Beaver Oil adds acid to break oil-water emulsions, and "[t]he oil portion is sold by the [Beaver Oil] Hodgkins facility as oil or used oil or transferred to Beaver Oil's Gary Indiana used oil processor facility for further blending, including into fuel." *Id.* ¶ 19. She determined from Beaver Oil's invoice to Summit, number 152262, that 750 gallons of oil and 2,250 gallons of water were removed from the total of 3,000 gallons shipped from Summit on March 21, 2009. Brauer Decl. ¶ 18 (citing CX 16).

[5] There were drums and containment boxes at the Site other than those in the gasoline recovery shed. Bourgikos Decl. ¶¶ 14, 15; Brauer Decl. ¶¶ 7, 10.

These facts as stated in the Declarations and shown in Complainant's exhibits establish that the liquids in the 39 drums and the accumulation tank were used automotive fluids that were contaminated and thus can no longer serve the purposes as motor fuel, motor oil, transmission fluid, brake fluid and windshield wiper fluid for which they were produced without processing, and therefore were "spent material" under the applicable definitions. 40 C.F.R. § 261.1(c)(1), 329 I.A.C. § 3.1-4-1(a), 329 I.A.C. 3.1-6-1(b).

The Declaration of Ms. Brauer shows that Beaver Oil processed the spent material from Summit to recover oil. Brauer Decl. ¶¶ 18, 19. The spent material from Summit was therefore "processed to recover a usable product," meeting the definition of "reclaimed." 40 C.F.R. § 261.1(c)(4); 329 I.A.C. § 3.1-4-1(a); 329 I.A.C. 3.1-6-1(b). As a "spent material" which was accumulated and stored at Respondent's facility before recycling by "reclamation," the liquid from the 39 drums and the accumulation tank was "recycled" material and "discarded material" that meets the regulatory definition of solid waste. 40 C.F.R. §§ 261.2(a)(2)(ii), 261.2(c) & Table 1; 329 I.A.C. § 3.1-4-1(a); 329 I.A.C. 3.1-6-1(b).

Respondent in its Answer denies that the liquid from the 39 drums and the accumulation tank are solid wastes, asserting that "[r]ecovered fluids stored in tanks and drums are products sold as substitutes for commercial products." To prevail on this argument, Respondent must meet the corresponding regulatory provision, that materials are not solid wastes "when they can be shown to be recycled by being . . . (ii) [u]sed or reused as effective substitutes for commercial products." 40 C.F.R. § 261.2(e)(1)(ii). This provision is incorporated by reference in the Indiana Administrative Code by 329 I.A.C. § 3.1-6-1(b). *See also*, 329 I.A.C. 3.1-6-5(a)(1) ("A secondary material that causes no significant increase in the threat posed to human health or the environment as defined in subsection (e)(4) is not a solid waste if it: (1) does not meet the definition of solid waste under 40 C.F.R. 261.2(e) . . . ."). In addition, Respondent must meet the following condition:

> Respondents ... who raise a claim that a certain material is not a solid waste ... must demonstrate that there is a known market or disposition for the material and that they meet the terms of the exclusion or exemption. In doing so, they must provide appropriate documentation to demonstrate that the material is not a waste or is exempt from regulation. An example of appropriate documentation is a contract showing that a second person uses the material as an ingredient in a production process. In addition, owners or operators of facilities claiming that they actually are recycling materials must show that they have the necessary equipment to do so.

329 I.A.C. § 3.1-6-2. *See also,* 40 C.F.R. § 261.2(f) (same requirement).

The only documents Respondent submitted in support of its case are those attached to its Answer, as follows:

(1) A letter dated December 15, 2011 ("December 2011 Letter) from Summit to Indiana Department of Environmental Management ("IDEM"), responding to a Violation Letter

from IDEM;

(2) Emails, dated in January and July 2012, between Joyce Casillas of Environmental Process Technologies, Inc. and Randy Braun of IDEM, referring to storm water issues;

(3) A Violation Letter, dated November 18, 2011, from IDEM to Summit, regarding an IDEM inspection on October 7, 2011, with attached Description of Violations and Further Actions, and photographs.

Respondent reflects in the December 2011 Letter the findings by IDEM in the Violation Letter that the facility had achieved compliance with "fluids management," including spills and releases, and had updated its Spill Prevention Control and Countermeasure Plan ("SPCC Plan") for storage of oil under the Clean Water Act. The December 2011 Letter and Violation Letter also discuss violations found regarding storm water, polychlorinated biphenyls (PCBs), waste tires, mercury switches, and refrigerants. None of these documents support Summit's assertion that recovered fluids are sold as commercial products. Respondent does not offer any affidavit or other document in support of its defense; even the summaries of witness testimony in Summit's Prehearing Exchange do not refer to products from the recovered fluids. Therefore, Respondent has not provided any support for its asserted defense, despite having been required by the Prehearing Order, dated June 10, 2014, to do so, and despite having been served with the Motion, upon which, the Rules of Practice provide, a party who fails to respond waives any objection to the granting of the motion. 40 C.F.R. § 22.16(b); FRCP 56(e)(3).

The documentation provided by Complainant shows that the liquids at issue in Counts 1 through 4 were "processed to recover a usable product" and thus "reclaimed" (40 C.F.R. § 261.1(c)(4)). The documentation does not show that oil reclaimed from the liquids at issue was used or reused as "effective substitutes for commercial products." The available evidence, namely the Declaration of Ms. Brauer, indicates merely that Beaver Oil reclaimed oil and then sold it, or blended it, and that some of this is blended for fuel. Motion at 17-18; Brauer Decl. ¶ 19. Even if the reclaimed oil could be considered as an effective substitute for a commercial product, it would nevertheless be a solid waste if the oil is burned for energy recovery, or used to produce a fuel, or contained in fuels, according to the following regulatory provision:

> The following materials are regulated as solid wastes, even if the recycling involves use, reuse, or return to the original process (described in paragraphs [40 C.F.R. 261.2](e)(1)(i) through (iii) of this section:
>
> * * *
>
> (ii) materials burned for energy recovery, used to produce a fuel, or contained in fuels;
>
> * * * *

40 C.F.R. § 261.2(e)(2), 329 I.A.C. § 3.1-6-1(b).

Accordingly, Respondent's defense fails, and it is concluded that the liquids at issue in Counts 1 through 4 are "solid waste." *Rogers Corp. v. EPA*, 275 F.3d at 1103.

B. Hazardous Waste

The next step is determining whether those liquids, namely the contents of the 39 drums and accumulation tank, were "hazardous waste."

The samples from four of the 39 drums were analyzed and found to have benzene concentrations of 4.3 mg/L, 14.2 mg/L, 213 mg/L, and 1,080 mg/L, all of which exceed the regulatory level of 0.5 mg/L for the characteristic of toxicity. Bourgikos Decl. ¶¶ 17-19; 40 C.F.R. § 261.24, table 1; 329 I.A.C. § 3.1-6-19(b). One of the four samples also had a flash point of 76.9 degrees Fahrenheit, which meets the characteristic for ignitability, namely, a flash point of less than 140 degrees Fahrenheit. Bourgikos Decl. ¶¶ 17-19; 40 C.F.R. § 261.21; 329 I.A.C. § 3.1-6-19(b). The contents of these drums were not merely "used oil" which had a hazardous waste characteristic, and which would be regulated as used oil under part 279 rather than as hazardous waste. 40 C.F.R. 261.6(a)(4); *see*, 329 I.A.C. § 13-3-1(a). Used oil is defined as such on the basis of being contaminated by impurities "as a result of . . . use." 40 C.F.R. § 279.1, 329 I.A.C. § 13-2-19. The liquids in the four drums not only contained oil with impurities from their use in vehicles, but also were mixed with other substances. Respondent admitted that the fluids collected from the car crushing process included not only transmission oil, brake fluid, and power steering fluid, which would appear to be oils, but also residual gasoline and windshield wiper fluid. CX 13, answers 16 and 20. Ms. Brauer stated that used engine oil is typically black in color, and red-dyed diesel fuel and automatic transmission fluid is reddish, and that she observed that one of the four samples from the drums contained a reddish oily liquid above a "yellow-green antifreeze-appearance liquid" and another sample had a light brown color. Brauer Decl. ¶¶ 10, 13. She stated that Summit's employees told her that Summit does not separate anti-freeze from other engine oil liquids. Brauer Decl. ¶ 11.

The regulations provide that "[a] solid waste . . . is a hazardous waste if . . . [i]t exhibits any of the characteristics of hazardous waste of hazardous waste identified in subpart C of this part," and "[m]ixtures of used oil and hazardous waste that solely exhibit one or more of the hazardous waste characteristics . . . are subject to . . . regulation as hazardous waste . . . rather than as used oil . . . if the resultant mixture exhibits any characteristics of hazardous waste identified in subpart C of part 261." 40 C.F.R. §§ 261.3(a)(2)(i), 279.10(b)(2)(i); 329 I.A.C. § 13-3-1(b)(2) ("Used oil mixed with characteristic hazardous waste . . . is subject to 329 IAC 3.1" (which, at 329 I.A.C. § 3.1-6-1(b), incorporates 40 C.F.R. part 261)). It is concluded that the contents of the four sampled drums were used oil mixed with other automotive fluids, and were characteristic hazardous wastes under the applicable regulations.

The contents of the four drums were mixed with the contents of the other 35 drums when pumped into the accumulation tank. Brauer Decl. ¶ 16, 17; CX 16, answers 7 and 8. There is no information in the case file as to any sampling or analysis of this mixture or of the other 35 drums.

Complainant asserts that the 3,000 gallons that Beaver Oil transported from Summit's facility on March 21, 2009 contained characteristic hazardous waste and thus should have been handled as hazardous waste. Complainant argues that "[a] mixture of a characteristic hazardous waste with a non-hazardous waste is a hazardous waste" and therefore "[t]he mixture of the

benzene characteristic hazardous waste in the 4 drums with the remaining liquids in the accumulation tank was . . . characteristic hazardous waste." Motion at 18-19 (citing 329 I.A.C. § 3.1-6-1(b) and 40 C.F.R. § 261.3(b)(3), (c)(1) and (d)). Because Respondent did not submit any sampling data for that shipment, Complainant argues, Summit "did not meet its burden to demonstrate that the resultant mixture did not exhibit the benzene characteristic," citing *American Chemistry Council v. EPA*, 337 F.3d 1060, 1065 (D.C. Cir. 2003). Motion at 19.

The portions of the federal regulations incorporated by 329 I.A.C. § 3.1-6-1(b) and cited by Complainant provide as follows, in pertinent part:

> §261.3 Definition of a hazardous waste.
> * * *
> (b) A solid waste . . . becomes a hazardous waste when any of the following events occur:
> (1) In the case of a waste listed in subpart D of this part, when the waste first meets the listing description set forth in subpart D of this part.
> (2) In the case of a mixture of solid waste and one or more listed hazardous wastes, when a hazardous waste listed in subpart D is first added to the solid waste.
> (3) In the case of any other waste (including a waste mixture), when the waste exhibits any of the characteristics identified in subpart C of this part.
>
> (c) Unless and until it meets the criteria of paragraph (d) of this section:
> (1) A hazardous waste will remain a hazardous waste.
> * * *
> (d) Any solid waste described in paragraph (c) of this section is not a hazardous waste if it meets the following criteria:
> (1) In the case of any solid waste, it does not exhibit any of the characteristics of hazardous waste identified in subpart C of this part. (However, wastes that exhibit a characteristic at the point of generation may still be subject to the requirements of part 268 [land disposal restrictions] even if they no longer exhibit a characteristic at the point of land disposal.)
> (2) In the case of a waste which is a listed waste under subpart D of this part, contains a waste listed under subpart D of this part or is derived from a waste listed in subpart D of this part, it also has been excluded from paragraph (c) of this section under §§ 260.20 and 260.22 of this chapter.

40 C.F.R. § 261.3(b), (c), (d).

The regulations clearly distinguish mixtures of solid wastes and *listed* hazardous wastes (under subpart D of part 261) from mixtures of solid wastes and *characteristic* hazardous wastes (under subpart C of part 261). While paragraph (b) Section 261.3 provides that a listed hazardous waste added to a solid waste renders the mixture a hazardous waste, there is no parallel provision for a characteristic hazardous waste added to a solid waste. Under Section 261.3(b), where there is no listed hazardous waste involved, a waste mixture is hazardous when the mixture itself has a characteristic of toxicity, ignitability, corrosivity, or reactivity under subpart C. Paragraph (c)(1) read together with paragraph (d)(2) specifies that a listed hazardous

waste, or a waste mixed with a listed hazardous waste or derived from a listed hazardous waste, remains a hazardous waste unless and until it has been excluded for a particular facility by a process of petition to the EPA Administrator. Paragraph (c)(1) read together with paragraph (d)(1) means that a characteristic hazardous waste will remain a hazardous waste unless and until it no longer exhibits any of the subpart C characteristics, such as when it is mixed with other substances. Similarly, the regulations provide that a mixture of a solid waste and a hazardous waste that is a listed under subpart D "solely because it exhibits one or more characteristics of ignitability . . . corrosivity . . . or reactivity . . ., is not a hazardous waste if the waste no longer exhibits any characteristic of hazardous waste identified in subpart C . . . ." 40 C.F.R. § 261.3(g)(1), (g)(2)(i).

The regulations governing used oil, in part 279, include analogous provisions, in pertinent part:

> (b) *Mixtures of used oil and hazardous waste—*
> (1) Listed hazardous waste. (i) Mixtures of used oil and hazardous waste that is listed in subpart D of part 261 . . . are subject to regulation as hazardous waste . . . .
> (2) Characteristic hazardous waste. Mixtures of used oil and hazardous waste that solely exhibit one or more of the hazardous waste characteristics identified in subpart C of part 261 . . . are subject to:
>
> > (i) . . . regulation as hazardous waste . . . if the resultant mixture exhibits any characteristics of hazardous waste identified in subpart C of part 261 . . .; or
> > (ii) . . . regulation as used oil under this part, if the resultant mixture does not exhibit any characteristics of hazardous waste identified under subpart C of part 261 . . . .

40 C.F.R. § 279.10(b). The Indiana used oil regulations provide a similar distinction, as 329 I.A.C. § 13-3-1(b) specifies that mixtures of used oil with a listed hazardous waste "are subject to regulation as hazardous waste under 329 IAC 3.1 rather than as used oil," but states that used oil mixed with characteristic hazardous waste "is subject to 329 IAC 3.1," which incorporates 40 C.F.R. part 261 (329 I.A.C. § 3.1-6-1(b)).

Congruously, the definition of hazardous waste in Paragraph 261.3(a) does not include a mixture of a solid waste with a *characteristic* hazardous waste, but it does include "a mixture of solid waste and one or more hazardous wastes listed in subpart D." 40 C.F.R. § 261.3(a)(2)(iv). In the case cited by Complainant, *American Chemistry Council,* the U.S. Court of Appeals for the D.C. Circuit upheld this "mixture rule" for listed hazardous wastes, and included in its opinion the following broad language:

> [B]ecause many mixtures of and derivatives from hazardous wastes are themselves hazardous, it is reasonable for the EPA to assume that all such mixtures and derivatives are hazardous until shown otherwise . . . . Placing the burden upon the regulated entity to show the lack of a hazardous characteristic in a mixture or derivative it manages avoids placing upon the EPA what the agency persuasively describes as 'the nearly impossible affirmative burden of anticipating and analyzing, in a listing decision, the hazardousness or non-hazardousness [of] every conceivable mixture or derivative that a generator might

create.

337 F.3d at 1065. This passage of the opinion, read alone, might suggest that all mixtures of solid and hazardous wastes are deemed hazardous waste, and therefore that the regulated entity has the burden to show that a mixture containing a characteristic hazardous waste no longer exhibits a hazardous waste characteristic. However, read in context of the court's opinion, the court recognized the distinction between listed and characteristic hazardous wastes, and merely upheld the regulatory provisions concerning mixtures and derivatives of *listed* hazardous waste, without ruling on or addressing mixtures of a characteristic hazardous waste with other wastes.

In promulgating Section 261.3, EPA explained in the preamble that "[w]aste mixtures containing only wastes which meet the characteristics are treated just like any other solid waste, *i.e.*, they will be considered hazardous only if they exhibit the characteristics." 45 Fed. Reg. 33,084, 33,095 (Final Rule, May 19, 1980). Noting that "it would no doubt encourage some desirable mixing of wastes," EPA conceded that some of these wastes may "escape regulation merely by being mixed with other wastes or other materials" but it knew of "no solution to this problem which did not create major inconsistencies in the way wastes are determined to be hazardous under Subpart C of this regulation." *Id.*

Under the applicable rules, and on a motion for accelerated decision, EPA has the burden to show that there are no genuine issues of material fact, and as a matter of law, the wastes at issue were hazardous wastes at the times relevant to the particular allegations of violation. There is no question that the contents of the four drums which were sampled met the criteria for characteristic hazardous waste. However, there is no evidence in the case file that the other 35 drums contained hazardous waste. The facts must be viewed, and reasonable inferences drawn, in favor of Respondent on Complainant's motion for accelerated decision. *Gentile v. Nulty*, 769 F. Supp. 2d at 577. No inference can be drawn that the other 35 drums contain waste similar to the four sampled drums and thus also contain characteristic hazardous waste, particularly where the concentration level of benzene among the four samples varied widely, only one sample met the ignitability characteristic, and not all drums were filled with liquid, as the Complaint alleges that "*most* of [the 39 drums] appeared to be filled with a liquid." Complaint ¶ 58 (emphasis added). Moreover, two of the samples were very different in appearance, according to Ms. Brauer's observations. Brauer Decl. ¶ 13.

As the accumulation tank contained a mixture of the characteristic hazardous wastes from the four sampled drums with the contents of other drums, the tank therefore contained a mixture of solid wastes with characteristic hazardous waste. As such, just like any other solid waste, the mixture is a hazardous waste only if the mixture meets a characteristic in subpart C of the regulations. 40 C.F.R. §§ 261.3(b)(3), 261.3(d)(1), 279.10(b)(2). The applicable rules do not create any presumption that such a mixture is a hazardous waste, and do not shift the burden to the Respondent to show that it is not. There is no evidence in the case file that the contents of the tank exhibited any characteristic of hazardous waste under subpart C. Consequently, Complainant has not shown that the mixture in the tank is a hazardous waste.

C. Generator

Nevertheless, as some of the allegations of violation do not depend on a finding that the accumulation tank contained hazardous waste, the analysis continues. The term "generator" is defined as "any person, by site, whose act or process produces hazardous waste identified or listed in part 261 of this chapter or whose act first causes a hazardous waste to become subject to regulation." 40 C.F.R. § 260.10; 329 I.A.C. § 3.1-4-1(a).

Complainant asserts that Respondent is a hazardous waste generator on the basis of generation of the used automotive liquids by automobile crushing, liquid collection and accumulation in containers, and mixture of the liquids in the accumulation tank. Motion at 19.

The documents in the case file establish that automotive fluids were contained in the automobiles when they arrived at Respondent's facility, and Respondent removed the gasoline before the vehicles were placed in the crusher, collected the other automotive fluids as and after the vehicles were crushed, and transferred the fluids to drums. Brauer Decl. ¶ 3, 7, 11; Bourgikos Decl. ¶¶ 8, 9; CX 13, Responses 16, 20. Collection of these used automotive fluids, which were spent materials, by the process of crushing the vehicles, and accumulating or storing them before recycling by reclamation, rendered them subject to regulation as solid wastes. 40 C.F.R. §§ 261.1(c)(1) and (c)(4), 261.2(c); 329 I.A.C. § 3.1-4-1(a), 329 I.A.C. 3.1-6-1(b). Such fluids that were contained in the four drums which were sampled were hazardous waste, and thus Respondent's act or process of crushing the vehicles and accumulating these fluids first caused them to become subject to regulation as hazardous waste. Consequently, it is concluded that Respondent is a generator of hazardous waste.

D. Count 1

Having shown that Respondent is a person who is a generator of hazardous waste, as to Count 1 Complainant must show in addition that Respondent failed to comply with the waste determination requirement of 40 C.F.R. § 262.11 (incorporated into the state regulations by 329 I.A.C. § 3.1-7-1), for the 39 drums and tank into which Respondent mixed the contents of the drums. This requirement applies whether or not Respondent is deemed a conditionally exempt small quantity generator. 40 C.F.R. § 261.5(g)(1).

Section 262.11 provides as follows:

> A person who generates a solid waste, as defined in 40 CFR 261.2, must determine if that waste is a hazardous waste using the following method:
>
> (a) He should first determine if the waste is excluded from regulation under 40 CFR 261.4.
>
> (b) He must then determine if the waste is listed as a hazardous waste in subpart D . . . .
>
> (c) For purposes of compliance with 40 CFR part 268, or if the waste is not listed in subpart D . . ., the generator must then determine whether the waste is identified in subpart C . . . by either:

(1) Testing the waste according to the methods set forth in subpart C . . . or
(2) Applying knowledge of the hazard characteristic of the waste in light of the materials or the processes used.

* * * *

Pointing to Summit's October 2009 response to EPA's information request, Complainant asserts that Summit did not have any waste determination related to the 39 drums or for the mixture in the accumulation tank, but relied on Beaver Oil to analyze the wastes. The information request directed Respondent to provide a copy of all waste determinations from March 19, 2009 on, and Summit's response did not enclose any such copies, but merely stated that it "believes that Beaver Oil possesses all relevant waste determinations." CX 16, answer 2. Complainant states that it is irrelevant that another entity analyzed the waste where the generator has the responsibility under the regulations, and in any event, Beaver Oil had no analysis for the shipment at issue and the analyses it did have were not adequate for a number of reasons.

As a person who generates a solid waste as defined in the regulations, Respondent was required to determine if the waste is a hazardous waste. 40 C.F.R. § 262.11. Because used automotive fluid waste sampled at Respondent's facility was found to be a characteristic hazardous waste and thus subject to the regulations in part 262, there is no question that Respondent was required to make the determination as to whether the used automotive fluid waste exhibited a hazardous characteristic. *See,* 45 Fed. Reg. at 33,096 ("As a practical matter, . . . persons handling solid wastes must determine whether they meet the characteristics whenever the management of the solid wastes would potentially be subject to EPA's Part 262 through 265 regulations."). Respondent admitted in its September 18, 2008 response to EPA's request for information that it had not determined whether automotive liquids from scrap vehicles are hazardous waste and that it had not characterized the fluids from the drip pad and storage tank. CX 13, answers 12, 20. Respondent has not pointed to any information that would raise a genuine issue of material fact as to whether it made any hazardous waste determination.

Accordingly, it is concluded that there is no genuine issue of material fact as to Count 1, and as a matter of law, Respondent failed to determine whether waste at its facility was hazardous waste, in violation of 40 C.F.R. § 262.11 (incorporated in 329 I.A.C. § 3.1-7-1).

E. Counts 2 and 3

Counts 2 and 3 allege that Summit offered hazardous waste, from the 39 drums and accumulation tank, for transportation without having received an EPA identification number and without a hazardous waste manifest, EPA Form 8700-22, in violation of 40 C.F.R. § 262.12(a). and 40 C.F.R. § 262.20(a), as incorporated in 329 I.A.C. § 3.1-7-1. Section 262.12 prohibits a generator from offering for transportation hazardous waste without having received an identification number. Section 262.20(a) requires a generator who offers for transportation hazardous waste for offsite treatment, storage or disposal to prepare a manifest.

The waste which Respondent offered for transportation, namely the contents of the 39 drums mixed together with contents of the accumulation tank, was a mixture of solid waste and

characteristic hazardous waste, and the mixture has not been shown to be a hazardous waste under the regulations, as discussed above. Consequently, Complainant has not demonstrated that it is entitled to judgment as a matter of law with respect to Counts 2 and 3 of the Complaint.

F. Count 4

Count 4 alleges that Respondent failed to comply with conditions, codified at 40 C.F.R. §§ 261.5(g) and 262.34, that are necessary for a generator to qualify for an exemption from the permit requirements, and therefore stored hazardous waste without a hazardous waste permit, in violation of 40 C.F.R. § 270.1(c) (incorporated by 329 I.A.C. §§ 3.1-13-1).

Section 3005 of RCRA authorizes EPA to promulgate regulations requiring each person owning or operating a facility for the treatment, storage or disposal of hazardous waste to have a permit. Accordingly, Section 270.1(c) of Title 40 provides that "[o]wners and operators of hazardous waste management units must have permits during the active life . . . of the unit." A hazardous waste management unit is "a contiguous area of land on or in which hazardous waste is placed, or the largest area in which there is significant likelihood of mixing hazardous waste constituents in the same area." 40 C.F.R. § 260.10; 329 I.A.C. §§ 3.1-1-7, 3.1-4-1. An example of a hazardous waste management unit is a container storage area, which "includes containers and the land or pad upon which they are placed." *Id.* A "container" is defined as "any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled" and thus would include a 55-gallon drum. 40 C.F.R. § 279.1; 329 I.A.C. § 13-2-4. The term "facility" is defined, in pertinent part, as "[a]ll 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; 329 I.A.C. § 3.1-4-1(a). "Storage" is defined as "the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed, or stored elsewhere." 40 C.F.R. § 260.10; 329 I.A.C. § 3.1-4-1; *see also* 42 U.S.C. § 6903(33).

The Complaint alleges specifically that "[t]he area where the 39 drums and the accumulation tank were stored on-site was a hazardous waste management unit" and Summit was an owner or operator of a hazardous waste storage facility with a hazardous waste storage unit as defined by the regulations, 329 I.A.C. § 3.1-4-1 and 40 C.F.R. § 260.10. Complaint ¶¶ 102-104. Because Respondent did not have a permit to operate such a unit, and did not qualify for a permit exemption, the Complaint alleges, Respondent was in violation of Section 270.1(c). Complaint ¶¶ 105, 113. It alleges that Respondent did not qualify for a permit exemption because it failed to label containers with the words "Hazardous Waste" as required by 40 C.F.R. § 262.34(a)(3) and 262.34(d), arranged for shipment of the contents of the accumulation tank as non-hazardous waste, failed to conduct weekly inspections of the areas where containers were stored as required by 40 C.F.R. § 265.174, did not have a contingency plan as required by 40 C.F.R. §§ 262.34(a)(4), 265.51 and 265.53, and did not conduct training for its employees and document it as required by 40 C.F.R. §§ 262.34(a)(4) and 265.16(a)-(d). These federal requirements are incorporated by reference in the state regulations by 329 I.A.C. §§ 3.1-7-1 and 3.1-10-1.

The first question is whether these conditions applied to Respondent. Although the four drums contained characteristic hazardous waste, it nevertheless would be regulated as used oil rather than as hazardous waste if it constituted conditionally exempt small quantity generator hazardous waste and met certain requirements. The Indiana regulations at 329 I.AC. § 13-3-1(b) and federal regulations at 40 C.F.R. § 279.10 identify which materials are regulated as used oil and which materials are regulated as hazardous waste, and provide that "[m]ixtures of used oil and conditionally exempt small quantity generator hazardous waste regulated under 40 CFR 261.5, revised as of July 1, 2005, are subject to regulation as used oil under this article." 329 I.AC. 13-3-1(b)(3); 40 C.F.R. § 279.10(b)(3)(almost identical). Section 261.5 identifies a "conditionally exempt small quantity generator" as follows: "a generator is a conditionally exempt small quantity generator in a calendar month if he generates no more than 100 kilograms of hazardous waste in that month." 40 C.F.R. § 261.5(a). Such a generator is not subject to requirements of 40 C.F.R parts 262 through 266 and 270 for that waste, provided it complies with requirements of 40 C.F.R. § 261.5(f),[6] 261.5(g) and (j). 40 C.F.R. § 261.5(b). Paragraph (g) requires compliance with the waste determination requirements of Section 262.11 and allows accumulation of no more than a total of 1,000 kilograms of hazardous wastes on site. Paragraph (j) provides that wastes mixed with used oil are required to comply with the used oil requirements of part 279.

As concluded above as to Count 1, Respondent did not make a determination of whether its wastes were hazardous, and thus failed to comply with 40 C.F.R. § 262.11 and thereby failed to qualify as a conditionally exempt small quantity generator. 40 C.F.R. 261.5(g). Furthermore, the documents in the case file indicate that Respondent generated more than 100 kilograms of hazardous waste in the month of March 2009. Respondent stated in a response to EPA's information request that waste oil was pumped from March 5 through March 18, 2009 into the drums that were observed and sampled by the inspectors on the latter date. CX 16, response 8. Therefore, the evidence shows that Respondent accumulated in those 13 days the contents of the four 55-gallon drums that contained characteristic hazardous waste. Official notice is taken that the weight of 220 gallons of water is 833 kg, and the weight of 220 gallons of petroleum motor oil is 726 kg. Even if the drums were only 25 percent full of liquid, Respondent generated more than 100 kilograms of hazardous waste in one month at the time of the March 2009 inspection. In addition, as discussed below as to Count 5, Respondent was not in compliance with used oil requirements of part 279. It is concluded that the contents of the four sampled drums were subject to regulation as hazardous waste.

Respondent therefore was required to comply with the requirements of Section 262.34, which sets conditions regarding the accumulation of hazardous waste. Paragraph (a) provides in part as follows:

> (a) . . . [A] generator may accumulate hazardous waste on-site for 90 days or less without a permit . . . provided that:
> (1) The waste is placed:
> (i) In containers and the generator complies with the applicable requirements of subparts I . . . of 40 C.F.R. part 265;
> ****

[6] Subparagraph (f) concerns acute hazardous wastes and is inapplicable here.

(3) While being accumulated on-site, each container and tank is labeled or marked clearly with the words "Hazardous Waste"; and
(4) The generator complies with the requirements for owners or operators in Subparts C and D in 40 CFR part 265, [and] with § 265.16 ****.

40 C.F.R. § 262.34(a).

Paragraph (d) governs generators of more than 100 kg but less than 1,000 kg of hazardous waste in a month and who accumulate the waste for 180 days or less, and never more than 6,000 kg. Such generators are similarly required to mark containers and tanks as "Hazardous Waste" under paragraph 262.34(a)(3) and comply, *inter alia,* with the requirements of subpart I of part 265. 40 C.F.R. § 262.34(d)(1), (2) and (4). Such generators are not, however, required to comply with subpart D of part 265 or with Section 265.16. See, 40 C.F.R. § 262.34(d)(4).

A requirement of Subpart I of part 265 referenced in the Complaint is Section 265.174, which states that the "owner or operator must inspect areas where containers are containers are stored, at least weekly, looking for leaks and for deterioration caused by corrosion or other factors." 40 C.F.R. § 265.174. In his Declaration, Mr. Bourgikos stated that he observed during the March 2009 inspection that Summit did not have any records of having conducted weekly inspections, and that it did not appear that it had conducted an inspection since used oil and other automotive liquids appeared to have been on the ground for a period of time, broken batteries were kept in an open container, and drums were stored without labels and without any space between them. Bourgikos Decl. ¶ 25. He and Ms. Brauer stated that they observed during the March 2009 inspection that the 39 drums were not marked with the words "Hazardous Waste" or "Used Oil." *Id.* ¶ 17; Brauer Decl. ¶ 13. While Respondent asserted in its Answer that "Used Oil" labels on used oil tanks and drums "are in place" as evidenced by IDEM's inspection in October 2011, there is no assertion or evidence that the labels were on the containers at the time of the March 2009 EPA inspection.

The evidence in the case file shows that at the time of the March 2009 inspection, Respondent failed to mark containers as hazardous waste and failed to conduct weekly inspections, and thus did not comply with conditions of Section 262.34(a)(1)(i), (a)(3), (d)(2) and (d)(4), for accumulating hazardous waste on-site without a permit. It is not necessary for purposes of ruling on this Motion to reach the issues of whether Respondent generated more than 1,000 kg of hazardous waste in March 2009 and was therefore also required to have a contingency plan under Part 265 Subpart D and to conduct employee training under Section 265.16.

To establish a violation of Section 270.1(c), Complainant must show that Respondent is an "owner or operator" of a "hazardous waste management unit." There is no dispute that Respondent is an "owner or operator" of the Summit facility, did not have a hazardous waste permit, and stored the four drums of hazardous waste in the gasoline recovery shed. Bourgikos Decl. ¶¶ 5, 15, 17; Brauer Decl. ¶¶ 10, 13; CX 13 answers 2, 3. The gasoline recovery shed therefore constitutes a hazardous waste management unit in a hazardous waste facility. 40 C.F.R. § 260.10; 329 I.A.C. § 3.1-4-1.

It is concluded that there are no genuine issues of material fact and that Complainant is entitled to judgment as a matter of law that Respondent stored hazardous waste without a permit, in violation of 40 C.F.R. § 270.1(c) (incorporated by 329 I.A.C. §§ 3.1-13-1).

VI. Discussion, Findings and Conclusions as to Counts 5 and 6

The Complaint concludes in Count 5 that "Respondent's failure to store used oil in containers marked with the words 'Used Oil' violated I.A.C. § 3.13-4-3(d) [40 CFR 40 CFR § 279.22(c)(1)]" (sic). Count 6 states that "Respondent's failure to stop the release, contain the released used oil, clean up and properly manage the released used oil and other materials, and, if necessary, repair or replace any leaking used oil storage containers or tanks prior to returning them violated 329 IAC § 3.13-4-3(e)(1)-(5) [40 CFR 40 CFR §§ 279.22(d)(1)-(4)]" (sic). These citations contain typographical errors, but the errors are of no consequence. The citations to the Indiana Administrative Code should read "329 I.A.C. § 13-4-3(d)" and "329 I.A.C. § 13-4-3(e)(1)-(5)," which are almost identical to 40 C.F.R. § 279.22(c)(1) and (d). The facts alleged in the Complaint, with the correct citations to 40 C.F.R. § 279.22(c)(1) and (d), gave Respondent adequate notice of the charges of violations in Counts 5 and 6.

A. Count 5

Count 5 of the Complaint alleges specifically that on March 18, 2009, the EPA inspectors observed 55-gallon drums, including the 39 drums, and an accumulation tank, that were not marked with the words, "Used Oil." The Complaint alleges further that the inspectors also observed "a box containing liquids with an oil sheen . . . that was not labeled," located east of Crusher #1. Complaint ¶¶ 56, 116.

Complainant explains in the Motion that before the automotive fluids were mixed together in the accumulation tank, the four sampled drums contained hazardous waste and should have been labeled as such, and the remaining 35 drums contained, and were required to be labeled as, used oil. In addition, Complainant argues that the large green tank and small red tank near the gasoline recovery area contained used oil and were not labeled as such. Motion at 23. Complainant does not reference in its Motion the metal box east of Crusher # 1.

The regulations provide in pertinent part that "Containers and aboveground tanks used to store used oil at generator facilities must be labeled or marked clearly with the words 'Used Oil.'" 329 I.A.C. § 13-4-3(d)(1); 40 C.F.R. § 279.22(c)(1). To establish a violation of Count 5, Complainant must show that: (a) Respondent's facility is a used oil "generator facility," (b) which stored used oil in containers and/or aboveground tanks, (c) that were not labeled or marked clearly as "Used Oil."

As noted above, the documents submitted by Complainant show that the 39 drums and accumulation tank contained used oil that included transmission oil, power steering fluid, brake fluid, residual gasoline, and windshield wiper fluid. CX 13, Responses 16, 20; CX 16. The contents of the 35 drums that were not sampled have not been shown to exhibit a hazardous waste characteristic, and therefore are subject to the used oil regulations. 329 I.A.C. § 13-3-1;

40 C.F.R. 279.10(b)(2)(ii). A "used oil generator" is defined as "any person, by site, whose act or process produces used oil or whose act first causes used oil to become subject to regulation." 40 C.F.R. § 279.1; 329 I.A.C. §§ 13-4-1(a), 13-2-24. The documents in the case file establish that automotive fluids were contained in the automobiles when they arrived at Respondent's facility, and Respondent collected the automotive fluids as and after the vehicles were crushed, and transferred the fluids to drums. Brauer Decl. ¶ 3, 7, 11; Bourgikos Decl. ¶¶ 8, 9; CX 13, Responses 16, 20. Collection of these fluids by the process of crushing the vehicles rendered them subject to regulation as used oil. 40 C.F.R. §§ 261.1(c)(1) and (c)(4), 261.2(c); 329 I.A.C. § 3.1-4-1(a), 329 I.A.C. 3.1-6-1(b). Therefore, Respondent was a "used oil generator" and the site at issue was a "generator facility."

As discussed above as to Count 4, the inspectors' observations during the March 2009 inspection that the 39 drums were not marked with the words "Hazardous Waste" or "Used Oil" are uncontested. Bourgikos Decl. ¶¶ 15, 17; Brauer Decl. ¶ 13. Mr. Bourgikos stated that during the inspection the tanks in the gasoline recovery shed were unlabeled, and there is no evidence to the contrary. Bourgikos Decl. ¶ 15. There are no genuine issues of material fact with respect to the failure of Respondent to label the 35 drums and accumulation tank as used oil. Therefore, Complainant is entitled to judgment as a matter of law that Respondent violated 329 I.A.C. 13-4-3(d) (40 C.F.R. § 279.22(c)(1)) by storing used oil in containers and a tank that were not marked with the words "Used Oil."

B. Count 6

Count 6 alleges that on March 18, 2009, the EPA inspectors "observed releases of used oil on the ground throughout the facility, including the areas of the gasoline recovery shed, between the crushed cars and the shredder, and on the soils near the crushed vehicles, and it appeared that the oils had "been there for a while and had not been cleaned-up or properly managed. Complaint ¶¶ 55, 60, 61, 120. Count 6 alleges further that the inspectors also observed liquids in a two boxes. One was a metal box half full of brownish liquid with an oily sheen, with two 55-gallon drums, located east of Crusher # 1, and the other was a steel box in which the green tank was placed, and which contained over one foot of a reddish liquid and near which the inspectors detected a gasoline or diesel fuel smell, located in the gasoline recovery area. Complaint ¶¶ 56, 57, 121.

As to spills of used oil, the applicable regulations provide as follows, in pertinent part:

(e) Upon detection of a release of used oil to the environment . . . a generator must perform the following clean-up steps:
(1) Stop the release.
(2) Contain the released used oil.
(3) Clean up and manage properly the released used oil and other materials.
(4) Communicate a spill report in accordance with 327 IAC 2-6.1.
(5) If necessary to prevent future releases, repair or replace any leaking used oil storage containers or tanks prior to returning them to service.

329 I.A.C. § 13-4-3(e); *see*, 40 C.F.R. § 279.22(d) (same, except no spill report required). To establish the violation, Complainant must show that Respondent detected or reasonably should have detected a release of used oil to the environment, and that it failed to perform one or more of the steps enumerated in Section 13-4-3(e).

The inspectors described and photographed their observations during the March 18, 2009 inspection. They observed "the ground beneath the crushed vehicles . . . saturated with oil," "dirt saturated with what appeared to be oil" on the pad near the gasoline recovery shed, and "a pool of water with an oil sheen" in front of which the soil was "dark and appeared to be stained with oil" between the crushed cars and the shredder. Bourgikos Decl. ¶¶ 10, 21; Brauer Decl. ¶ 8, 10; CX 14 pp. 6, 7 and photos 23-32. They also observed dark puddles that appeared to contain automotive liquids, including gasoline and oil. Bourgikos Decl. ¶ 11; Brauer Decl. ¶¶ 8, 9; CX 14, photo 30. Ms. Brauer stated that she is "familiar with the various automotive liquids present in scrap vehicles and typical operations of automotive scrap yards." Brauer Decl. ¶ 3. From these descriptions and photographs, even viewed in light most favorable to Respondent, it is concluded that Respondent reasonably should have detected a release of used oil to the environment.

These descriptions and photographs also establish that Respondent failed to contain released used oil and failed to clean it up. Although the inspectors documented their observations of a green tank and two drums placed in metal boxes which contained liquid, the evidence does not establish that the liquid in the boxes resulted from any leak in the tank or drums. Complainant has not argued in its Motion or shown that it was necessary for Respondent to repair or replace any leaking used oil storage containers or tanks.

In its Answer, Respondent denied that it failed to contain used oil releases and that "[a]ny releases of used oil that are detected by Summit employees are stopped, contained, cleaned up and properly managed." Answer at 2. Respondent also asserted in its Answer that it "has prepared and implemented a Spill Prevention Control and Countermeasures Plan" that "includes procedures adopted for safe fluid management and reporting of spills to management so appropriate clean-up response can be completed," and that the plan was reviewed and oil programs found in compliance during an IDEM inspection on October 7, 2011. *Id.*

The Violation Letter, dated November 19, 2011, from IDEM, submitted by Respondent with the Answer, shows that IDEM determined that on May 4, 2010 there were "spills and contaminated soil/debris resulting from spills and releases," which Respondent was directed to dispose of in a solid waste landfill, and that it was subsequently cleaned up. However, it does not show, nor is there any other evidence in the case file that shows, that Respondent contained and cleaned up the released used oil observed by the EPA inspectors on March 18, 2009, or that it timely did so. The fact that Summit had a spill plan in place does not excuse its liability for failure to contain and clean up the released oil.

It is concluded that there are no genuine issues of material fact as to Count 6, and Complainant is entitled to judgment as a matter of law that Respondent failed to contain, clean up and properly manage released used oil, in violation of 329 IAC § 13-4-3(e); 40 C.F.R. § 279.22(d).

VII. Count 7

A. Regulatory Background

Set forth at 40 C.F.R. part 273, the federal universal waste rule governs the collection and management of certain widely-generated hazardous wastes referred to as "universal wastes," which are of four specific types: batteries, recalled and unused pesticides, mercury-containing equipment, and electric lamps. 40 C.F.R. § 273.1-273.5, 273.9; 329 I.A.C. § 3.1-16-1; 60 Fed. Reg. 25492, 25,503 (May 11, 1995). The State of Indiana has adopted the federal universal waste rule. 329 I.A.C. § 3.1-16-1 (incorporating by reference 40 C.F.R. part 273).

The rule applies to "transporters" and "handlers" of universal waste, imposing less stringent standards for storing, transporting and collecting these wastes than the regulations governing other hazardous wastes, to encourage environmentally sound collection and proper management of universal wastes. 64 Fed. Reg. 36466, 36468 (Final Rule, July 6, 1999). Facilities that treat, dispose of, or recycle universal wastes, on the other hand, are subject to the general hazardous waste regulations including the requirement for a permit. 40 C.F.R. § 273.60.

A "universal waste handler" is:

> (1) A generator . . . of universal waste; or
> (2) The owner or operator of a facility, including all contiguous property, that receives universal waste from other universal waste handlers, accumulates universal waste, and sends universal waste to another universal waste handler, to a destination facility, or to a foreign destination.

40 C.F.R. § 273.9. A "generator" is defined as in other parts of the hazardous waste regulations. *Id.* A small quantity handler of universal waste is defined as not accumulating 5,000 kg or more total of universal waste at any time. 40 C.F.R. §§ 273.9. Such handler must manage the batteries in a way that prevents the release of any universal waste or component of universal waste into the environment as follows:

> (1) A small quantity handler of universal waste must contain any universal waste battery that shows evidence of leakage, spillage, or damage that could cause leakage under reasonably foreseeable conditions in a container. The container must be closed, structurally sound, compatible with the contents of the battery, and must lack evidence of leakage, spillage, or damage that could cause leakage under reasonably foreseeable conditions.

40 C.F.R. § 273.13(a). The small quantity handler generally may only accumulate the universal waste for one year. 40 C.F.R. § 273.15(a). Therefore, the regulations require a demonstration of the length of time the waste has been accumulating since it was received or became a waste, by one of several methods (1) marking the container of universal waste with the earliest date such waste was received or became a waste; (2) marking each item of waste with the date it was received or became a waste; (3) maintaining an inventory system with each such date; (4) maintaining an inventory system with the earliest date a group of universal waste items or

containers thereof was received or became a waste; (5) placing the universal waste in a specific accumulation area and identifying the earliest date any such waste in the area was received or became a waste; or (6) any other method which clearly demonstrates the length of time the universal waste has been accumulated. 40 C.F.R. § 273.15(c).

In addition, the regulations require the batteries or their container to be marked as "Universal Waste," "Waste Batteries" or "Used Batteries." 40 C.F.R. § 273.14(a).

The regulations also require a small quantity handler to "inform all employees who handle or have responsibility for managing universal waste" as to "proper handling and emergency procedures appropriate to the type(s) of universal waste handled at the facility." 40 C.F.R. § 273.16.

B. Discussion, Findings and Conclusions

Count 7 alleges that Respondent's handling of batteries did not prevent the release to the environment of any waste from the batteries, and that Respondent did not mark the battery container with the accumulation start date or have an inventory system that met the requirements of 40 C.F.R. § 173.15(c), and did not have a training program that met the requirements of 40 C.F.R. § 273.16.

During the March 18, 2009 inspection, Mr. Bourgikos observed on the site a "steel box filled with car batteries" that were "not arranged in any manner," that the box did not have a top, that "several batteries were broken with the lead plates exposed," that the box was "not labeled with any markings," and that he "ha[d] not received an inventory system for the contents of the box." Bourgikos Decl. ¶ 16. The box was approximately two feet high and six to eight feet square, and was located outside the gasoline recovery shed. CX 14. He stated that Summit "did not have a training program for handlers of universal wastes." Bourgikos Decl. ¶ 24.

Complainant argues that the mismanagement of the batteries in the box and failure to have a top on the box was insufficient to prevent a release. Motion at 25. Respondent in its Answer asserts that "[b]atteries are managed inside metal bins that are covered" which protects them from stormwater and prevents damage to them. Answer at 3.

There is no dispute that Respondent was a small quantity handler of universal hazardous waste at the time of the March 18, 2009 inspection. The used batteries observed by Mr. Bourgikos were contained, and there is no evidence that the metal box in which they were contained was structurally unsound, or that there was any leakage, spillage or damage to the container. The lack of a top on the box, however, indicates that the container was not "closed," and in that respect did not meet the requirements of 40 C.F.R. § 273.13(a). Respondent's unsupported assertion that the metal bins "are covered," in the present tense, without reference to any time period, does not raise any genuine issue fact material to liability for failure to comply with Section 273.13.

There is also no dispute that the battery container was not marked with time of

accumulation of the batteries. Respondent has not shown that there was any inventory system, or any other method to demonstrate the time of accumulation, for the batteries that were on site during the inspection.

As to employee training, the IDEM's Description of Violations and Further Actions, submitted with Respondent's Answer, notes that at the time of the May 2010 inspection, no records were available regarding universal waste employee training under 40 C.F.R. § 273.16, that IDEM received a letter thereafter advising that "staff would be trained on safety and spill response," and that at the October 2011 inspection, Summit was found in compliance, as it had a log of employees that had been trained. This further supports a finding that at the time of the March 18, 2009 inspection, Respondent had not informed its employees who handle or have responsibility for managing used batteries as to appropriate handling and emergency procedures.

Consequently, it is concluded that there are no genuine disputes of material fact with respect to liability, and Complainant is entitled to judgment as a matter of law that Respondent failed to comply with 40 C.F.R. § 273.13(a), 273.15(c) and 273.16, as incorporated by 329 I.A.C. § 3.1-16-1.

ORDER

IT IS HEREBY ORDERED THAT, consistent with the Discussion, Findings and Conclusions above:

1. Complainant's Motion for Accelerated Decision is **GRANTED** with regard to Respondent's liability for violations alleged in Counts 1, 4, 5, 6 and 7 of the Complaint.

2. Complainant's Motion for Accelerated Decision is **DENIED** with regard to the violations alleged in Counts 2 and 3 of the Complaint.

3. The parties shall make efforts in good faith to achieve a settlement of this matter. Complainant shall file a status report on or before **September 4, 2015,** reporting on the status of such settlement discussions.

Lisa Busch

M. Lisa Buschmann
Administrative Law Judge

In the Matter of Summit, Inc., Respondent
Docket No. RCRA-05-2014-0002

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Complainant's Motion for Accelerated Decision**, dated July 24, 2015, was sent this day in the following manner to the addressees listed below.

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Staff Assistant

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Dated: July 24, 2015
Washington, DC