UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
VEMCO, INC.,	)	**Docket No. CAA-05-2002-0012**
d/b/a VENTURE GRAND RAPIDS	)	
	)	
Respondent	)	

ORDER ON COMPLAINANT'S MOTION FOR ACCELERATED DECISION

I. Procedural Background

This proceeding was initiated on September 12, 2002 by a Complaint filed by the Director of the Air and Radiation Division of the United States Environmental Protection Agency, Region 5 (EPA), under Section 113(d) of the Clean Air Act (CAA or Act), 42 U.S.C. § 7413(d). On February 24, 2003, Complainant filed a Motion to Amend the Complaint Instanter, which was granted, and the Amended Administrative Complaint was filed on April 2, 2003. Both the Complaint and the Amended Complaint charge Respondent with four counts of violating volatile organic compounds (VOC) emission limits set forth in Permits to Install, which were issued by the Michigan Department of Natural Resources (MDNR) pursuant to the State Implementation Plan (SIP) for the State of Michigan. Respondent filed an Answer to the Complaint, denying the violations and requesting a hearing.[1] Thereafter the parties filed prehearing exchanges. The evidentiary hearing in this matter is scheduled to commence on May 13, 2003.

On March 19, 2003, Complainant filed a Motion for Accelerated Decision, requesting a decision in its favor as to Respondent's liability on all four counts of the Amended Complaint. Respondent submitted a Response thereto on April 3, 2003, contesting liability as to Counts 1, 3 and 4.

II. Factual Background

Respondent operates a plastic automobile parts manufacturing and coating facility located at 5050 Kendrick S.E., in Grand Rapids, Kent County, Michigan. The facility is owned by Venture Holdings Corporation. Respondent began operating the facility in June 1996, prior to which

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[1] Because the amendments to the Complaint did not add or substantively change any allegations, Respondent was not required to submit an Answer to the Amended Complaint. Accordingly, its Answer is deemed to respond to the allegations set forth in the Amended Complaint.

Autostyle Plastics, Inc. (Autostyle) owned and operated the facility. During all times relevant to the Amended Complaint, Respondent operated at its facility three automotive plastic parts coatings lines: a prime line, top coat line, and small parts line.

On September 3, 1991, the MDNR issued to Autostyle a Permit to Install, No. 51-88A (Permit 51-88A), which was revised by MDNR on August 31, 1993. A Permit to Install is defined in the MDNR's Air Pollution Control Commission General Rules (MDNR Rules) as "a permit issued by the [Air Pollution Control] commission authorizing the construction, installation, relocation, or alteration of any process, fuel burning, refuse-burning, or control equipment in accordance with approved plans and specifications. Permit 51-88A includes VOC emission rates for the prime coat system, basecoat system, clearcoat system, and adhesion promoter. On November 13, 1990, the MDNR issued to Autostyle a Permit to Install, No. 838-90 (Permit 838-90) which includes VOC emission rates for the plastic parts repair painting process and the basecoat repair painting process at the facility. Respondent is subject to the restrictions and conditions of both Permits, because they both provide that "[t]he restrictions and conditions of this Permit to Install shall apply to any person or legal entity which now or shall hereafter own or operate the equipment for which this Permit to Install is issued."

On April 9, 2001, EPA issued a Notice of Violation (NOV) to Venture Grand Rapids for violations of the Michigan SIP regulations by its failure in 1998 and 2000 to comply with the VOC emission rate set forth in Special Condition 33 of Permit 51-88A. On December 17, 2001, EPA issued a NOV to Vemco, Inc., for violations of the Michigan SIP by Respondent's failure to comply with VOC emission rates set forth in Special Conditions 16, 17, 18, and 33 of Permit 51-88A and Special Conditions 14 and 15 of Permit 838-90, during certain time periods in 1997 through 2001. Thereafter, EPA and Respondent held a conference to discuss the NOV.

On March 8, 2002, EPA and the Michigan Department of Environmental Quality (MDEQ) inspected the facility for compliance with the Michigan SIP and the Permits to Install. The inspector found minor exceedences of the Permit 51-88A VOC limit of 4.3 pounds per gallon for the basecoat system, on one day in January 2002 and during the last week of September 2001.

The Amended Complaint alleges that Respondent failed to comply with VOC emissions limitations set forth in Special Conditions of the Permits. Count 1 alleges violations of Special Condition Number 16, and Count 2 alleges violations of Special Condition Number 33, of Permit 51-88A. Count 3 alleges violations of Special Condition Number 14, and Count 4 alleges violations of Special Condition 15, of Permit 838-90. The parties' arguments and discussion as to each count are set out separately below, *in seriatim.*

III. Standard for Accelerated Decision

A. Standards for Accelerated Decision

With respect to accelerated decisions and dismissals, the Consolidated Rules of Practice provide, in pertinent part, as follows:

> 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 judgement as a matter of law.

40 C.F.R. § 22.20(a). Accelerated decision is similar to summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure (FRCP), and therefore case law thereunder is appropriate guidance as to accelerated decision. *CWM Chemical Services, Inc.*, 6 E.A.D. 1, 12, TSCA Appeal No. 93-1 (EAB 1995); *Mayaguez Regional Sewage Treatment Plant* 4 E.A.D. 772, 780-82, 1993 EPA App. LEXIS 32 (EAB 1993), *aff'd sub nom., Puerto Rico Aqueduct and Sewer Authority v. EPA,* 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied,* 513 U.S. 1148.

Under FRCP 56(c), the movant has the initial burden of showing that there exists no genuine issue of material fact, by identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ing] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)(quoting FRCP 56(c)).

After the initial burden of the movant is met, it is the obligation of the party responding to a motion for summary judgment to designate specific facts showing that there is a genuine issue for trial by presenting affidavits, depositions, answers to interrogatories, admissions on file, or other evidence. *Id.* at 324. The motion for summary judgment places the nonmovant on notice that all arguments and evidence opposing the motion, including affirmative defenses, must be properly presented and supported. *Pantry, Inc. v. Stop-N-Go Foods, Inc.,* 796 F. Supp. 1164 (S.D. Ind. 1992). To avoid the summary judgment motion being granted, the nonmovant must provide "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). It is not sufficient if the nonmoving party's evidence is "merely colorable" or "not significantly probative." *Id.* at 249-250. Summary disposition may not be avoided merely by alleging that a factual dispute may exist, or that future proceedings may turn something up. *Green Thumb Nursery, Inc.,* 6 E.A.D. 782 n. 23, 1997 EPA App. LEXIS 4 (EAB 1997). If, however, the nonmovant states reasons that he cannot present by affidavit facts essential to justify his opposition, summary judgment may be denied or continued pending discovery, under FRCP 56(f). *Celotex*, 477 U.S. at 326.

IV. Count 1

A. Background and Arguments of the Parties

Special Condition Number 16 of Permit 51-88A states that:

> The VOC emission rate from the prime coat system shall not exceed 4.5 pounds per gallon of coating (minus water) as applied, based on a 24-hour averaging period.

Count 1 charges Respondent with exceeding that limitation on four days in 2000 and on sixteen days in 2001. The specific dates of violating the limitation are shown in Complainant's Initial Prehearing Exchange Exhibits ("CX") 3 and 5,[2] and in Exhibit A to the Motion. Respondent admits that it exceeded the limitation on those dates. Answer ¶ 35; Respondent's Prehearing Exchange statement p. 4. However, Respondent denies that Special Condition Number 16 sets forth the limit applicable to black or red coatings. Answer ¶ 34. Respondent asserts that "prime coatings used on days where emissions were in excess of 4.5 pounds per gallon coating . . . were black coatings and that pursuant to Table 66, footnote one, Respondent was not in violation of applicable limits on those days." Answer ¶ 36. On that basis, Respondent denies violating Special Condition Number 16.

Respondent refers to Table 66 in Rule R336.1632 (Rule 632) of the MDNR Rules, a copy of which was submitted by Complainant in its Initial Prehearing Exchange, CX 28. The MDNR Rules are part of the federally enforceable Michigan SIP, approved by the U.S. EPA. 45 Fed. Reg. 29790 (May 6, 1980). Rule 632 provides, in pertinent part:

> (3) After December 31, 1992, both of the following provisions shall be met:
> (a) A person shall not cause or allow the emission of volatile organic compounds from the coating of plastic parts of automobiles and trucks from any existing coating line in excess of the applicable emission rates specified in table 66.

Table 66, entitled, "Volatile organic compound emission limitations for existing automobile and truck plastic parts coating lines after 12/31/92," provides, *inter alia,* for "High bake coating – exterior and interior parts," prime flexible coating, that 4.5 pounds of VOC is allowed to be emitted per gallon of coating (minus water) as applied. There are three footnotes to the table. Footnote one, for each of the coating provisions in the table, provides the following exception:

> For red and black coatings, the emission limitation shall be determined by multiplying the appropriate limit in this table by 1.15.

[2] The dates on which emissions exceeded 4.5 pounds per gallon were shown on Respondent's weekly summaries of VOC emissions (CX 5) submitted to EPA by Respondent in response to a request for information, and in the NOV dated December 17, 2001 (CX 3).

According to the terms of Table 66, this exception provides that for high-bake, prime flexible red or black coatings, the emission limitation is 5.175 pounds per gallon.

This exception does not appear in Permit 51-88A. In its Motion, Complainant asserts that the SIP exception for black and red coatings is neither included nor incorporated in Permit 51-88A. Therefore, Complainant's position is that the emission limitation of 4.5 pounds per gallon applies to prime coatings, including red and black coatings.

In response, Respondent asserts that its emissions were within the limitations prescribed by Rule 623(3)(a) and the SIP when the first footnote in Table 66 is accounted for, *i.e.*, 5.175 pounds per gallon. Respondent asserts further that the Rule and the SIP supercede the general limitation of 4.5 pounds per gallon in Special Condition Number 16 of Permit 51-88A. Thus, Respondent maintains that it is entitled as a matter of law to the benefit of the emission rates set forth in the exception, even if the footnote was not specifically referenced in the Permit. Respondent concludes that a hearing is required to establish the extent to which its emissions comply with the emission rates set forth in the exception.

In support, Respondent argues that when the State of Michigan proposed and EPA approved Table 66, with the footnotes, it was expressly acknowledged that the footnotes modified the numbers set forth in Table 66, and that they were necessary, appropriate and adequately protective with respect to red and black coatings. Second, Respondent argues that the SIP regulations and Table 66 must apply where the permit is silent as to a particular application of the rules. Otherwise, a permit would have to reiterate every applicable regulation in order to be enforceable. Third, General Condition 3 of Permit 51-88A and the permit transmittal letter note that the permit is "based on and subject to compliance with" all of the rules of the MDNR as well as the conditions in the Permit.

In its Reply, Complainant asserts that the Amended Complaint does not allege any emission limits in Table 66.[3] Complainant points out that Permit 51-88A makes no reference to Rule 632, Table 66. Complainant asserts that there is no disputed issue of material fact as to the allegations in Count 1, conceding that the actual emission rates reported by Respondent on the emission forms exceeded 5.175 pounds per gallon on only one day. Motion at 3, Exhibit A.

B. Discussion

Contrary to Respondent's position, Permit 51-88A is not silent as to the particular application to black prime coatings. The Permit clearly provides that 4.5 pounds per gallon is the emission limitation for the prime coat system. Respondent apparently recognized that is the applicable

[3] The original Complaint alleged that the failures to comply with the VOC emissions limitation of 4.5 pounds per gallon are violations of MDNR Rule 632(3)(a) and the Michigan SIP as well as of Permit 51-88A. The Amended Complaint omits the allegations of violating the Rule and SIP.

limitation for black coatings, as its weekly emission summary sheets show, for the products described as "Lt gray primer, black smc primer, hs conductive prime, 30 gloss black primer, black 2010," that the limit of VOC emissions is 4.5 pounds per gallon in a 24 hour period. CX 5; Motion, Exhibit A. The sheets also indicate "no" as a response to the question "comply?" where the actual emissions exceed 4.5 pounds per gallon. *Id.* As applied to black and red coatings, this limitation is more stringent than that provided in the SIP exception in Footnote 1.

The fact that it is more stringent than the SIP exception does not mean it is invalid or unenforceable. Respondent provides no authority in support of its veritable "SIP-as-a-shield" defense: that an exception to an emission limitation, which exception appears in the SIP, but not in the permit, shields the permittee from liability for violating the limitation where the permittee complied with the exception.[4] This argument is inconsistent with the MDNR Rules and the states' authority to impose specific emission limitations in permits, in their efforts to attain or maintain compliance with ambient air quality standards.

The MDNR Rules include following definition:

> "Allowable emissions" means the emissions rate calculated using the maximum rated capacity of the process or process equipment . . . and the <u>most stringent</u> of the following:
> (i) Any applicable standards pursuant to the clean air act, as amended, 42 U.S.C. § 7401 et seq.
> (ii) Any applicable emission limit specified in these rules . . .
> (iii) Any applicable emissions rate specified as a legally enforceable permit condition . . .

R 336.1101(j) (MDNR Rule 101(j)(underlining added)(CX 28).

Accordingly, pursuant to the Michigan SIP, the applicable emission rate is Condition 16 of Permit 51-88A, because it is more stringent than the relevant emission limitation provided in Footnote 1 of Table 66 in Rule 632.

EPA has authority to enforce the emission limitations contained in a permit, even if they are more stringent than limitations in a regulation or SIP. EPA's enforcement authority is not limited to enforcing provisions of regulations and state implementation plans, but includes authority to enforce permit provisions, which may not be identical to regulations or state implementation plan provisions. The regulations governing State implementation plans provide, at 40 C.F.R. § 52.23:

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[4] This defense appears to be an inappropriate inversion of the "permit-as-a-shield" defense under Section 504(c) of the CAA, which provides, "Compliance with a permit . . . shall be deemed compliance with section 7661a of this title" and "the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this chapter that relate to the permittee" if the permit includes the applicable requirements of such provisions, or the permit includes a determination that other provisions are not applicable.

> Failure to comply with any provisions of this part, or with any approved regulatory provision of a State implementation plan, or with any permit condition . . . issued pursuant to . . . regulations for the review of new or modified stationary or indirect sources, or with any permit limitation or condition contained within an operating permit issued under an EPA-approved program that is incorporated into the State implementation plan, shall render the person . . . so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act.

General Condition 3 of Permit 51-88A, as amended, does not override the specific permit provisions. Condition 3 states, "Applicant shall demonstrate compliance with all Commission rules and with all general and specific conditions of this permit prior to issuance of the Permit to Operate." CX 17 (emphasis added). The transmittal letters to the amended Permit state that "approval is based upon and subject to compliance with all administrative rules of the Commission and conditions stipulated in the attached supplement" to Permit 51-88A. *Id.* These statements are consistent with, and do not alter, the MDNR Rule 101(j) quoted above, providing that the more stringent of the limitations in a permit and in the SIP is the allowable emissions rate.

Respondent has not raised any genuine issue of material fact as to its liability for Count 1, and Complainant has established as a matter of law that Respondent is liable for exceeding the VOC emission rate set forth in Special Condition Number 16 of Permit 51-88A on four days in 2000 and on sixteen days in 2001, as alleged in Count 1 of the Amended Complaint.

V. Count 2

Special Condition Number 33 of Permit 51-88A states that the VOC emissions rate from the adhesion promoter process shall not exceed 25.3 pounds per hour nor ten tons per year. The Amended Complaint alleges, and Respondent admits in its Answer, that on two days in 2000 and one day in 2001, emissions from the adhesion promoter process exceeded 25.3 pounds per hour. The Amended Complaint further alleges that annual emissions from Respondent's adhesion promoter process were 27.19 tons in 1998, 36.38 tons in 1999, 43.87 tons in 2000, and 19.1 tons in 2001. In its Answer (¶ 41), Respondent denies this allegation, and states "that it purchased emission reduction credits to offset adhesion promoter discharges for the year 2000 and that those credits were sufficient to maintain compliance with the ten tons per year limitation."

Complainant presents in its Prehearing Exchange calculations of yearly VOC emission rates, and Respondent's monthly VOC summaries which show pounds of VOCs emitted per week and per month for adhesion promoter. CX 29. See also, Motion, Exhibit B. These summaries were submitted by Respondent in response to EPA's requests for information. CX 5, 7. In its Motion, Complainant asserts that MDEQ determined that Respondent's use of emission reduction credits was not allowed. CX 13; Motion, Exhibit C.

In its Prehearing Exchange, Respondent includes a summary of yearly VOC emissions for 1998 through 2001 that are substantially the same as the yearly emissions alleged by Complainant. Respondent's Prehearing Exchange Exhibit (RX) 2.[5] Respondent also includes documentation showing its payment for, notices of, and MDEQ responses to emission reduction credits. RX 1, 7. Respondent asserts in its Prehearing Exchange (at 4) that the use of the emission reduction credits was wrongfully denied by the MDEQ, and that Respondent appealed the denial to the Kent County Circuit Court. RX 3. The appeal has been stayed pending resolution of the December 17, 2001 NOV, Respondent states. In its Response to the Motion, however, Respondent does not contest liability for Count 2.

Count 2 of the Amended Complaint is based upon, and makes the same allegations, as the NOV dated December 17, 2001. CX 3 ¶ ¶ 18, 19. The instant proceeding is the process to resolve the December 17, 2001 NOV. Therefore this proceeding cannot be affected by a stay of Respondent's appeal of the denial of emission reduction credits.

Respondent has not raised any genuine issue of material fact as to its liability for Count 2, and Complainant has established as a matter of law that Respondent is liable for exceeding the VOC emission rate of ten tons per year and 25.3 pounds per hour for the adhesion promoter process, as alleged in Count 2 of the Amended Complaint.

VI. Counts 3 and 4

A. Background and Arguments of the Parties

Special Condition 14 of Permit 838-90 states that the VOC emission rate from the plastic parts repair painting process shall not exceed 13.6 pounds per hour nor 21.25 tons per year. The Amended Complaint alleges in Count 3 that on three days in December 1997, eight days in 1998, and five days in 1999, emissions from the plastic parts repair painting process exceeded 13.6 pounds per hour.

Special Condition 15 of Permit 838-90 states that the VOC emission rate from the basecoat repair painting process shall not exceed 33.8 pounds per gallon of solids applied, based on a 24 hour averaging period. The Amended Complaint alleges in Count 4 that on 57 days from September 1997 through December 1997, at least 210 days in 1998, and 115 days in 1999, emissions from the basecoat repair painting process exceeded 33.8 pounds per gallon of solids applied, based on a 24 hour averaging period.

[5] The summary states that emissions were 29.66 tons/year for 1998, 36.38 for 1999, 43.87 for 2000, and 19.11 for 2001. RX 2.

In its Answer, Respondent admits that VOC emissions from these processes exceeded the limits during some days in the years alleged. However, Respondent asserts that on some days where its reports show exceedances of these limits, the exceedance was *de miminis*. Respondent asserts further that it had to correct reports of emissions because of an error in the spreadsheet calculations, that it discovered the error in March 1999, that corrective actions were taken, and that the coatings were promptly brought back into compliance.

In its Response to the Motion, Respondent explains that many of the violations alleged were the result of mistakes in formulas used to calculated materials usage and emission rates. Respondent states that it "is prepared to demonstrate at hearing that these formulas were in a typical spreadsheet format, that once these formulas are developed, they are opaque to the users of the spreadsheets, and that during the time the error persisted, Vemco did not know or have reason to know that it was violating its permit requirements." Motion at 3. Further, Respondent states that it will show at hearing that it intended to use its coating in a manner that complied with its permits. Respondent argues that a violation of Section 113 of the CAA "there must at least be general intention, or the intention to perform the underlying act that lead to a violation." Respondent asserts that there was merely an "innocent mistake" and that, but for the error, it could have and would have been in compliance.

In its Reply, Complainant disagrees that an intention to perform the act that leads to a violation is required for a finding of liability. Complainant asserts that Respondent know exactly what formula it was required to use and should have ensured that calculations of its emission rates were done according to this formula, which was provided in Appendix A to Permit 838-90. CX 18. Complainant asserts further that Respondent knew of the violations before the date it claims to have discovered the violations. Complainant states that as early as August 12, 1998, the MDEQ issued to Respondent a Letter of Violation identifying violations of the emission rate in Special Condition 14, and on November 5, 1998, issued another Letter of Violation, identifying additional violations of the emission rates in Special Condition 14, and violations of the emission rate in Special Condition 15. CX 31.

B. Discussion

The Clean Air Act imposes strict liability on owners and operators of pollution sources. *Sierra Club v. Public Service Co.,* 894 F. Supp. 1455, 1459 (D. Col. 1995)(CAA establishes a regime of strict liability, and Continuous Emissions Monitoring data and reports may provide conclusive evidence of violations of opacity standard under CAA); *United States v. Hugo Key & Sons, Inc.,* 731 F. Supp. 1135, 1139-1140 (D. R.I. 1989)("federal courts have consistently adhered to the legislative intent of the [CAA] to provide for strict liability"); *Ocean State Asbestos Removal, Inc.,* 7 E.A.D. 522, 546 (EAB 1998). The CAA's imposition of strict liability "is essential to meet the purpose of the Act to protect and improve the quality of the nation's air." *United States v. Ben's Truck and*

Equipment, Inc., Civ. No. S-84-1672-MLS, 1986 U.S. Dist. LEXIS 25595 (E.D. Cal., May 12, 1986). Congress provided the following rationale in the legislative history to the 1977 amendments to the CAA:

> Where protection of the public health is the root purpose of a regulatory scheme (such as the Clean Air Act), persons who own or operate pollution sources in violation of such health regulations must be held strictly accountable. This rule of law was believed to be the only way to assure due care in the operation of any such source. Any other rule would make it in the owner or operator's interest not to have actual knowledge of the manner of operation of the source. Moreover, in the Committee's view, the public health is injured just as much by a violation due to negligence or inaction as it is by a violation due to intent to circumvent the law. Thus, the Committee believes that the remedial and deterrent purposes of the civil penalty would be better served by not limiting its application to "knowing" violations.
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> * * * *
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> The Act imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will assure that violations will not occur.

HR Rep. No. 94-1175, 94th Cong. 2d Sess 52-54 (1976).

With strict liability, factors of intent, good faith, willfulness or fault are not relevant to a finding of liability for violations. *United States v. Brotech Corp.,* Civ. No. 00-2428, 2001 U.S. Dist LEXIS 15894 * 9 (E.D. Pa. Sept. 12, 2001)(Clean Air Act does not require a knowing violation in order to impose civil liability"); *United States v. Sheyenne Tooling and Manufacturing Co.,* 952 F. Supp. 1420, 1421 (D. N. D. 1996), *aff'd*, 162 F.3d 1166 (8th Cir. 1998)("there need be no showing of maliciousness, willfulness or fault to support a finding of liability" under a strict liability statute; a finding of liability may be supported simply by the establishment of the violation); *United States v. CPS Chemical Co.,* 779 F. Supp. 437, 442 (D. Ark. 1991)(under a strict liability statute, a permittee's intention to comply or a good faith attempt to do so does not excuse a violation).

Therefore, Respondent's arguments that it intended to comply, did not know of the violations, and made an innocent mistake are not defenses to liability. These arguments, and the assertion that errors in calculating emissions were discovered, reported and corrected by Respondent, may be relevant to assessment of a penalty, but are not relevant to the issue of liability.

VII. Affirmative Defenses

Respondent sets forth several "defenses" in its Answer. The first defense incorporates its responses in the Answer, and these responses were addressed above. The second and third defenses are that the alleged violations are barred by the statute of limitations, and that EPA must demonstrate

compliance with Section 113(d)(1) of the CAA. In its Prehearing Exchange (p. 5), Respondent expressly withdrew the second and third defenses.

The remaining defenses, numbered four through seven, claim that some or all of the violations are *de minimis* and/or within the margin of error for calculating applicable limits, that the penalty is excessive given the underlying facts and circumstances, that penalty policy factors mitigate in favor of a significant reduction of the penalty in that the facility was in compliance with annual VOC limits and therefore the violations had no incremental impact on the environment beyond what was permitted, and that the proposed penalty does not adequately take into account Respondent's good faith efforts to comply or financial impact of the penalty on the facility. The latter defenses clearly relate only to the penalty, not to liability.

As to the argument that the alleged violations are *de minimis* or within the margin of error for calculating applicable limits, Respondent asserted in its Prehearing Exchange statement (at 5) that many alleged violations were "not environmentally significant and some were not mathematically significant" and were "sometimes only a few percent above daily emission allowances." Respondent provides graphs of VOC emissions (RX 6) and an unsigned, undated analysis of emissions violations (RX 9). The latter states that the amount of average VOC emission rates over the limit is 9% for Count 1, 3% for Count 2, 21% for Count 3, and 25% for Count 4. Respondent does not refer to any defense to liability for *de minimis* violations provided in the CAA, applicable rules, regulations, or the Permits, and no such defense has been otherwise found.

Accordingly, Defenses four through seven may be relevant only with respect to any penalty to assess, and do not bar findings of liability.

VIII. Conclusion

Respondent does not dispute that the VOC emission limitations set forth in the Permits were exceeded as alleged in the Amended Complaint. It is concluded that there are no genuine issues of material fact as to Respondent's liability for Counts 1 through 4, and Complainant is entitled to judgment as a matter of law that Respondent violated Special Conditions 16 and 33 of Permit 51-88A, and Special Conditions 14 and 15 of Permit 838-90, as alleged in Counts 1 through 4 of the Amended Complaint.

The issues as to the assessment of any penalty remain in dispute and are reserved for further proceedings.

ORDER

1. Complainant's Motion for Partial Accelerated Decision is **GRANTED** as to liability for all four Counts of the Amended Complaint.

2. The hearing as previously scheduled shall be held on issues as to the penalty for Counts 1 through 4.

_____
Susan L. Biro
Chief Administrative Law Judge

Date: April 23, 2003
Washington, D.C.

In the Matter of Vemco, Inc., d/b/a Venture Grand Rapids, Respondent
Docket No. CAA-05-2002-0012

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Complainant's Motion For Accelerated Decision**, dated April 23, 2003, was sent this day in the following manner to the addressees listed below:

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: April 23, 2003

Original and One Copy by Pouch Mail to:

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