UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
	)	
Belmont Plating Works	)	**Docket No. RCRA-5-2001-0013**
	)	
	)	
Respondent	)	

ORDER GRANTING RESPONDENT'S MOTION TO SUPPLEMENT PREHEARING EXCHANGE

ORDER GRANTING, IN PART, AND DENYING, IN PART, COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY

Resource Conservation and Recovery Act. By motion dated August 2, 2002, Complainant, the United States Environmental Protection Agency ("EPA"), moved pursuant to Section 22.20(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32 (2001), for an accelerated decision on the issue of liability in the above-referenced case. The Motion For Accelerated Decision On Liability ("Motion") alleges violations of the Resource Conservation and Recovery Act ("RCRA") of 1976, as amended, and applicable provisions of the Illinois Administrative Code ("I.A.C.") relating to the regulation of hazardous waste. Complainant asserts that it is entitled to judgement as a matter of law and supports its Motion with an accompanying legal memorandum. On August 16, 2002, Respondent, Belmont Plating Works ("BPW"), filed a Response to Motion For Accelerated Decision ("Response") and a Motion To Supplement Prehearing Exchange ("Motion to Supplement"). **Held:** Respondent's Motion to Supplement Prehearing Exchange is **GRANTED**. Based upon the conclusion that no genuine issue of material fact exists, and that Complainant is entitled to judgment as a matter of law, its Motion for Accelerated Decision on Counts I-III is **GRANTED**. Based upon the conclusion that there exist genuine issues of material fact, Complainant's Motion for Accelerated Decision is **DENIED** for Counts IV-VI.

Before: Stephen J. McGuire
Administrative Law Judge

Date: September 11, 2002

Appearances:

For Complainant:	Andre Daugavietis Associate Regional Counsel U.S. EPA Region V 77 West Jackson Boulevard Chicago, Illinois 60604-3590
For Respondent:	Steven P. Kaiser 39 S. LaSalle Street, Suite 404 Chicago, Illinois 60603

I. Introduction

On September 20, 2001, EPA filed an Administrative Complaint and Compliance Order ("Complaint") against Respondent, alleging violations of the federal Resource Conservation and Recovery Act ("RCRA") and 35 Illinois Administrative Code ("I.A.C.") Parts 722 and 725. Complainant contends that Respondent violated Section 3005 of RCRA, 42 U.S.C. § 6925, which sets forth the permit requirements for the treatment, storage, or disposal of hazardous waste. The Complaint alleges that Respondent also violated 35 I.A.C. §§ 721.105(g)(2) and 722.134(a), "by not complying with applicable provisions for accumulating hazardous waste without a permit." Complainant's Motion for Accelerated Decision ("Motion") at 1. In total, Complainant asserts six violations for Respondent's alleged failure to comply with state regulations governing generators of hazardous waste (Counts 1-6). Complainant's Motion for Accelerated Decision is based upon the pleadings in this case, in particular, ¶¶ 1-62 of the Answer, in conjunction with the information provided by the parties in their respective prehearing exchanges.[1]

On April 13, 2000, the EPA conducted a Compliance Evaluation Inspection ("CEI" or "Inspection") of Respondent's facility. *See* Complt's Ex. C-6 (Inspection Report). During this visit, the EPA inspector conducted a visual inspection of the facility and examined a variety of company records related to hazardous waste management. The inspector also requested certain documents which, by Respondent's own admission, Respondent did not produce at the time of the inspection. *See* Answer ¶¶ 48, 57. Utilizing the observations and information gathered during the CEI, Complainant has charged Respondent with six specific violations, as follows:

Count 1 of the Complaint alleges that Respondent, as a generator of hazardous waste, failed to mark a storage container with an accumulation date as required by 35 I.A.C § 722.134(a). Count 2 of the Complaint alleges that Respondent violated 35 I.A.C. §§ 722.134(a)(1)(A) and 725.273 by failing to keep closed the container in which hazardous waste was stored. Count 3 of the Complaint alleges that Respondent's failure to produce any records indicating that facility personnel had been

[1] Reference to exhibits attached to the parties' prehearing exchanges will be referred to as: Complt's Ex. ___ and Respt's Ex. ___.

trained in the management of hazardous waste constitutes a violation of 35 I.A.C. § 725.116. Count 4 asserts that Respondent is in violation of 35 I.A.C. §§ 725.151-725.153 for failing to produce documents evincing Respondent's submission of its Contingency Plan to local emergency responders. Count 5 charges Respondent with violating 35 I.A.C. § 725.137 for failing to produce evidence indicating that Respondent had familiarized local emergency responders with its facility. Finally, Count 6 alleges that hazardous waste was observed on the floor of the facility, constituting a violation of 35 I.A.C. § 725.131.

The Administrator of the U.S. EPA granted the State of Illinois final authorization, pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), to administer a state hazardous waste program in lieu of the federal RCRA program, effective January 31, 1986. *See* 51 Fed. Reg. 3778 (January 31, 1986). Nonetheless, pursuant to Section 3008(a) of RCRA, and 40 C.F.R. § 272.700(c), the EPA retains its federal enforcement authority to prosecute violations of RCRA and the particular hazardous waste provisions of the Illinois Administrative Code which are "incorporated by reference . . . as part of the hazardous waste management program under Subtitle C of RCRA." 40 C.F.R. § 272.701(a)(1).

At issue in this matter are regulations pertaining to generators of hazardous waste who operate without a permit and without having interim status. Respondent, Belmont Plating Works ("BPW"), is an Illinois corporation which describes itself as a "job shop metal finishing facility that specializes in plating various metal parts." Respt's Ex. B at 4. Respondent does not have a permit or interim status to treat, store, or dispose of hazardous waste at its facility. Answer ¶ 31. Complainant characterizes Respondent as a large quantity generator of hazardous waste which accumulates more than 1000 kilograms of hazardous waste at its facility in a calendar month. The Complaint alleges that Respondent "is subject to regulation under the special requirements of 35 I.A.C. Part 722 [40 C.F.R. Part 262] for generators of greater than 1000 kilograms of hazardous waste in a calendar month, as well as the applicable provisions of I.A.C. Parts 703, 720, 721, 724, 725, and 728." Complaint ¶ 33. Respondent, in fact, admits that it has accumulated in excess of 1000 kilograms of hazardous waste. Answer ¶ 32. Accordingly, Respondent's activity falls within the purview of those provisions which regulate the accumulation or storage of hazardous waste in excess of 1000 kilograms and without a permit or interim status.

Before analyzing the substance of the instant motion, it should be noted that in several places Complainant appears to cite mistakenly to incorrect regulations in the Complaint, and these errors are repeated in the Motion. Because Complainant also cites to the corresponding federal regulations, it is generally ascertainable to which regulation Complainant intends to refer. Yet an administrative law judge or an opposing party should not be confronted with the task of making sense of such substantial citation errors. In the future, the undersigned will disregard any filings in this proceeding which contain such errors.

II. Standard for Accelerated Decision

Section 22.20(a) of the Rules of Practice, 40 C.F.R. Section 22.20(a), authorizes the Administrative Law Judge ("ALJ") to "render an accelerated decision in favor of the Complainant

or Respondent as to all or any part 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" as to any part of the proceeding. In addition, the ALJ, upon motion of the Respondent, may dismiss an action "on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant."

A long line of decisions by the Office of Administrative Law Judges (OALJ) and the Environmental Appeals Board (EAB) has established that this procedure is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (F.R.C.P.). *See, e.g.*, *In re CWI Chemical Serv.*, Docket No. TSCA-PCB-91-0213, 1995 TSCA LEXIS 13, TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995); and *Harmon Electronics, Inc.*, RCRA No. VII-91-H-0037, 1993 RCRA LEXIS 247 (Aug. 17, 1993).

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

"Bare assertions, conclusory allegations or suspicions" are insufficient to raise a genuine issue of material fact precluding summary judgment. *Jones v. Chieffo*, 833 F. Supp. 498, 503 (E.D. Pa. 1993). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits and other evidentiary materials submitted in support or opposition to the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); 40 C.F.R. Section 22.20(a); F.R.C.P. 56(c).

Upon review of the evidence in a case, even if a judge believes that summary judgment is technically proper, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

III. Discussion

A. Respondent's Motion to Supplement Prehearing Exchange

Respondent concomitantly filed the pending Motion to Supplement Prehearing Exchange ("Motion to Supplement") when it filed its Response to Complainant's Motion for Accelerated Decision. Respondent, appending these documents to its Response as attachments E and F, claimed

that "copies of these documents had not been in the possession of Belmont Plating Works at the time of the earlier prehearing exchanges." *See* Respondent's Motion to Supplement ¶ 1. Moreover, Respondent contends that these documents are relevant to the proceeding and that Complainant will not be prejudiced if the undersigned grants Respondent's Motion. *See* Respondent's Motion to Supplement ¶¶ 2-3.

Section 22.19 of the Rules of Practice, 40 C.F.R. § 22.19, governs discovery in administrative enforcement proceedings. Section 22.19(a) of the Rules of Practice provides for the prehearing exchange of witness lists, documents, and information between the parties. Section 22.19(a)(2) provides, *inter alia*, that the prehearing information exchange contain "copies of all documents and exhibits which [a party] intends to introduce into evidence at the hearing." 40 C.F.R. § 22.19(a)(2)(ii).

The Rules of Practice also require the parties to supplement prior exchanges. *See* 40 C.F.R. § 22.19(f). "A party who has made an information exchange under paragraph (a) of this section, or has exchanged information in response to a request for information . . . shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete . . ." 40 C.F.R. § 22.19(f). A party's failure to provide information within its control, as required by Section 22.19(a), may result in several sanctions including; an inference that the information would have been adverse to the party failing to provide it, exclusion of the information from evidence, or a basis to issue a default order to the party. *See* 40 C.F.R. § 22.19(g)(1)-(3).

Generally, an administrative law judge will admit all evidence into the record which is not irrelevant, immaterial, unduly repetitive, unreliable, or of little probative value. *See* 40 C.F.R. § 22.22(a)(1). However, Section 22.22(a) of the Rules of Practice states, in pertinent part, that if a party "fails to provide any document [or] exhibit . . . required to be exchanged under § 22.19(a), (e), or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document [or] exhibit . . ." *Id.*

Respondent filed its Motion to Supplement on August 16, 2002, at least two months prior to the scheduled hearing date. Therefore, Complainant is neither unfairly prejudiced by Respondent's delay in producing these documents nor are the sanctions of Sections 22.19(g) or 22.22(a) implicated. Moreover, the documents that Respondent moves to add to its prehearing exchange, Response Attachs. E-F, are likely probative in that they offer support for Respondent's defense to liability under Count V of the Complaint. Respondent's assertion that these documents were not within its possession previously in the proceeding, taken at face value, does lend support for granting its Motion to Supplement inasmuch as its prior exchanges were "incomplete" without these documents. Thus, the undersigned can conceive of no legitimate reason to preclude Respondent from supplementing its prehearing exchange with these two documents. Moreover, in light of Complainant's failure to respond to Respondent's Motion, the undersigned can draw an

inference that Complainant does not object to the granting of the Motion.[2] *See* 40 C.F.R. § 22.16(b) ("Any party who fails to respond within the designated period waives any objection to the granting of the motion."). As such, Respondent's Motion to Supplement Prehearing Exchange is **GRANTED**.

Presumably anticipating that Respondent would eventually locate and seek to introduce some evidence regarding its compliance with Counts IV-V, Complainant asserted in its Motion for Accelerated Decision, that Respondent must be compelled to "explain how and where it found such documentation and why it could not be located earlier." Complainant's Motion ¶ 66 at 25. Although the undersigned will accept these documents as supplements to the prehearing exchange, Complainant, on cross-examination, will have the opportunity to pose precisely this question to Respondent. However, it would be premature at this point in the proceeding to require Respondent to furnish such an explanation as to the credibility and authenticity of the documents. Rather, such a challenge to Respondent's proposed evidence should be made at the hearing when Respondent seeks to introduce such information into the record. The weight that these documents are ultimately afforded will be determined by the undersigned as the trier-of-fact in this proceeding.

B. Complainant's Motion for Accelerated Decision on Liability

2. Count 1

In Count 1 of the Complaint, Complainant alleges that Respondent was accumulating hazardous waste in a container which bore no accumulation start date as required by 35 I.A.C. § 722.134(a)(2). To support its Motion for Accelerated Decision as to liability on Count 1, Complainant points to the Answer, in which Respondent states it "labeled the box at issue immediately upon receiving notice of this issue." Answer ¶ 40. In its Response to Complainant's Motion, Respondent admits directly that "it failed to immediately mark a hazardous waste storage container with an accumulation start date in violation of 35 I.A.C. § 722.134(a) and 40 C.F.R. § 262.34." Response at 1. In light of Respondent's admission, and Respondent's decision not to contest its liability in its Response to Complainant's Motion for Accelerated Decision, there remains no genuine dispute of fact as to liability on this count. As such, Complainant's Motion for Accelerated Decision as to this count is **GRANTED**.

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[2] On September 10, 2002, the undersigned received Complainant's Reply in Support of Motion for Accelerated Decision ("Reply"), which was filed with the Regional Hearing Clerk on September 5, 2002. In this document, the Court notes Complainant did not challenge the granting of Respondent's Motion to Supplement. However, because Complainant's Reply was untimely filed, with no request for an extension of time to file said reply, the Complainant is deemed to be unresponsive to Respondent's Motion. *See* 40 C.F.R. §§ 22.16(b) ("The movant's reply to any written response must be filed within 10 days after service of such response."); 22.7(c) ("Where a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery, 5 days shall be added to the time allowed by these Consolidated Rules of Practice for filing of a responsive document.").

However, Respondent claims that the storage container at issue arrived at the plant on the same day, April 13, 2000, as EPA's inspection and that Respondent had simply not yet marked the container with the accumulation start date. Respondent further asserts that it labeled the container before the end of the day on April 13, 2000. Respondent's prompt labeling of the container may be pertinent for the determination of a penalty, if any.

2. Count 2

Pursuant to 35 I.A.C. § 722.134(a)(1)(A) and, more specifically, 35 I.A.C. § 725.273, Respondent's hazardous waste must be stored in a container, always "closed during storage, except when it is necessary to add or remove waste." 35 I.A.C. § 725.273(a). Count 2 alleges that Respondent was in violation of this regulation because the EPA inspector observed the container at issue to be uncovered. Respondent as well admits that the roll-off box was not closed. *See* Answer ¶ 44. Complainant's allegation is further supported by the affidavit of Judith Kriz which states that Respondent admitted that it did not possess a cover for the roll-off box. *See* Kriz Aff. ¶ 8. *See also* Complt's Ex. C-6 at 2. Respondent seeks to defeat this allegation by claiming that the container was in "continuous use" and "equipped with a tarp cover" when ready for shipment. Answer ¶ 45. This argument is again set forth in Respondent's Response, as well as the argument that "the possibility of covering the roll-off anytime prior to shipping off site for final disposal is not practical." Response at 2. Respondent contends that accelerated decision on Count 2 is improper because a "question of fact exists whether BPW continuously adds wastes to the roll-off box precluding covering until ready for transport." Response at 2.

By its own admission, Respondent concedes that the storage container is not always closed as required by 35 I.A.C. § 725.273(a). Respondent's hours of operation, at a maximum, are 24 hours a day, 6 days a week. *See* Respt's Ex. E (Contingency Plan) (allegedly prepared and implemented in the year 1989 and in effect on April 13, 2000). Respondent's hours of production, as disclosed in Exhibit E of Respondent's prehearing exchange indicate that the plant remains closed from 7:01 a.m., Sunday morning through 6:59 a.m., Monday morning. *See id*. at 4 ("Production Hours: Monday through Saturday, 7 AM-7AM"). Therefore, no operations are conducted for a minimum of 24 consecutive hours each week. Because the plant is closed for this period, there can be no need to add waste to or remove waste from the storage container. Thus, Respondent's argument is unavailing that continuous use of the storage container makes it impractical or unnecessary to cover the container prior to shipping. A 24-hour lull in activity is sufficient to constitute a *non*-continuous use of the container. Accordingly, no genuine question of fact exists as to Count 2, and accelerated decision in favor of Complainant is appropriate. As such, Complainant's Motion for Accelerated Decision as to this count is **GRANTED**.

3. Count 3

Count 3 alleges that Respondent failed to produce any documents indicating that facility personnel had been trained in hazardous waste management, thus violating 35 I.A.C. § 725.116. The regulation at subsection (d) states that the "owner or operator must maintain . . . documents and

records at the facility" describing which staff positions are related to hazardous waste and the type of training given to the employees who occupy these positions. 35 I.A.C. § 725.116(d)(1)-(4). Respondent concedes liability as to Count 3, admitting that its failure to maintain personnel training documents, and to produce such documents during EPA's inspection, was a violation of 35 I.A.C. § 725.116(d). *See* Response at 2. Although unable to produce the necessary documentation, Respondent denies that it failed to train its staff and further declares that, in response to the EPA inspection, it has retained the services of a consulting firm to "coordinate its training and assist it in maintaining applicable environmental records." Response at 2. Such factors may pertain to the determination of a penalty, if any, but on the question of liability, Respondent raises no dispute of material fact on Count 3. As such, Complainant's Motion for Accelerated Decision as to this count is **GRANTED**.

4. Count 4

Complainant, in Count 4, alleges violations of the Contingency Plan and Emergency Procedures regulations codified at 35 I.A.C. Part 725 Subpart D. These regulations apply to owners and operators of hazardous waste facilities. *See* 35 I.A.C. § 725.150. However, generators of hazardous waste, who generate over 1000 kilograms of hazardous waste per calendar month, and who accumulate the waste on site, must also comply with the Contingency Plan and Emergency Procedures regulations. *See* 35 I.A.C. § 722.134(a)(4). Thus, the regulations codified at 35 I.A.C. Part 725 Subpart D apply to Respondent.

The applicable regulations require that a Contingency Plan be designed to minimize hazards to human health or the environment from fires, explosions or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil or surface water. *See* 35 I.A.C. § 725.151(a). The Contingency Plan must describe the actions of facility personnel in response to fires, explosions, or releases of hazardous waste or hazardous waste constituents which includes, *inter alia*, the names, addresses and phone numbers of the facility's emergency coordinators, all emergency equipment at the facility, and an evacuation plan. *See* 35 I.A.C. §§ 725.152(a), (d)-(f). The regulations allow the use of a Spill Prevention Control and Countermeasures ("SPCC") Plan to satisfy the Contingency Plan requirements provided that the plan incorporates the hazardous waste management provisions of Subpart D. *See* 35 I.A.C. § 725.152(b). A copy of the Contingency Plan and all revisions to the Plan must be "maintained at the facility; and submitted to all local police departments, fire departments, hospitals and state and local emergency response teams that may be called upon to provide emergency services." 35 I.A.C. § 725.153(a)-(b).

Complainant specifically alleges that Respondent violated the "submittal" requirement codified at 35 I.A.C. § 725.153(b) because, according to Complainant, Respondent was "unable to provide letters, documents, or any other evidence to indicate that the Facility's July 28, 1999 Contingency Plan had been submitted to the requisite local police departments, fire departments, hospitals, and State and Local emergency response teams." Complaint ¶ 53. *See also* Complainant's Motion ¶ 53 (restating the allegation in the Complaint). Complainant also alleges that "since Respondent was unable to produce Contingency Plans for 1997 and 1998, Respondent is also in violation of the submittal requirements for 1997 and 1998." Complaint ¶ 53. Thus, from

the plain terms of the Complaint, Complainant is not alleging that Respondent failed to maintain the Contingency Plans at its facility, which is required by 35 I.A.C. § 725.153(a), but rather that Respondent failed to submit its Contingency Plan to the enumerated state and local authorities pursuant to 35 I.A.C. § 725.153(b).

Respondent has denied this allegation both in its Answer to the Complaint and in its Response to Complainant's Motion for Accelerated Decision. *See* Answer ¶ 53; Response at 2-4. Respondent challenges this allegation on two grounds. First, Respondent contends that Complainant has not established when Respondent first submitted a Contingency Plan to the requisite authorities. This is dispositive, according to Respondent, because neither state nor federal regulations require that the Contingency Plan be submitted annually. Rather, after an initial submission, the regulations governing the Contingency Plans are only triggered by key events such as, "applicable regulations are revised; the plan fails; the facility changes; the list of emergency coordinators changes; or the list of emergency equipment changes." *See* 40 C.F.R. § 265.54(a)-(e).[3] Thus, Respondent maintains, without establishing when Respondent first submitted its Contingency Plan to the local authorities, and without establishing when, if ever, Respondent was obligated to amend its Contingency Plan, the undersigned cannot, at this stage in the proceeding, evaluate whether Respondent has violated 35 I.A.C. § 725.153(b). And therefore, contends Respondent, it would be impossible for the undersigned to conclude that Respondent was in violation of 35 I.A.C. § 725.153(b) in the calendar years 1997-1999 for failing to submit a Contingency Plan to state and local authorities. *See* Response at 3.

As a second ground to challenge the allegation, Respondent alleges that it prepared an SPCC Plan in 1994. *See* Response at 3; Response Attachs. A-C. As cited above, the regulations allow the use of an SPCC Plan to satisfy the requirements for a Contingency Plan provided it incorporates all of the relevant hazardous waste management provisions. *See* 35 I.A.C. § 725.152(b). Since Complainant has not addressed Respondent's SPCC Plan, Respondent contends that "a question of fact exists whether BPW submitted the SPCC Plan to the required entities." *See* Response at 3.

In this proceeding Respondent has provided the court with three Contingency Plans, *see* Respt's Exs. B, C, and E, and two SPCC Plans, *see* Response Attachs. C, D. In its prehearing exchange, Respondent contends that the Contingency Plan provided in Ex. E was "prepared and implemented in the year 1989 . . . [and] was in effect on April 13, 2000." *See* Respondent's Supplemental Prehearing Exchange at 1 (Mar. 26, 2002). *See also* Respt's Ex. E. Respondent asserts that the Contingency Plan "referred to in the inspection was not in use by the Respondent at any time." *See* Respondent's Supplemental Prehearing Exchange at 1. Rather, the "Contingency Plan [had been] prepared in the year 1999, but not implemented by Respondent." *See id*. *See also* Respt's Ex. B. Respondent also provided an amended Contingency Plan which was implemented "on our about April 20, 2000 following the inspection by the Complainant to insure Respondent was

[3] The undersigned cited to the federal regulation because the applicable state regulations for amendment of the Contingency Plan were not provided by either party. But, *see also* 35 I.A.C. § 725.154(a)-(e)

complying with all applicable requirements." *See* Respondent's Supplemental Prehearing Exchange at 1. *See also* Respt's Ex. C. Yet, in its Response to Complainant's Motion for Accelerated Decision, Respondent seemingly claims that an SPCC Plan, which was allegedly implemented in 1994, was in effect at the time of the EPA inspection. *See* Response at 3; Response Attachs. B-C.

As a threshold matter, it is unclear which Plan Respondent was relying on to fulfill its obligations under 35 I.A.C. Part 725 Subpart D, §§ 725.150-725.156. This factual uncertainty alone would render this count inappropriate for accelerated decision. However, Complainant has failed to carry its burden of establishing that there is no genuine issue of material fact. Complainant maintains that because Respondent could not provide letters, documents, or any other evidence to indicate that Respondent had submitted the Plan to the requisite state and local authorities, that Respondent, *per se,* violated 35 I.A.C. § 725.153(b). However, the regulations at issue do not impose upon Respondent a regulatory obligation to maintain such things as "letters, documents, or other evidence" at its facility as proof of compliance with 35 I.A.C. § 725.153(b) nor does Complainant cite to any applicable law or policy otherwise creating an obligation to maintain such items as proof that the Plan had in fact been submitted. It is clear from the applicable regulations that Respondent is required to *maintain* the Contingency Plan at its facility. *See* 35 I.A.C. § 725.153(a) (requiring that the Contingency Plan be "maintained" at the facility). And, as a general matter, because Respondent is a generator, it is required to maintain certain kinds of "records". *See* 35 I.A.C. § 722.140. However, Complainant has not alleged that "letters, documents, or other evidence" are "records" pursuant to 35 I.A.C. § 722.140 nor has it alleged a violation of 35 I.A.C. § 722.140.

It is part of Complainant's *prima facie* case to first establish the year in which Respondent became subject to the regulations codified at Part 725 Subpart D, the year that Respondent submitted or should have submitted its Contingency Plan, and that Respondent was legally obligated to resubmit its Contingency Plan subsequently thereafter for the years 1997, 1998, and 1999. After establishing when Respondent was obligated to initially submit its Contingency Plan, and that Respondent had a legal obligation to resubmit the Plan in the aforementioned years, Complainant must then establish that Respondent did not, in fact, submit the Contingency Plan as required by 35 I.A.C. § 725.153(b) or 40 C.F.R. § 265.53(b). Complainant could have substantiated Count 4 with either an admission by Respondent that it had never submitted the Plan or affidavits of representatives from the relevant state and local authorities averring that they had not, in fact, ever received a Plan from Respondent.[4] In so doing, Complainant would have carried its burden of

[4] The 1989 Contingency Plan, *see* Respt's Ex. E, and the 1994 SPCC Plan, *see* Response Attach. B, that Respondent submitted in this proceeding contain contact information for emergency personnel. *See* Respt's Ex. E at 10 (section entitled "Emergency Response Notification" which contains the phone numbers to such entities as the police department, the fire department, and the local hospital); Response Attach. B at 5. One could infer that these entities should have received a Plan from Respondent and if they hadn't, Respondent would be in violation of the submittal requirement of 35 I.A.C. § 725.153(b). But, Complainant has failed to provide the undersigned with proof that these entities did not, in fact, receive a Plan from

establishing the factual elements for a violation of 35 I.A.C. § 725.153(b), for it is part of Complainant's prima facie case to prove that the Plan was not submitted to the requisite authorities. Instead, Complainant choose to rely solely on the absence of letters or documents at Respondent's facility. Respondent has always contested the factual allegations comprising Count 4, and the evidence Complainant relies on in support of this allegation has not shifted the burden of production to Respondent. As such, a factual dispute exists as to whether or not Respondent failed to submit copies of its Contingency Plan to the requisite state and local authorities in violation of 35 I.A.C. § 725.153(b). Thus, Complainant's Motion for Accelerated Decision as to this count is **DENIED**.

5. Count 5

Count 5 of the Complaint alleges that Respondent violated 35 I.A.C. § 725.137, the regulation governing "Arrangements with Local Authorities." This provision requires Respondent to "attempt to make arrangements to familiarize police, fire departments, and emergency response teams with the layout of the facility, properties of the hazardous waste handled at the facility and associated hazards, places where facility personnel would normally be working, entrances to roads inside the facility and possible evacuation routes . . ." *See* 35 I.A.C. § 725.137(a)(1). The regulations do acknowledge that state and local authorities may "decline to enter into such arrangements." *See* 35 I.A.C. § 725.137(b). In those instances where state and local authorities decline to enter into arrangements pursuant to this section, the regulation requires this refusal be documented in the operating record. *Id*. Otherwise, 35 I.A.C. § 725.152 requires that the Contingency Plan "describe arrangements agreed to by local police department, fire departments, hospitals, contractors, and state and local emergency response teams to coordinate emergency services, pursuant to § 725.137." *See* 35 I.A.C. § 725.152(c). Thus, by virtue of these two regulatory provisions, Respondent must either have recorded in its operating record that it attempted but was unable to secure arrangements with the requisite entities or alternatively, Respondent described the arrangements that it had made under 35 I.A.C. § 725.137 in its Contingency Plan pursuant 35 I.A.C. § 725.152(c).

Complainant contends that "during the [inspection], Respondent was unable to produce evidence that arrangements had been made with police, fire departments, and emergency response teams, to familiarize them with the regulatory requirements set forth in [35 I.A.C. § 725.137(a)(1)]." Complaint ¶ 57. In its Answer, Respondent admitted that it did not produce such documents but it denied that it had not, in fact, made arrangements to familiarize the aforementioned entities pursuant to 35 I.A.C. § 725.137. *See* Answer ¶ 57. Moreover, Respondent contends that "Section 725.137 does not require the owner or operator to document the fact that arrangements have been

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Respondent, or a revised Plan, if Respondent was required to amend its Plan pursuant to 35 I.A.C. § 725.154. The Court does note, however, that Complainant has identified "representatives of Fire, Police, and appropriate emergency response agencies whose service area would include Respondent's facility" as potential witnesses who will "testify as to their agencies' degree of familiarity, if any, with Respondent's facility, as well as their possession of and familiarity with Respondent's Contingency Plan." *See* Complt's Prehearing Exchange at 8.

made; it requires only that arrangements be made." Response at 4. Finally, Respondent has furnished this court with "recently located letters submitted to the Franklin Fire Department prior to the USEPA inspection." Response at 4. In these letters, Respondent alleges that "BPW familiarized the Franklin Park Fire Department with the layout of the facility, properties of hazardous waste handled at the facility and associated hazards, places where facility personnel would normally be working, and, entrances to roads near the facility as required by 35 I.A.C. § 725.137(a)(1)." *Id*. *See also* Response Attachs. E-F.

Respondent's contention that it need not document the arrangements made pursuant to 35 I.A.C. § 725.137(a) is inconsistent with the applicable regulations which require either: a description of the arrangements agreed to by the enumerated authorities, as required by 35 I.A.C. § 725.152(c) or documentation in its operating record that Respondent had attempted to make arrangements with state and local authorities but that these entities refused, as required by 35 I.A.C. § 725.137(b). Yet, Complainant's allegation, supported only by the absence of evidence that arrangements had been made, does not establish that there is no dispute of material fact. Complainant's vague use of the phrase "unable to produce evidence," *see* Complainant's Motion ¶ 57, does not indicate whether it is relying on Respondent's Plans (Contingency or SPCC) or Respondent's operating records to demonstrate Respondent's failure either to document the arrangements, pursuant to 35 I.A.C. § 725.152(c), or its attempt to make arrangements, pursuant to 35 I.A.C. § 725.137(b). The matter is further compounded by the undersigned's inability to ascertain which of Respondent's many Plans, i.e., Contingency or SPCC, is the correct document to memorialize a description of its arrangements. As such, a factual dispute exists as to whether or not Respondent failed to comply with 35 I.A.C. § 725.137. Thus, Complainant's Motion for Accelerated Decision on this count is **DENIED**.

6. Count 6

The final count of the Complaint, Count 6, alleges a failure to minimize the possibility of a release of hazardous waste in violation of 35 I.A.C. § 725.131. The applicable regulation states that "facilities must be maintained and operated to minimize the possibility of a fire, explosion or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment." 35 I.A.C. § 725.131. The term "release" is neither defined by Illinois nor federal hazardous waste regulations. However, the Illinois Environmental Protection Act defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, but excludes (a) any release which results in exposure to persons solely within a workplace, with respect to a claim which such persons may assert against the employer of such persons . . ." 415 ILL. COMP. STAT. 5/3.395 (West 2002) (formerly § 3.33, renumbered § 3.395 by P.A. 92-574, § 5, eff. June 26, 2002).

During the inspection of Respondent's facility on April 13, 2000, the EPA inspector observed and photographed F006 filter cake, a listed hazardous waste, on the floor of Respondent's facility. *See* Complaint ¶ 61; Complt's Ex. C-6; Complt's Ex. C-18. Additionally, Respondent has admitted that on the day of the inspection "material was observed on the floor," Answer ¶ 61, and

that the "hazardous waste sludge (F006) that was observed on the floor around the wastewater treatment filtration unit was a result of the unit's standard of operation," Complt's Ex. C-12 (Response to EPA's Notice of Violation). Complainant proffered the affidavit of Judith Kriz, US EPA Enforcement Officer for Region V, to aver that in releasing the F006 sludge to the floor of Respondent's facility, Respondent was not minimizing the possibility of release because "the waste falling to the floor increases the likelihood that the waste will be tracked or spread into the environment and outside of the Facility. Further, these releases which resulted in sludges on the floor of the facility do not represent usual operations in similar facilities which I have visited." Kriz Aff. ¶ 13.

These admissions, observations, and expert averments notwithstanding, Respondent argues that there is a genuine issue of material fact precluding accelerated decision on this count. Respondent proffered its own expert, the engineer who built Respondent's facility, to challenge Complainant's contention that hazardous waste is released to air, soil, or surface water. Specifically, Respondent's affiant, Mr. Veit, averred that if released, "the sludge is deposited on a portion of the floor that is bermed," that "the floor area upon which the sludge is deposited is not within an aisle and is not likely to be picked up on the bottoms of the shoes of BPW employees," and that "the small door nearest the sludge drier also has a poured concrete berm to prevent the sludge from migrating or being carried out-of-doors." Veit Aff. ¶ 10. In Mr. Veit's expert opinion, "with good housekeeping, consisting of regular cleanup, there is no reason to believe that F006 sludges have ever escaped into the environment from the solid concrete floor, or that there is any reasonable expectation of any sludges ever doing so." Veit Aff. ¶ 11.

Respondent contends that although a small volume of sludge does occasionally spill onto the floor beneath the press, BPW's good housekeeping practices, which consist of "inspect[ing] the sludge processing area several times each day and sweep[ing] up promptly any sludges that fall on the floor," prevent releases to the air, soil, or surface water. Response at 6. Accordingly, "the fallen sludge does not pose a risk to human health or the environment because it is always contained within a bermed area." *Id*. (citing Veit Aff. ¶¶ 3, 10, 11). Thus, Respondent maintains, a genuine issue of material fact exists "concerning whether BPW failed to maintain and operate its facility so as to minimize the possibility of any release of hazardous waste to the air, soil, or surface water which could threaten human health or the environment." Response at 7.

Based upon the affidavit of Respondent's expert, the undersigned concludes that Respondent has met its burden of producing some evidence which places the Complainant's evidence in question and raises a question of fact for an adjudicatory hearing. For instance, whether or not the F006 sludge on the floor of Respondent's facility was, in fact, released to the air, soil, or surface water is one such question of fact that can only be properly addressed at a hearing. Moreover, the record at this stage does not detail sufficient facts about the operation and maintenance of Respondent's facility to determine, as a matter of fact, that Respondent was not minimizing the possibility of a fire, explosion or any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water which could threaten human health or the environment. Thus, regardless of the parties' respective burdens for this count, sound judicial policy and the exercise of judicial discretion permit a denial of Complainant's Motion for Accelerated

Decision on Count 6 so that the facts can be developed fully at trial. *See Roberts v. Browning*, *supra*, at 536. As such, Complainant's Motion for Accelerated Decision as to this count of the Complaint is **DENIED**.

An appropriate civil penalty will therefore be assessed for the violations found in Counts I-III of the Complaint. Such penalty will be determined by the evidence received at the hearing that is scheduled to begin at **9:00 a.m.**, on **Tuesday**, **October 22, 2002** in Chicago, Illinois. That hearing will also adjudicate Counts IV-VI to which EPA has not been awarded accelerated decision. The parties are reminded that EPA bears the burden of proof as to both the civil penalty and liability issues. *See* 40 C.F.R. § 22.24.

ORDER

Respondent's Motion to Supplement Prehearing Exchange is **GRANTED**

Pursuant to Section 22.20(a) of the Rules of Practice: Complainant's Motion for Accelerated Decision on Counts I-III is **GRANTED**; and Complainant's Motion for Accelerated Decision on Counts IV-VI is **DENIED**.

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Stephen J. McGuire
United States Administrative Law Judge

September 11, 2002
Washington, DC