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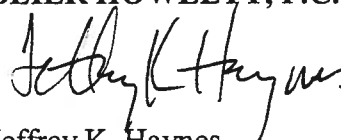
Re: Respondent: Dearborn Refining Company
Docket No: RCRA-05-2001-0019

Dear Clerk:

Attached is an original and one copy of respondent's reply brief and proof of mailing.

Very truly yours,

BEIER HOWLETT, P.C.



Jeffrey K. Haynes

JKH/drd

Enclosures

cc (w/ encls):

Barbara A. Gunning, Administrative Law Judge
Regional Hearing Clerk
Mr. Richard J. Clarizio
Dearborn Refining Company

**United States Environmental Protection Agency
Environmental Appeals Board**

In the matter of

Dearborn Refining Company,)
)
 Respondent)
_____)

Docket No. RCRA-05-2001-0019

**Dearborn Refining Company's
Reply Brief**

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Table of Authorities

Cases

<i>United States v Municipal Authority of Union Township</i> 150 F.3d 259 (3d Cir. 1998).....	7
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Rules

40 CFR 279.10(a)(1).....	2
40 CFR 279.52(a)(3).....	4
40 CFR 279.52(a)(4).....	3
40 CFR 279.52(a)(4)(i).....	3
40 CFR 279.52(b)(2)(v).....	3
40 CFR 279.54(b).....	2

EPA's response brief consists of conclusory, contradictory and exaggerated statements that EPA substitutes for reasoned analysis and citation to the record. EPA piles inference upon innuendo to paint a gruesome picture of the Dearborn Refining facility that is inconsistent with the record. It is impossible within the scope of this brief to reply to each such instance in EPA's prolix 110-page response. Dearborn Refining files this reply brief to illustrate these errors in EPA's response brief.

Count I, Secondary containment.

EPA's response (brief pp. 15-26) attempts to reverse the burden of proof. EPA argues that Dearborn Refining did not sustain its burden of proof to show that oil and grease found at the site were caused by a source other than Dearborn Refining (brief pp. 22-24). EPA has the burden of proof on this issue. EPA never demonstrated that the oil and grease found in its sampling results were consistent with partially reclaimed oil in Dearborn Refining's tanks. EPA thus never showed a causal connection between Dearborn Refining's operations and the oil and grease found sometimes dozens of feet below the surface of the facility.

EPA further ignores that it never tested the compaction of the surface of the facility. EPA implies that there are portions of the site that allow flow off-site (brief p. 5). It is clear from the transcript that these portions are the office area, where there is no used oil storage (Tr 3, 139). EPA further attempts, by innuendo, to argue that Dearborn Refining has placed sludge on the ground at the facility (brief p. 6). The ground that is referred to (Tr 4, 244) is cemented and specifically designed for that purpose.

The lack of EPA's proof in this regard is shown by its consistent citation of its proposed findings of fact rather than the record (brief pp. 18-21). For instance, it cites its proposed finding

of fact ¶132 that sump no. 1, which received used oil, was dilapidated. Only the edges of that sump were dilapidated, not the sump itself. EPA's further innuendo is shown in footnote 15 on page 22 of its brief, in which it asserts that Mr. Moloian, Dearborn Refining's president, testified that site activities can be "sloppy." It is clear from Mr. Moloian's testimony that he refers to site operations before he assumed control of the operations. Tr 4, 224-225, 244-246. Specifically, EPA does not rebut its own assertion that it has no reason to doubt Dearborn Refining's statement that the ground at the site was compacted. Tr 3, 130; EPA Ex. 77. EPA ignores this contemporary evidence in favor of relying on Dearborn Refining's 20-year-old hydrogeological report (Dearborn Refining Ex. 1), which found loose soils at depth.

Count II, Failure to properly label tanks and containers.

EPA fails utterly to show that any of the tanks and containers alleged in the complaint at the time of the June 1999 inspection contained anything other than partially reclaimed used oil. 40 CFR 279.10(a)(1) provides that materials reclaimed from used oil that are used beneficially are not used oil.

Count III, Poor condition containers.

EPA's argument (brief pp. 33-39) overlooks that EPA never observed any of the tanks at the Dearborn Refining facility leaking used oil (Tr 2, 93). EPA never tested the structural integrity of Dearborn Refining's tanks to determine if they were in poor condition (Tr 2, 95). In particular, EPA observed only surface rust on the tanks, which EPA does not even attempt to argue constitutes "severe rusting" required by the regulation, 40 CFR 279.54(b). Significantly, EPA does not cite to the record its assertion that Mr. Moloian admitted that there were drips and leaks from the tanks (brief p 36). EPA's position is further diminished by its citation to Mr. Valentino's testimony that some of the drums located in the storage bed near the office building

were deteriorating (brief p 38). Nowhere does EPA show that Dearborn Refining stored used oil in drums; in fact, the contrary is true (Tr 4, 275).

Count IV, Communication devices.

EPA's brief (pp. 39-42) fails to show how Dearborn Refining's telephone system for contacting emergency personnel was inadequate under 40 CFR 279.52(a)(4). EPA does not show that Mr. Moloian's unrebutted testimony in that regard is fanciful or unbelievable (Tr 4, 299-301). Furthermore, EPA does not rebut Dearborn Refining's evidence that its intercom system was adequate (Tr 4, 299). Furthermore, EPA fails to show how Dearborn Refining's practice of having two people go into the oil processing area does not satisfy 40 CFR 279.52(a)(4)(i), which require visual or voice contact with another employee (Tr 4, 301).

Count V, Contingency plan.

EPA argues that Dearborn Refining's SPCC plan does not accurately indicate the location of emergency equipment (brief pp. 42-45). EPA again confuses the burden of proof by arguing that Dearborn Refining must prove that its contingency plan was adequate (brief pp. 44-45). EPA argues that Dearborn Refining did not specify the exact location of oil-absorbent on its SPCC plan and that the plan must be "immediately amended" whenever the list of emergency equipment changes, citing 40 CFR 279.52(b)(2)(v). EPA mis-cites the regulation, which requires amendment of the plan when the "list" of emergency equipment changes, but nowhere does the regulation require that the plan be amended if the emergency equipment is temporarily not located in the location on the plan. Thus, EPA cites a rule that it never alleged Dearborn Refining violated.

Count VI, Emergency equipment.

EPA once again reverses the burden of proof (brief pp. 45-48). EPA seeks to place the burden on Dearborn Refining of showing that the fire extinguishers, whose inspection tags had expired two months before the inspection, were not adequately maintained. EPA never tested the fire extinguishers. EPA offers no argument or evidence that Dearborn Refining's practices did not meet the amorphous standard in 40 CFR 279.52(a)(3) the emergency equipment be tested "as necessary" to assure their proper operation in time of emergency.

Count VII, Written analysis plan.

EPA's brief (p. 53) repeated without elaboration the initial decision (pp. 36-38) that discounted Dearborn Refining's extensive written analysis plan consisting of generator manifests (Dearborn Refining Ex. 14), waste characterization reports (Dearborn Refining Ex. 17), and waste analysis plan (Dearborn Refining Ex. 18). The initial decision ignores that Dearborn Refining's sampling method was submitted to EPA in 1981 and was used in these documents. Furthermore, EPA argues that generator waste characterization reports were not available for shipments received by Dearborn Refining between June and September 1999 (brief p. 52). As pointed out in Dearborn's initial brief, EPA's inspection would have turned up these documents had it inspected the facility with Mr. Moloian present, rather in the hospital with a heart attack. The fact that EPA could not find the reports does not mean they do not exist.

Count VIII, Storage of hazardous waste without a permit.

EPA attempts unsuccessfully (brief pp. 54-58) to show that the presence of partially reclaimed oil in Dearborn Refining's tanks together with the presence of lead several feet below the surface of the soil shows that Dearborn Refining disposed of hazardous wastes. Nowhere does EPA show any causal connection between the two. As pointed out in Dearborn Refining's

brief (p. 9), EPA never determined when lead was deposited in the subsurface (Tr 2, 112). EPA attempts to shift the burden to Dearborn Refining (brief pp. 57-58), when in fact EPA utterly failed in its burden of showing some causal connection between Dearborn Refining's operations and lead found dozens of feet below the surface of the facility. EPA produced no competent hydrogeologic testimony, no soil chemistry testimony, and no fate and transport testimony to prove its unsupported theory.

EPA attempts to wiggle out from its admission that Dearborn Refining rebutted the presumption of storing hazardous wastes in tanks 5, 12, 17, 59, 62 and 70 (brief pp. 58-73). EPA fails to show how its own document (respondent's Ex 23) (its "expert" Sue Brauer's determination that Dearborn rebutted the hazardous waste presumption as to tanks 5, 12, 17 and 59) is an admission that is fatal to EPA's position. EPA unsuccessfully tries to impeach this admission in its brief (pp. 61-66). EPA's argument that Dearborn Refining admitted that the contents of the tanks had changed is fatuous. EPA equates drawing down the tanks with changing them, without any supporting evidence that removing material from the tanks in any way changes the chemical composition of those tanks.

As to tanks 62 and 70, Dearborn Refining merely had to show that they contained insignificant amounts of halogenated hazardous constituents. This was shown by EPA's consultants' sampling in June 1999 (Tr 2, 151-179, EPA Ex. 1, Table 2). Dearborn Refining extensively cross-examined the author of the contractor's report to show there were insignificant amounts of any halogenated hazardous constituents, not just the F001 and F002 scans, contrary to EPA's brief (p 66).

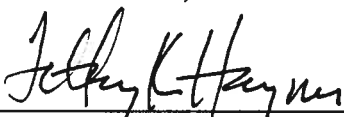
credibility than audited financial statements, not whether the existence of fraudulent audited statements implies that unaudited statements are equally fraudulent.

Recognizing that Dearborn Refining has no assets to pay any penalty, EPA seeks to lasso another company of which Aram Moloian is president (Chem Serve) and his personal assets in order to show that Dearborn Refining has an ability to pay the proposed penalty (brief pp. 95-110). EPA utterly fails to demonstrate, however, that either Chem Serve or Mr. Moloian have any obligation to finance Dearborn Refining's debts. Lacking such an obligation, neither the assets of Chem Serve (which were never established by EPA, see brief p. 98), nor the assets of Mr. Moloian (which were excluded Tr 5C, pp. 130-135) are relevant. EPA's attempt to analogize to a corporate parent is inapposite. EPA cites *United States v Municipal Authority of Union Township*, 150 F.3d 259 (3d Cir. 1998), but that case, which dealt with a corporate parent, has no relevance to this action, in which EPA is attempting to improperly obtain personal financial information of a corporation's shareholder.

Conclusion

For the reasons stated in Dearborn Refining's brief on appeal and this reply brief, respondent Dearborn Refining requests that this Board reverse the initial decision, holding that EPA failed to prove any of its allegations and holding that Dearborn Refining Company proved that it is unable to pay any penalty.

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Dated: December 1, 2003

United States Environmental Protection Agency
Environmental Appeals Board

In the matter of

Dearborn Refining Company,)
)
Respondent)
_____)

Docket No. RCRA-05-2001-0019

Certificate of Mailing

Doreen R. Defauw deposes and states that she served documents as follows:

1. **Documents served:** Certificate of mailing and Dearborn Refining Company's reply brief

2. **Served Upon:** Judge Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, DC 20460-2001

Mr. Richard J. Clarizio
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, Illinois 60604-3590

Regional Hearing Clerk (E-19J)
United States EPA
Region 5, 77 W. Jackson Boulevard
Chicago, Illinois 60604

3. **Method of Service:** Federal Express

4. **Date of Service:** December 1, 2003

I declare that the above statements are true to the best of my knowledge, information, and belief.



Doreen R. Defauw

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