UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
DEARBORN REFINING COMPANY,	)	**Docket No. RCRA-05-2001-0019**
RESPONDENT	)	

INITIAL DECISION

Pursuant to Section 3008 of the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act of 1976, as amended by the Hazardous and Solid Waste Amendments of 1984 (collectively referred to as "RCRA"), 42 U.S.C. § 6928, Dearborn Refining Company is assessed a civil penalty of $1,250,000 for violations of RCRA and its implementing regulations for the management of used oil and hazardous waste found in Michigan Administrative Code Rules 299.9813 (40 C.F.R. Part 279, Subpart F) and 299.9502, and is ordered to comply with the attached Compliance Order.

Issued: August 15, 2003

Before: Barbara A. Gunning
Administrative Law Judge

Appearances:

For Complainant: Richard J. Clarizio, Esquire
James J. Cha, Esquire
U.S. EPA, Region V
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Chicago, IL 60604-3590

For Respondent: Jeffrey K. Haynes, Esquire
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Bloomfield Hills, MI 48304-2361

I. Procedural History

This civil administrative penalty proceeding arises under the authority of Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On September 28, 2001, the United States Environmental Protection Agency, Region V (the "EPA" or "Complainant") filed a Complaint against Dearborn Refining Company ("Dearborn" or "Respondent") alleging violations of RCRA and its implementing regulations for the management of used oil and hazardous waste found in Michigan Administrative Code ("MAC") Rules 299.9813 (40 C.F.R. Part 279, Subpart F)[1] and 299.9502.

Specifically, Count I of the Complaint alleges that Respondent failed to have adequate secondary containment for existing aboveground tanks used to store or process used oil for at least 179 days in violation of MAC R. 299.9813(3)[2] (40 C.F.R. § 279.54(d)). Count II alleges that Respondent failed to label its aboveground tanks and containers used to store or process used oil with the words "Used Oil" for at least 3 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.54(f)(1)). Count III alleges that Respondent failed to store or process used oil in aboveground tanks and containers in good condition for at least 179 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.54(b)). Count IV alleges that Respondent failed to have an adequate communications system for at least 3 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.52(a)(4)). Count V

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[1] Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), the Administrator of the U.S. Environmental Protection Agency granted the State of Michigan final authorization to administer a state hazardous waste program in lieu of RCRA on October 16, 1986. 51 Fed. Reg. 36804 (Oct. 16, 1986). The State of Michigan's rules for the management of used oil became federally effective on June 1, 1999. 64 Fed. Reg. 10111 (Mar. 2, 1999). Under Section 3008 of RCRA, 42 U.S.C. § 6928, the EPA retains the authority to enforce regulations comprising an authorized State program.

[2] MAC R. 299.9813(3) directly incorporates many of the federal requirements for used oil processors and re-refiners into the state regulations, providing that "[a]n owner or operator of a facility that processes used oil shall comply with the provisions of 40 C.F.R. §§ 279.51, 279.52, 279.54, 279.55, 279.56, and 279.58, except § 279.54(a)." *See also* MAC R. 299.9813(7) and 299.11003(1)(x).

alleges that Respondent failed to have an adequate contingency plan for at least 3 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.52(b)(2)(v)). Count VI alleges that Respondent failed to adequately maintain emergency equipment for at least 1 day in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.52(a)(3)). Count VII alleges that Respondent failed to have a written analysis plan for at least 179 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.55). Finally, Count VIII alleges that Respondent failed to have an operating license for the storage or disposal of hazardous waste for at least 179 days in violation of MAC R. 299.9502(1).

For these alleged violations, Complainant seeks a compliance order and a civil administrative penalty in the amount of $2,910,524.94 against Respondent. Complainant considered the statutory penalty factors in Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), and calculated the proposed penalty by applying the methodology of the RCRA Civil Penalty Policy dated October 1990.

Respondent filed an Answer on October 29, 2001, denying or claiming to have no knowledge of the allegations made by Complainant. Respondent also raised several defenses and requested a hearing.

After the parties engaged in a prehearing information exchange, Complainant filed a Motion to Strike Defenses, Motion for Accelerated Decision, Motion to Compel Discovery Related to Respondent's Inability to Pay Defense, and Motion to Strike Respondent's Witnesses and Documents. Respondent subsequently filed a response to these motions, as well as a Motion for Issuance of Subpoenas to secure the appearance of two witnesses at the hearing.

In its Motion to Strike Defenses, Complainant asserted that Respondent violated Section 22.15(b) of the Rules of Practice by failing to state the circumstances or arguments that were alleged to constitute the grounds of any defense listed in its Answer, and that Respondent's defenses were factually and legally insufficient and constituted nothing more than a "quick and dirty" reply to the Complaint. In its response, Respondent argued that Complainant failed to meet its high burden of showing the legal and factual insufficiency of Respondent's defenses, or that such defenses had resulted in any prejudice or confusion. By Order dated January 3, 2003, Complainant's Motion to Strike Defenses was denied. *In the Matter of Dearborn Refining Co.*, Docket No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 10 (ALJ, Jan. 3, 2003). Although the defenses provided by Respondent in its

Answer were deficient under the Rules of Practice, I ruled that motions to strike are highly disfavored and Respondent should have the opportunity to support its arguments at a hearing. *Id.* at *6-9.

Complainant's Motion for Accelerated Decision argued that there were no genuine issues as to any material fact regarding the violations alleged in the Complaint, and that Respondent's pleadings failed to establish any facts in controversy or that supported any defense. In its response, Respondent contended that genuine issues of material fact existed for each count in the Complaint and for each ground asserted by Complainant in its motion. By Order dated January 17, 2003, Complainant's Motion for Accelerated Decision was denied on Counts I and III-VIII, and granted on Count II. *In the Matter of Dearborn Refining Co.*, Docket No. RCRA-05-2001-0019, 2003 EPA ALJ LEXIS 1 (ALJ, Jan. 17, 2003). For most of the allegations, I found that genuine issues of material fact existed that would be most properly resolved following an adjudicatory hearing. On Count II, however, Respondent failed to offer any probative evidence to support a finding contrary to Complainant's allegation that it failed to label its aboveground tanks and containers used to store or process used oil with the words "Used Oil" for at least 3 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.54(f)(1)).

In a conference call with the parties on January 24, 2003, I orally denied Complainant's Motion to Compel Discovery Related to Respondent's Inability to Pay Defense. This decision was based on the fact that ability to pay is an affirmative defense under RCRA for which Respondent bears the burden of presentation and persuasion, and requiring the production of documents at that stage would have unreasonably delayed the proceedings. Complainant's Motion to Strike Witnesses and Documents was also denied, although Respondent was instructed to produce a resume for proposed expert witness Aram Moloian. Respondent's Motion for the Issuance of Subpoenas was granted for Robert Buckley, a current employee of the U.S. Environmental Protection Agency, but denied for a former employee whose proposed testimony and current whereabouts were uncertain.

An evidentiary hearing was held on January 28 through 31, 2003, and February 5, 2003 in Detroit, Michigan. Both parties have since filed post-hearing briefs and post-hearing reply briefs. For the reasons discussed below, having fully considered the record in the case, the arguments of counsel, and being fully advised, I find Respondent to be in violation of RCRA as alleged in Counts I-VIII of the Complaint. For these violations, Respondent shall pay a civil administrative penalty in the amount

of $1,250,000 and comply with the requirements of the attached Compliance Order.

II. Findings of Fact

1. Dearborn Refining Company, a corporation incorporated under Michigan law, owns and operates an approximately 6-acre site at 3901 Wyoming Avenue in Dearborn, Michigan (the “facility”).

2. Dearborn blends and markets lubricating and metalworking products primarily from virgin oils and various additives, and also receives, stores, and processes used oil.

3. The facility is located in a predominantly industrialized area on the eastern side of Dearborn, although residential neighborhoods exist within a mile of the site. Apart from the structures located on the northeast side of the facility along Wyoming Avenue, the majority of the site has been associated with the storage and processing of used oil.

4. The current owner and president of Dearborn is Mr. Aram Moloian, who purchased the facility on February 4, 1985.

5. Since June 1999, Dearborn has employed at least four individuals at the facility.

6. From June 15 through June 17, 1999, the United States Environmental Protection Agency conducted a multi-media inspection and compliance investigation (the “inspection” or “MMI”) at the facility.

7. Mr. Moloian was hospitalized around the time of the MMI due to a heart attack suffered on June 10, 1999, and was not present at the facility during any portion of the inspection.

8. During the inspection, at least 1 million gallons of used oil were present at the facility. Dearborn took in approximately 400,000 gallons of used oil in 1998.

9. During the inspection, at least eighty aboveground tanks and one hundred 55-gallon drums were located on the portion of the facility involved with the processing of used oil. The following aboveground tanks and containers were used to store or process used oil: Tanks 1, 2, 5-7, 12, 13, 16-18, 22, 23, 26-28, 40-46, 48, 49, 59, 60, 62-68, 70, 75, 76, 78, 80-94, 301, 302, the uniflash tank, Sump 1 and 2, the plastic totes, and several 55-gallon drums.

10. Sampling of the aboveground tanks, containers, and soils at the facility was conducted during the June inspection, January 2000, and March 2000. The sampling was done by Ecology and Environment, Inc. ("E&E"), an EPA contractor, using methods approved by the EPA.

11. Dikes, berms, retaining walls, and a floor are absent from many of the areas surrounding the existing aboveground tanks used to store or process used oil at the facility.

12. The Dearborn site was historically used as a clay mine, and the first 15-20 feet of soil below the ground surface consists of a fill material composed of silt, wood, brick, concrete, clay, and sand.

13. Petroleum products have been found at the facility in surface soils and water, subsurface soils, and groundwater. Vegetation is present around the aboveground tanks and throughout the used oil portion of the facility.

14. The existing aboveground tanks used to store or process used oil at the facility were not equipped with a secondary containment system.

15. During the inspection, none of Dearborn's aboveground tanks and containers were labeled with the words "Used Oil."

16. Several of the aboveground tanks and containers used to store or process used oil at the facility were rusting, deteriorating, or otherwise in poor condition.

17. During the inspection, Dearborn's communication devices consisted of a telephone in the main office along Wyoming Avenue, a loud speaker mounted on top of one of the boiler rooms, and an internal intercom system connecting the main office with the blending room. Visual or voice contact did not exist between several areas of the used oil portion of the facility and the main office due to the presence of many large tanks and buildings.

18. During the inspection, Dearborn provided the EPA with a Spill Prevention Control and Countermeasures/Pollution Incident Prevention Plan ("SPCC Plan") dated May 27, 1999. Dearborn does not have a separate contingency plan for the management of used oil.

19. According to the SPCC Plan, oil absorbent is located in the blending room, wastewater treatment building, a boiler room, and

adjacent to the 50-series aboveground tanks. During the inspection, oil absorbent was not found in the wastewater treatment building, in the boiler room, or adjacent to the 50-series aboveground tanks.

20. During the inspection, several fire extinguishers located in the boiler house and boiler rooms had tags indicating that the extinguishers were last serviced in April 1998 and that the tags were void one year from that date.

21. At the time of the inspection, Dearborn provided the EPA with a Waste Analysis Plan last updated on October 23, 1989, and a Generator Waste Characterization Report form last modified on November 20, 1996. When accepting used oil at the facility, Dearborn also employed a Uniform Hazardous Waste Manifest provided by the Michigan Department of Environmental Quality ("MDEQ") and a Laboratory Report form to record test results from incoming waste oil and water. Dearborn later submitted to the EPA a Waste Analysis Plan updated on October 15, 1999.

22. The Waste Analysis Plan dated October 23, 1989 does not discuss used oil or total halogens.

23. The Waste Analysis Plan dated October 15, 1999 states that "[i]f the load is from a first time generator location or from a generator whose process has changed the load is also analyzed for Halogens, if the halogens are above 1000 ppm then either by MSDS or by testing (F1,F2 scan) it must be verified that the sources of halogens are not halogenated solvents."

24. The Generator Waste Characterization Report form dated November 20, 1996 requires generators of used oil to certify that their "waste contains no...halogens (other than halogenated paraffins) of greater than 1000ppm."

25. Generator Waste Characterization Report forms were not provided to the EPA for at least 23 generators who shipped waste to Dearborn between June 1999 and September 1999.

26. Since at least 1996, Dearborn has not routinely tested incoming waste shipments for total halogens.

27. Dearborn does not have a written analysis plan describing the procedures that will be used to ensure that used oil managed at the facility is not hazardous waste.

28. Dearborn's operations at the facility have resulted in the discharge, spilling, or placing of used oil containing lead onto

the ground surface.

29. In January 2000, soil borings were taken in ten locations around the facility at depths of eight to twenty feet below ground surface, resulting in twenty-nine composite soil samples collected from four or eight-foot intervals. Analytical results from these samples, based on the toxicity characteristic leachate procedure ("TCLP"), documented the following lead levels:

Boring location B-2, 4-8' depth interval: 7.0 mg/l
Boring location B-5, 4-12' depth interval: 7.7 mg/l
Boring location B-7, 0-4' depth interval: 5.1 mg/l
Boring location B-8, 4-8' depth interval: 21 mg/l
Boring location B-10, 4-8' depth interval: 6.9 mg/l
Boring location B-10, 8-12' depth interval: 23 mg/l

30. Analytical results from the sampling of aboveground tanks on June 16 and 17, 1999 documented total halogen concentrations for Tank 5 at 9,800 parts per million ("ppm"), Tank 12 at 15,000 ppm, Tank 17 at 4,100 ppm, Tank 59 at 5,400 ppm, Tank 62 at 6,300 ppm, and Tank 70 at 7,100 ppm.

31. Dearborn has not possessed an operating license for the treatment, storage, or disposal of hazardous waste since at least 1992.

32. Dearborn does not process any used oil through a tolling agreement.

33. Dearborn stored and disposed of hazardous waste at its facility without an operating license for hazardous waste.

34. Dearborn did not demonstrate that the used oil in Tanks 5, 12, 17, 59, 62, and 70 did not contain significant concentrations of the halogenated hazardous constituents listed in 40 C.F.R. part 261, appendix VIII.

35. In October 2001, Dearborn hired Paragon Laboratories, Inc. to sample Tanks 5, 12, 17, and 59 for halogenated hazardous constituents. Based on the analytical results from these samples, the EPA determined that Dearborn had rebutted the presumption that Tanks 5, 12, 17, and 59 contained hazardous waste as of October 2001.

36. The EPA considered the statutory factors regarding the seriousness of the violations and any good faith efforts to comply in Section 3008(a)(3) of RCRA in determining the amount of the proposed penalty for Respondent's alleged violations of the

used oil and hazardous waste management standards. The proposed penalty for each alleged violation was calculated in accordance with the RCRA Civil Penalty Policy dated October 1990, and the EPA sought a total penalty of $2,910,524.94.

III. Statutory and Regulatory Background

Although state and federal regulations for used oil have been effective for just a few years, concerns about the potential impacts of improperly managed used oil have existed for decades. In 1972, Congress mandated the Environmental Protection Agency to conduct a study of the generation, disposal practices, long-term chronic biological effects, and potential market for waste oil in Section 104(m) of the Clean Water Act ("CWA"), 33 U.S.C. § 1254(m). Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, 823. In response to growing concerns about energy conservation and environmental protection, Congress eventually passed the Used Oil Recycling Act of 1980 ("UORA"), which supplemented the basic requirements for the regulation of hazardous waste under RCRA with special provisions for used oil. Used Oil Recycling Act, Pub. L. No. 96-463, 94 Stat. 2055-59 (1980). While recognizing "a valuable source of increasingly scarce energy and materials," Congress found that "used oil constitutes a threat to public health and the environment when reused or disposed of improperly." 42 U.S.C. § 6901a. Section 7 of UORA provided that:

> Not later than one year after October 15, 1980, the Administrator shall promulgate regulations establishing such performance standards and other requirements as may be necessary to protect the public health and the environment from hazards associated with recycled oil. In developing such regulations, the Administrator shall conduct an analysis of the economic impact of the regulations on the oil recycling industry. The Administrator shall ensure that such regulations do not discourage the recovery or recycling of used oil, consistent with the protection of human health and the environment.

42 U.S.C. § 6935(a). This section essentially gave the EPA the authority to develop regulations for used oil under Subtitle C of RCRA without classifying it as a hazardous waste. Section 8 of UORA, however, required the EPA to:

> (1) make a determination as to the applicability to used oil of the criteria and regulations promulgated under Section 6921 [RCRA § 3001] relating to the

> characteristics of hazardous waste, and (2) report to the Congress the determination together with a detailed statement of the data and other information upon which the determination is based. In making a determination under paragraph (1), the Administrator shall ensure that the recovery and reuse of used oil are not discouraged.

94 Stat. at 2058 (uncodified).

By the time Congress reauthorized RCRA in 1984 with the Hazardous and Solid Waste Amendments ("HSWA"), the EPA had reported to Congress its determination that certain types of used oils should be listed as hazardous waste because of their toxic constituents, but it failed to actually list those oils as hazardous waste and missed the mandated deadline for establishing used oil regulations. House Comm. on Energy and Commerce, Hazardous and Solid Waste Amendments of 1984, H.R. Rep. No. 98-198, pt. 1, at 64 (1983), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5623. As a result, Section 8 of UORA was amended to require the EPA to determine whether used oil should be listed as a hazardous waste under Section 6921 by November 8, 1986. 42 U.S.C. § 6935(b). Furthermore, Congress specifically added the phrase "consistent with the protection of human health and the environment" at the end of Section 6935(a) to make it clear that certain recycling practices may be prohibited if necessary to ensure an adequate level of protection. H.R. Conf. Rep. No 98-1133 at 114 (1984); 42 U.S.C. § 6935(a).

On November 29, 1985, the EPA proposed listing used oil as a hazardous waste and regulating it under subtitle C of RCRA because it "typically and frequently contains significant quantities of lead and other metals, chlorinated solvents, toulene, and naphthalene which would pose a substantial hazard to human health and the environment, if improperly managed." 50 Fed. Reg. 49258 (Nov. 29, 1985). After the close of the public comment period but before the final rule was issued, Congress enacted the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). Pub. L. No. 99-499, 100 Stat. 1613. SARA gave the EPA additional authority to regulate used oil without classifying it as a hazardous waste by providing that state enforcement programs and federal criminal penalties would apply to used oil regulated under Section 6935 regardless of how it was classified. 42 U.S.C. §§ 6926(h); 6928(d)(4), (7); 6828(e).

On November 19, 1986, the EPA issued its decision not to list used oil as a hazardous waste because the "stigmatic effects" of such a listing might discourage the recycling of used

oil and cause an increase in uncontrolled and detrimental disposal practices. 51 Fed. Reg. 41900 (Nov. 19, 1986). This decision was challenged by the Hazardous Waste Treatment Council, the Association of Petroleum Re-refiners, and the Natural Resources Defense Council, who argued that the EPA's rationale was arbitrary and capricious since the Agency may only consider the technical characteristics enumerated in RCRA when making a determination to list a substance as a hazardous waste. *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 270, 274 (D.C. Cir. 1988). The D.C. Circuit agreed, finding that Congress intended the EPA to consider the stigmatic effects of listing only when adopting regulations for hazardous recycled oil, and it directed the Agency to determine whether used oil met the technical criteria for listing as a hazardous waste under Section 6921. *Id.* at 276-77.

After reevaluating its 1985 proposed listing, the EPA announced on September 10, 1992 that used oil would not be listed as a hazardous waste. 57 Fed. Reg. 41566 (Sept. 10, 1992). The Agency's decision was based on its belief that used oil handled in compliance with the new management standards in 40 C.F.R. Part 279 would not pose serious adverse risks to human health and the environment. 57 Fed. Reg. at 41575. The regulations in Part 279 were designed to address the major concerns with past used oil management practices (improper storage, road oiling, and the adulteration of used oil with hazardous waste), and were characterized by the EPA as containing "basic, good housekeeping standards for the management of used oil." 57 Fed. Reg. at 41577-78. Specific standards were established for five categories of used oil handlers (generators, transporters and transfer facilities, processors and re-refiners, fuel marketers, and burners), although the EPA stated that processing/re-refining facilities posed the biggest problems due to used oil mismanagement and thus were subject to the toughest controls.[3] 57 Fed. Reg. at 41593.

Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, the EPA may authorize qualified states to administer and enforce a hazardous waste program within the state in lieu of the federal program. In particular, Section 3006(h) of RCRA allows the EPA to authorize state used oil management programs in the same manner as hazardous waste programs, even if used oil is not identified or listed as a hazardous waste. 42 U.S.C. § 6926(h). The State of Michigan received final authorization on October 16,

[3] The used oil management standards for processors and re-refiners are found in 40 C.F.R. Part 279, Subpart F, §§ 279.50-59.

1986, effective on October 30, 1986, to implement a state hazardous waste program in lieu of RCRA. 51 Fed. Reg. 36804 (Oct. 16, 1986). Subsequently, Michigan adopted regulations for the management of used oil in MAC R. 299.9809-9816 that became effective in the state on October 15, 1996 and federally effective on June 1, 1999.[4] 64 Fed. Reg. 10111 (Mar. 2, 1999).

The requirements for used oil processors and re-refiners in MAC R. 299.9813 incorporate most of the federal regulations found in 40 C.F.R. Part 279, Subpart F, making the state program nearly identical to the federal standards.[5] Accordingly, although the Michigan rules govern the management of used oil and hazardous waste in this enforcement proceeding, the federal used oil management standards and preamble to the final regulations provide guidance for interpreting and applying the rules.[6]

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[4] The EPA retains enforcement authority under Section 3008 of RCRA after state programs have been authorized. However, new federal regulatory requirements promulgated under RCRA provisions that existed prior to the HSWA of 1984 (as in this case, Section 3014(a)) do not apply in authorized states until the state adopts and receives authorization for equivalent state requirements. 57 Fed. Reg. at 41604. Thus, although the effective date of the federal used oil management standards was March 8, 1993, the rules were not applicable in Michigan until the state revised its hazardous waste program to adopt equivalent standards under state law. *Id.* at 41604-05. *See* 40 C.F.R. §§ 271.21(e), 271.26.

[5] Under MAC R. 299.9813(3), "An owner or operator of a facility that processes used oil shall comply with the provisions of 40 C.F.R. §§ 279.51, 279.52, 279.54, 279.55, 279.56, 279.57, and 279.58, except § 279.54(a)." Furthermore, MAC R. 299.9813(7) provides that "[t]he provisions of 40 C.F.R. §§ 279.41, 279.51, 279.52, 279.54, 279.55, 279.56, 279.57, 279.58, and 279.61, except § 279.54(a), are adopted by reference in R 299.11003[(1)(x)]." For this proceeding, it is important to note that the Michigan rules replaced the federal "rebuttable presumption" standard in § 279.53 with MAC R. 299.9809(2)(b), and the storage requirement in § 279.54(a) with MAC R. 299.9813(5).

[6] The preamble to a regulation may be consulted in determining the administrative construction and meaning of the final version of the regulation. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 158 (1982); *Martin v. American Cyanamid Co.*, 5 F.3d 140, 145 (6th Cir. 1993); *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999).

IV. Complainant's Motion to Amend the Complaint

In its post-hearing brief ("CPHB"), the EPA seeks to amend the Complaint for Counts I-III in order to include or exclude specific tanks and containers[7] in the allegations based on a review of the evidence produced at the hearing. CPHB at 27 n. 14, 39 n. 20, 55 n. 27. The EPA also requests that the Complaint be amended to correct typographical errors in the citation of regulatory provisions in paragraphs 84, 88, 96, and 121. CPHB at 54 n. 26, 61 n. 29, 63 n. 30, 73 n. 31.

Section 22.14(c) of the Rules of Practice allows the complainant to amend the complaint once as a matter of right at any time before the answer is filed, and otherwise "only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(c). However, the Rules of Practice do not illuminate the circumstances when amendment of the complaint is appropriate. In the absence of administrative rules on this subject, the Environmental Appeals Board ("EAB") has offered guidance by consulting the Federal Rules of Civil Procedure ("FRCP")[8] as they apply in analogous situations. *In re Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, slip op. at 19, 10 E.A.D. __ (EAB, July 31, 2002); *In the Matter of Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3, 4 E.A.D. 819, 827 n. 20 (Oct. 6, 1993).

The FRCP adopt a liberal stance toward amending pleadings, stating that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).[9] The Supreme Court has

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[7] Complainant seeks to amend Count I to include evidence regarding a cement drum pad surrounded by concrete parking stops. CPHB at 39 n. 20. Although this may be relevant to general conditions at the facility, Count I only alleges that Respondent failed to have adequate secondary containment for existing *aboveground tanks* in violation of 40 C.F.R. § 279.54(d). Complainant has not alleged any violations of Section 279.54(c), which addresses secondary containment for containers and would apply essentially the same standards for 55-gallon drums used to store or process used oil.

[8] The FRCP are not binding on administrative agencies, but many times these rules provide useful and instructive guidance in applying the Rules of Practice. *See Oak Tree Farm Dairy, Inc. v. Block*, 544 F.Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); *In the Matter of Wego Chemical & Mineral Corp.*, TSCA Appeal No. 92-4, 4 E.A.D. 513, 524 n. 10 (EAB, Feb. 24, 1993).

[9] FRCP 15 provides that:

also expressed this liberality in interpreting Rule 15, finding that "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). In considering a motion to amend under Rule 15(a), the Court has held that leave to amend shall be freely given in the absence of any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment. *Id.* at 182.

Similarly, the EAB has adhered to the principle that administrative pleadings should be liberally construed and easily amended, and that permission to amend a complaint will ordinarily be freely granted since it promotes accurate decisions on the merits of each case. *Asbestos Specialists*, 4 E.A.D. at 830; *In the Matter of Port of Oakland and Great Lakes Dredge and Dock Co.*, MPRSA Appeal No. 91-1, 4 E.A.D. 170, 205 (EAB, Aug. 5, 1992). Furthermore, an administrative law judge ("ALJ") may properly grant a motion to amend the complaint after the hearing when the Respondent is neither surprised nor prejudiced by such action. *In the Matter of Tifa Limited*, Docket No. FIFRA-II-547-C, 1999 EPA ALJ LEXIS 55 at *18 (ALJ, July 7, 1999); *In the Matter of Yaffe Iron & Metal Co.*, TSCA Appeal No 81-2, 1 E.A.D. 719, 721-22 (CJO, Aug. 9, 1982), aff'd 774 F.2d 1008 (10th Cir. 1985).

(a) Amendments.
A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires...
(b) Amendments to Conform to the Evidence.
When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues...

Based on the liberal standard for adjudicating motions to amend the complaint, there is no apparent reason to deny Complainant's motion. Despite any procedural errors, the Complainant gave Respondent adequate notice of the alleged violations, and the context provided in the Complaint made it clear which regulatory provisions were applicable to the charges. *See* 40 C.F.R. § 22.16(b). Respondent has not claimed that it was surprised or disadvantaged by the evidence presented at the hearing, and it has not objected to Complainant's motion in its post-hearing reply brief. As Complainant points out, amending the Complaint will not prejudice the Respondent since the outcome of the litigation will not be affected and there is no change in the proposed penalty. CPHB at 28 n. 14, 39 n. 20, 55 n. 27. Accordingly, Complainant's Motion to Amend the Complaint is GRANTED.

V. Discussion

As a preliminary matter, I must address an issue briefed and argued extensively by both parties regarding the contents of the numerous aboveground tanks and containers located at the facility. For Counts I-III, the EPA is required to show that the alleged violations involve aboveground tanks or containers that are "used to store or process used oil at processing and re-refining facilities." 40 C.F.R. § 279.54(b),(d), (f).[10] While Respondent has not contested the application of the used oil management standards to its facility, it argues that many of the tanks and containers at the site contain "reclaimed oil," rainwater,[11] or have been emptied, and thus are not subject to the used oil requirements alleged by Complainant. Transcript, Volume IV ("Tr. IV") at 255-62, 264-65, 270-78, 291-99, 314-17, 326.

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[10] In its post-hearing brief, the EPA stated that "[f]or the tanks subject to Counts I-III and VIII the Complainant must show that they contained used oil." CPHB at 30. Although the six tanks at issue in Count VIII must have contained used oil in order to implicate the rebuttable presumption under MAC R. 299.9809(2)(b), whether the other tanks and containers actually contained used oil during the inspection or when the sampling was conducted is relevant but not conclusive of their status for Counts I-III.

[11] MAC R. 299.9809(2)(g) does provide an exception for wastewater subject to regulation under the Clean Water Act that is contaminated with "de minimis" quantities of used oil. However, tanks containing "used oil recovered from wastewater" are still covered by the used oil requirements, and Respondent has never raised this exemption for the violations alleged by Complainant.

However, the preponderance of the evidence in this proceeding supports a finding that most of the aboveground tanks and containers at the facility were used to store or process used oil. First and foremost, Respondent has never disputed that it operates a used oil processing facility, and it stipulated to such at the hearing. Transcript, Volume I ("Tr. I") at 161; Tr. IV at 259. Although Dearborn now handles virgin oils in addition to its used oil operation, the majority of the facility was identified by Dearborn President Aram Moloian at the hearing and at his December 1999 deposition, as well as by Dearborn employee Gagik Gabrielyan during the June 1999 inspection, as being associated with the processing of used oil. Tr. IV at 39, 217; Tr. I at 157-58; Transcript, Volume III ("Tr. III") at 182; Complainant's Exhibit ("CX") #7 at 26-40. Furthermore, sampling conducted by the EPA found at least twenty aboveground tanks and five drums at the site that contained liquids consistent with used oil. Tr. III at 75, 185-89, 231-32, 234-35; CX #1, 2. Ms. Erin White Newman, who climbed and measured Dearborn's aboveground tanks in September 1999, observed liquids consistent with used oil inside many of the tanks and sumps. CX #56.

In its post-hearing brief ("RPHB"), Respondent notes that 40 C.F.R. § 279.10(e)(1) provides an exception from the used oil regulations for "[m]aterials that are reclaimed from used oil that are used beneficially and are not burned for energy recovery or used in a manner constituting disposal (e.g., re-refined lubricants)."[12] RPHB at 2. Based on this provision, Respondent argues that "[a]ll process tanks at the Dearborn Refining facility contain materials that are reclaimed from used oil" and "[a]ll oil in drums is processed oil." *Id.* at 2-3.

However, Respondent's assertion that many of its tanks and containers contain "reclaimed oil" is unsupported and contradicted by other testimony and evidence in the record. Under the exemption in MAC R. 299.9809(2)(e) and 40 C.F.R. § 279.10(e)(1), any aboveground tanks and containers that are used exclusively to hold materials derived from used oil, such as Tanks 51-54, may not be covered by the used oil management standards since they are not being used to store or process used oil. Tr. IV at 271-72; CX #7 at 31. However, tanks and

[12] Although this section has not been incorporated into the Michigan program, MAC R. 299.9809(2)(e) provides a similar, albeit more confusing, exemption for "[u]sed oil and materials that are derived from used oil and that are disposed of or used in a manner constituting disposal." Although such materials are not subject to regulation as used oil, they may be subject to regulation as hazardous waste. MAC R. 299.9809(2).

containers used to process used oil[13] into reclaimed oil[14] are clearly subject to the used oil regulations, even if the finished product is not. It appears that Respondent is attempting to apply this exemption to any used oil at its facility for which processing has begun, regardless of whether further processing is needed to produce a finished product. I find no support for such a broad interpretation,[15] which is contrary to the language of the exemption itself as well as the main objectives of the used oil management standards.

During his 1999 deposition, Mr. Moloian stated that most of the oil at the facility was "unfinished reclaimed oils" that were being "stored for future more drastic treatment." CX #7 at 30. At the hearing, Mr. Moloian's testimony regarding the contents of Dearborn's tanks often contradicted the assertions in Respondent's post-hearing brief:

> Q. Okay. Are there any tanks on the property, Mr. Moloian, as of June of 1999, were there any tanks on the property that were used as part of your process that contained used oil?
>
> A. Tank 13, tank 93, sump 1, sump 2. But, again, they're immediately drained. The water is immediately drained out of them and they become feedstock for product. Once they hit my plant, there's no longer a fear of disposal. We don't dispose it, we recycle it.

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[13] "Used oil" is defined broadly in MAC R. 299.9109(p) as "any oil which has been refined from crude oil, or any synthetic oil, which has been used and which as a result of the use, is contaminated by physical or chemical impurities."

[14] According to Mr. Moloian, reclaiming oil is a "process whereby you separate the oil from all of the water and all of the dirt...and dry it and that becomes finished reclaimed oil." CX #7 at 29.

[15] Mr. Moloian appears to support a strict reading of the exemption as well:

> Q. It's a finished product. As so in your view is the finished product used oil or not used oil, at that point?
>
> A. The way I understood the regs when I read them and I looked at them again, just to review my understanding, that at that point that oil becomes exempt from the used oil rule.

Tr. IV at 271-72.

> There's no longer a fear of it ending up in fuel, and they are immediately concentrated. The water is taken out, treated and discharged by Detroit permit. So they're no longer waste oil in the sense that we understand, you know, to be shipped somewhere or discarded or whatever. They are feedstock for me. But you can classify them as used oil because they are used oil. But they're also partially reclaimed oil.
>
> Q. So when you say they are used oil, you're saying that -
>
> A. They're derived from used oil and they're still used oil, really.
>
> Q. All right. But are they reclaimed used oil?
>
> A. They are partially reclaimed used oil to fully reclaimed used oil.

Tr. IV at 292.

Similarly, Respondent's post-hearing brief stated that tanks labeled as "Dearcut 8" or "Dearcut 10" contain "processed oil, not used oil." RPHB at 2. At the hearing, however, Mr. Moloian described "Dearcut 8" as oil that has been "concentrated to a level where it can be used either as salable oils...or it can go into the drying unit to become Dearcut 10" and as "reclaimed oil, but not polished enough to be sold as lubricating oil," while "Dearcut 10" is used to indicate "finished product" that can be sold as lubricating oil. Tr. IV at 257, 271, 278, 291, 339. The fact that used oil has undergone some processing does not exempt it from the used oil management standards under MAC. R. 299.9809(2)(e), and Respondent failed to provide any documentation that it had sold "Dearcut 8" or "Dearcut 10" as "reclaimed oil" or any type of finished product. Transcript, Volume II ("Tr. II") at 82. Furthermore, the only tanks identified by Respondent as containing "Dearcut 10" were Tanks 51-54, which were not alleged by the EPA as tanks that are used to store or process used oil.

Although Respondent identified several tanks at the facility as being "empty,"[16] Mr. Moloian admitted that they may still have

[16] Even tanks that may have been completely empty at the time of the inspection and sampling are not automatically exempt from the used oil management standards, which apply to aboveground tanks and

contained heavy oil and have never been cleaned out.[17] Tr. IV at 256-57; CX #7 at 93, 140-45. In fact, when asked to identify the contents of Dearborn's aboveground tanks, Mr. Moloian stated that he "would have to guess in some of them." CX #7 at 27. This uncertainty appears to stem from the fact that during the early 1990's, Dearborn's tanks were filled with approximately 3.5 million gallons of used oil by Environmental Strategies, Inc., a company that was operating the used oil portion of the facility at that time. Tr. IV at 256-59, 275; Transcript, Volume V - Confidential Business Information ("Tr. VC") at 8-9; CX #7 at 31-33. While Respondent claims to be in the process of reducing the amount of used oil stored at the facility and eliminating aboveground tanks from service, at least 1 million gallons of used oil were present at the site during the June 1999 inspection. CX #7 at 33. Furthermore, Mr. Moloian stated that Dearborn took in approximately 400,000 gallons of used oil in 1998. CX #7 at 327-328.

Finally, Respondent made the implausible claim that it does not store[18] used oil in tanks or containers at the facility. Tr. IV at 275, 278, 297-98; RPHB at 3. Given that at least 1 million gallons of used oil were present at the facility in June 1999, and Dearborn was taking in about 400,000 gallons of used oil annually during that time, I find no merit to this argument. The fact that Respondent claims to be emptying used oil from aboveground tanks that it does not actively use also indicates that it is storing used oil at the site. Furthermore, Mr. Moloian's own testimony on this assertion is contradictory at best:

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containers "used to store or process used oil." Otherwise, a used oil processor could simply avoid liability by emptying tanks before inspectors arrive or diverting incoming shipments to another location. Mr. Moloian testified that he had recently placed reclaimed oil in a tank that had been empty for 15 years, and that other empty tanks could be put back into service as well. Tr. IV at 257-58.

[17] Respondent has never alleged that the remaining contents of tanks that had been "emptied" would be exempt from regulation as used oil under MAC R. 299.9809(2)(f), and the evidence in the record does not support such a finding.

[18] "Storage" is defined in MAC R. 299.9107(cc) as "the holding of hazardous waste for a temporary period at the end of which the hazardous waste is treated, disposed of, or stored elsewhere." Since separate definitions were not provided for the used oil management rules, it is reasonable to substitute the term "hazardous waste" with "used oil" in this context. *See* 40 C.F.R. § 279.1.

> Q. All right. Mr. Moloian, other than the tanks that you've described that are part of the reclamation process and the tanks that are used to store rain water, are there any other tanks on site that you use to store used oil?
>
> A. We don't use any tanks on site to store used oil. However, there are tanks on site that have some waste oil in them.

Tr. IV at 277-78. While Respondent claims to never store used oil in drums, Mr. Moloian testified that used oil arriving at the facility in drums sometimes "sits around for as long as three weeks before we can make a unit available for drying and filtering that oil." Tr. IV at 298.

Other than the self-serving testimony of Mr. Moloian, Respondent has offered no evidence to dispute that its aboveground tanks and containers were used to store or process used oil. In the absence of any recordkeeping or a comprehensive sampling effort and laboratory analysis, it is impossible to determine the precise contents of each aboveground tank and container at the facility. However, such uncertainty and the possibility that a few tanks and containers did not contain used oil is not sufficient to defeat the charges. For these reasons, I find that the EPA has demonstrated by a preponderance of the evidence that the following aboveground tanks and containers at the facility were used to store or process used oil: Tanks 1, 2, 5-7, 12, 13, 16-18, 22, 23, 26-28, 40-46, 48, 49, 59, 60, 62-68, 70, 75, 76, 78, 80-94, 301, 302, the uniflash tank, Sump 1 and 2, the plastic totes, and several 55-gallon drums.

A. Count I

Count I of the Complaint alleges that Dearborn failed to have adequate secondary containment for its existing aboveground tanks used to store or process used oil in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.54(d)). By enacting this requirement, the EPA hoped to address a major concern that past practices at used oil management facilities had "resulted in releases of used oil to the environment and in some cases, substantial damage to human health and the environment." 57 Fed.

Reg. at 41595.[19] As a result, the EPA decided that the use of floors and containment structures made from an oil-impervious material was necessary, since the contamination of soil, groundwater, and surface water resources could reduce water quality or cause significant ecological harm. *Id.*

According to Section 279.54(d)(1), a secondary containment system for existing aboveground tanks used to store or process used oil must consist of, at a minimum:

> (i) Dikes, berms or retaining walls; *and*
> (ii) A floor. The floor must cover the entire area within the dike, berm, or retaining wall except areas where existing portions of the tank meet the ground; *or*
> (iii) An equivalent secondary containment system.

40 C.F.R. § 279.54(d)(1) (emphasis added). Although there was some confusion regarding this section at the hearing, a plain reading of the regulatory language suggests that the system must include a floor[20] *and* dikes, berms, or retaining walls, and that an "equivalent secondary containment system" would be an alternative to having these structures.[21] The preamble to the final rule supports this reading, stating that used oil

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[19] The EPA noted that the standards in Part 279 "address the same types of mismanagement, particularly spilling and improper land disposal, typically addressed by [RCRA] Subtitle C controls." 57 Fed. Reg. at 41576. Also, facilities covered under the Spill Prevention, Control, and Countermeasures ("SPCC") regulations at 40 C.F.R. Part 112 under the Clean Water Act are still subject to those requirements independent of the used oil management standards. *Id.* at 41580.

[20] The EPA's main witness on secondary containment, Ms. Sue Rodenbeck Brauer, noted several times at the hearing that Dearborn's aboveground tanks were placed directly on the ground. Tr. I at 86, 146, 156. However, this does not constitute a violation of the secondary containment requirements under Section 279.54(d)(1)(ii). *See* Tr. I at 89; Tr. IV at 30. For existing aboveground tanks, the floor must cover the entire area within the containment structure *except* where the existing tanks meet the ground, since the EPA believed that requiring facilities with existing tanks to retrofit their containment structures "would be financially burdensome and that there is little opportunity for contamination to occur under the small area where the tank touches the ground." 57 Fed. Reg at 41595.

[21] EPA witness Michael Valentino testified that the requirement to have dikes, berms, or retaining walls could not be waived, and that an equivalent secondary containment system could only substitute for a floor. Tr. IV at 27-29.

processing and re-refining facilities "must equip the storage area surrounding the tanks and containers with a floor made from material(s) that is impervious to used oil," and "must also equip the storage area with secondary containment structures (dikes, berms, and/or retaining walls) that are made of a material(s) that is impervious to used oil..." 57 Fed. Reg. at 41594. As for an "equivalent secondary containment system," the preamble states that "any used oil processing/re-refining facility that is currently in compliance with the [40 C.F.R. Part 264/265] subpart J requirements (e.g., the facility has double-walled tanks with double-walled or otherwise contained pipes) will be deemed in compliance with the secondary containment requirements." *Id.* at 41595. Also, tank systems at SPCC-regulated facilities with "a shop-fabricated doubled walled tank installed and operated with overfill prevention measures that include an overfill alarm, an automatic flow restrictor or flow shut-off, and constant monitoring of all product transfers" would be in compliance with the secondary containment requirements for used oil. *Id.* at 41595-96.

Regardless of the particular structures chosen to provide secondary containment, Section 279.54(d)(2) requires that the entire containment system "must be sufficiently impervious to used oil to prevent any used oil released into the containment system from migrating out of the system to the soil, groundwater, or surface water." 40 C.F.R. § 279.54(d)(2). Although the used oil management regulations do not define or quantify the term "sufficiently impervious,"[22] the preamble to the final rules states that "commonly used construction materials such as cement, clay, asphalt, plastic, and steel...can adequately prevent releases of used oil to the environment from storage units that are properly operated and maintained at used oil processing and re-refining facilities." 57 Fed. Reg. at 41596. For the cost analysis accompanying the final rules, the EPA used a secondary

[22] At the hearing, the EPA indicated that a "sufficiently impervious" secondary containment system should have a hydraulic conductivity of no more than 1×10^{-7} cm/sec. Tr. I at 90-91, 98-99, 102; Tr. II at 95-96; Tr. III at 316-17; Tr. IV at 40-41. This standard is referenced in Section 3004(o)(5)(B) of RCRA, 42 U.S.C. § 6924(o)(5)(B), and 40 C.F.R. § 264.221(c)(1)(i)(B) (Subpart K), for owners and operators of facilities that use surface impoundments to treat, store, or dispose of hazardous waste. Although it may provide some assistance in interpreting the phrase "sufficiently impervious," there is no requirement that a secondary containment system for used oil meet this standard. In its post-hearing brief, the EPA stated that it "used a 1×10^{-7} cm/sec hydraulic conductivity standard as guidance." CPHB at 50.

containment system that consisted of a 3-inch asphalt floor with an annual application of sealant. *Id.* at 41596. The EPA felt that there was no need to specify the type of oil impervious construction material that must be used at all facilities since selection of a suitable material will depend on the size of the storage units and site characteristics. *Id.* In a general sense, the used oil regulations "contain basic, good housekeeping standards for the management of used oil." *Id.* at 41578. While they do not demand that a used oil processing/re-refining facility remain completely spotless,[23] the secondary containment requirements are clearly designed to prevent releases of used oil into the environment.

Although a few containment structures were present at Respondent's facility, Dearborn's existing aboveground tanks were not equipped with a secondary containment system consisting of dikes, berms, or retaining walls and a floor. For example, an earthen berm consisting of bulldozed materials was present near the northwest tank farm (Tr. I at 130-33; Tr. III at 269-70, 277; CX #60, 61), partially around the 50-series tanks (Tr. III at 141; Tr. IV at 282; CX #7S), and around Tanks 2, 1, and 5 (Tr. III at 270); tanks 91, 92, and the 80-series tanks in the center of the facility appeared to be resting on concrete (Tr. III at 270); a cement trench was located around the boiler rooms (Tr. I at 163; Tr. IV at 245, 282, 338-39; CX #7S, 60); and a cement drum pad surrounded by concrete parking stops was present near the main office (Tr. I at 83, 88, 143-45; Tr. III at 271-72, 278; Tr. IV at 48-49, 340-42; CX #60). However, these structures alone do not satisfy the minimum secondary containment requirements in Section 279.54(d)(1). The bulldozed berms did not surround the adjacent tanks, some of the concrete and cement structures were cracked and crumbling, and many tanks at the facility had none of the containment structures listed above. Tr. I at 85-86; Tr. III at 269-73; CX #60.

In fact, Dearborn has never claimed to have dikes, berms, or retaining walls and a floor for its existing aboveground tanks,

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[23] For example, Section 279.10(f) anticipates that wastewater may become mixed with certain "de minimis" quantities of used oil, which is defined as "small spills, leaks, or drippings from pumps, machinery, pipes, and other similar equipment during normal operations or small amounts of oil lost to the wastewater treatment system during washing or draining operations." 40 C.F.R. § 279.10(f). However, the regulation is clear that "de minimis" does not refer to used oil that is "discarded as a result of abnormal manufacturing operations resulting in substantial leaks, spills, or other releases" at a facility. *Id.*

but instead argues that the design of its facility provides "equivalent secondary containment" by forming an impervious "bowl" with a sufficient capacity to contain any major spill. Tr. IV at 283-91; Tr. III at 163-66. Dearborn asserts that the used oil portion of its facility is graded to allow any liquid wastes to flow toward the center of the property, where they can be collected for treatment or storage, and that the facility has a total holding capacity of approximately 2.5 million gallons. Tr. IV at 282-84.

Although it does not dispute the holding capacity of the "bowl," the EPA argues that the facility was not designed for compliance with the used oil management standards, and the use of a bowl to contain used oil violates the prohibition on surface impoundments[24] in 40 C.F.R. § 279.12(a) and MAC R. 299.9813(5). Tr. III at 91-93; CX #77; CPHB at 51-53. Furthermore, the EPA alleges that the site does not provide sufficient topographical relief for liquids to flow toward the center of the facility, and it provided evidence to demonstrate that used oil and rainwater were collecting in several locations around the site. Tr. I at 112, 134, 139-40, 175-77; Tr. III at 138-40, 194-95; CX #60, 81.

The used oil management standards are unclear as to whether a surface impoundment may constitute an "equivalent secondary containment system" at used oil processing and re-refining facilities. In the preamble to the final rules, the EPA stated that the improper storage of used oil was one of the major concerns that Part 279 was designed to address by providing "stringent secondary containment and spill cleanup provisions for used oil processors and re-refiners" and an outright ban on the "storage of used oil in unlined surface impoundments." 57 Fed. Reg. at 41576. The EPA believed that surface impoundments "do not provide adequate protection of human health and the environment against potential releases and damages," citing "numerous cases of environmental damage from the storage of used oil in these units." 57 Fed. Reg. at 41586.

However, the "surface impoundment prohibition" in Section

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[24] "Surface impoundment" is defined in MAC R. 299.9107(ee) as "a treatment, storage, or disposal facility or part of a treatment, storage, or disposal facility which is a natural topographic depression, man-made excavation, or diked area formed primarily of earthen materials, although it may be lined with man-made materials, which is designed to hold an accumulation of liquid wastes or wastes containing free liquids, and which is not an injection well. Examples of surface impoundments are holding, storage, settling, and aeration pits, ponds, and lagoons."

279.12(a) states that "[u]sed oil shall not be managed in surface impoundments or waste piles *unless* the units are subject to regulation under parts 264 or 265 of this chapter," which appears to allow surface impoundments approved for use in facilities that treat, store, or dispose of hazardous waste.[25] 40 C.F.R. § 279.12 (emphasis added). Similarly, Section 279.54(a) provides that "[u]sed oil processors/re-refiners may not store used oil in units other than tanks, containers, or units subject to regulation under part 264 or 265 of this chapter." Neither of these provisions, however, are incorporated into the Michigan regulations at issue in this matter.

Instead, MAC R. 299.9813(5) provides that "[a]n owner or operator of a facility that processes used oil shall not store used oil in units other than containers and tanks," and the use of surface impoundments does not otherwise appear to be contemplated in the rules. Although the EPA may be correct in its interpretation that "Michigan law clearly prohibits the use of a surface impoundment for storing used oil,"[26] the alleged violation in Count I does not deal with storage under Section 279.54(a) but with secondary containment under Section 279.54(d). The use of a surface impoundment "designed to hold an accumulation of liquid wastes" may be tantamount to storage, but the requirements for the storage of used oil are clearly distinct from the secondary containment requirements for existing aboveground tanks.

Regardless of whether a surface impoundment may be used as an equivalent secondary containment system for used oil, Dearborn has failed to meet the key requirement under Section 279.54(d)(2) that its entire containment system "must be sufficiently impervious to used oil to prevent any used oil released into the containment system from migrating out of the system to the soil, groundwater, or surface water." 40 C.F.R. § 279.54(d)(2). The EPA presented a substantial amount of evidence throughout the hearing to show the presence of oil in surface water and soils, in subsurface soil samples, and in groundwater beneath the site. For example, Ms. Brauer, EPA's Regional RCRA Used Oil Expert, inspected the site in June 1999 and observed oil-stained soils in numerous locations at the facility. Tr. I at 84-89; CX #60. Ms. Newman, who surveyed the facility in September 1999 and conducted

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[25] Subpart K of Parts 264/265 provides standards for facilities that use surface impoundments to treat, store, or dispose of hazardous waste.

[26] CPHB at 51.

tank and soil sampling in January and March 2000 as an employee of E&E, found "oil stained areas throughout the back two-thirds portion of the site," oil in the soil borings and groundwater, and lead levels exceeding the TCLP lead standard of 5 mg/l in six subsurface soil samples.[27] Tr. III at 185, 190, 220-21; CX #2, 61. Similarly, EPA inspection team leader Michael Valentino testified that oil was present on the ground throughout the facility, and that contaminants typically found in used oil were present in the soil borings. Tr. III at 269-70; Tr. IV at 32-36, 40. Based on its inspection of the site and sampling results, the EPA does not believe that the ground surface[28] at the facility is sufficiently impervious to prevent the release of used oil to the environment. Tr. I at 97-102, 170-71; Tr. IV at 33, 40-41.

Respondent contends that the EPA has misrepresented the general conditions at Dearborn, arguing that "[n]inety percent of the property has never seen oil," that the EPA's photographs show soils that are "five shades darker" than the ground in Respondent's copies, and that any used oil on the ground is typical for operations at this type of facility. Tr. IV at 223-26, 244-46, 250, 330-44; Tr. II at 207-08. Furthermore, Dearborn disputes that its operations are the source of oil in the subsurface soils and groundwater (Tr. II at 102, 107-12; Tr. IV at 33, 36, 43-46, 314), arguing that none of the EPA's witnesses actually saw used oil leak from Dearborn's tanks onto the ground (Tr. II at 93-94; Tr. III at 117; Tr. IV at 30-31) or could identify the type of oil found at the site (Tr. II at 93-95, 98-99, 113; Tr. III at 225-26; Tr. IV at 44-45, 226). Dearborn also alleged that other possible sources of contamination include past operations at the site (Tr. II at 99, 129), nearby industrial facilities (Tr. II at 99; Tr. III at 238-39; Tr. IV at 36, 42; CX #2 at 5-1), a railroad running along the northwest side of the property (Tr. III at 166-68; Tr. IV at 322-24), or the fill material itself (Tr. II at 112-13, 128-29; Tr. III at 33-35; Tr. IV at 35-36).

However, Respondent has not put forth any probative evidence to show that the EPA misstated the general conditions at the

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[27] For a full discussion of the lead sampling results, see Count VIII below at 39-41.

[28] The Dearborn site was historically used as a clay mine, and the first 15-20 feet of soil below ground surface consisted of a fill material composed of silt, wood, brick, concrete, clay, and sand. Tr. I at 97-102, 170-71; Tr. III at 21-22, 190; CX #2, Appendix D; Respondent's Exhibit ("RX") #1.

site, or that the source of oil is anything other than Dearborn's own operations. In fact, Mr. Moloian himself has described the appearance of the facility as "lousy" and "ugly," and admits that he "assumed that all of the oil on the ground was due to Dearborn's operations" before allegedly smelling diesel fuel in one of the EPA's soil samples. Tr. IV at 223-25, 323. While Respondent may not agree that general housekeeping practices and oil-saturated soils are regulated by the used oil management standards, such evidence is clearly relevant to the existence of an impervious secondary containment system at the facility. Tr. I at 124-25; Tr. IV at 32, 37-40. Without offering any other information regarding the source of contamination at the site, Respondent's theories can be characterized as nothing more than bare assertions, conclusory allegations, or suspicions. *See In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, & MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *50-51 (ALJ, Sept. 9, 2002).

Respondent's evidence regarding the imperviousness of the site consisted of testimony by Mr. Moloian that liquids on the surface remain until they evaporate, and that efforts to further grade the facility with a bulldozer several years ago were ineffective because the ground surface was too hard.[29] Tr. III at 129-30; Tr. IV at 286-89; Transcript, Volume 5 ("Tr. V") at 9-10; CX #77; RX #11. Respondent's expert witness, Mr. Richard Anderson, also testified based on a hydrogeological investigation he completed in 1982 that soils at the facility have a very low permeability and are underlined by an impervious clay layer. Tr. III at 19-21, 29-32, 53; RX #1 ("SME Report").

However, Respondent's testimony is contradicted not only by the evidence of oil in the surface soils, subsurface soils, and groundwater, but also by the fact that Respondent has admitted to digging up underground piping and removing soils throughout the facility. Tr. IV at 224-25, 245-46, 344; Tr. VC at 107; CX #43. Furthermore, there was testimony and photographs showing vegetation throughout the site, including small trees growing in areas adjacent to Tanks 12, 19, 48, 49, 59, 75, 78, and 80-82, which is inconsistent with a ground surface that is alleged to be sufficiently impervious. Tr. I at 129-30, 135; Tr. III at 212; Tr. IV at 223, 338; CX #60, 61.

Similarly, the 1982 SME Report testified to by Mr. Anderson

[29] Respondent also presented testimony regarding the volume of its secondary containment system, which is not at issue under the used oil management regulations. Tr. IV at 283-86.

does not support a finding that the ground surface at the facility is sufficiently impervious.[30] The SME Report notes the presence of petroleum products in the fill material and groundwater, and states that the "fill was generally in a loose random state with many voids noted." Tr. III at 27; RX #1 at 4. Although the clay layer underlining the site may prevent the contamination of an aquifer beneath it, it cannot stop pollutants from reaching the overlying soils and groundwater. RX #1 at 6-8. As a result, I find that Respondent's facility was not sufficiently impervious to prevent used oil from migrating to the soil, groundwater, or surface water, and that Respondent failed to have adequate secondary containment for its existing aboveground tanks used to store or process used oil for at least 179 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.54(d)).

B. Count II

In Court II of the Complaint, the EPA alleges that Dearborn failed to label its aboveground tanks and containers used to store or process used oil with the words "Used Oil" for at least 3 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.54(f)(1)). Section 279.54(f)(1) requires that "[c]ontainers and aboveground tanks used to store or process used oil at processing and re-refining facilities must be labeled or marked clearly with the words 'Used Oil.'" The EPA included this requirement in the used oil management standards to "assist employees in identifying which units are used exclusively for used oil storage," and to address several documented instances where used oil was either deliberately or inadvertently used as a carrier for the illegal disposal of hazardous waste. 57 Fed. Reg. at 41576.

By order dated January 17, 2003, I granted Complainant's Motion for Accelerated Decision on Count II based on Ms. Brauer's declaration regarding the absence of any "Used Oil" labeling, photographs of the aboveground tanks and containers showing an absence of labels, Mr. Moloian's assertion that he was not aware of the labeling requirement and that the tanks have always been labeled as "Dearcut 8" or "Dearcut 10," and the lack of any evidence raising a genuine issue of material fact on this count. *Dearborn Refining Co.*, 2003 EPA ALJ LEXIS 1 at *17-21. The evidence presented at the hearing further supported this ruling.

[30] As Respondent has pointed out, it is unclear if the findings in the 1982 SME Report were of any value during the time of the June 1999 inspection. Tr. II at 100-01.

Ms. Brauer testified that photographs of the tanks and containers taken during the investigation show an absence of labeling with the words "Used Oil," while Mr. Moloian stated that he was "still not fully convinced that they need to have used oil labels" on Dearborn's tanks and containers, but Respondent had since marked them as such "just to satisfy EPA." Tr. I at 84, 120, 127, 130, 134-36, 139, 141, 146, 150, 164; Tr. II at 72; CX #60; Tr. IV at 257, 272, 278, 291, 339-40; RX #11.

Although Section 279.54(f)(1) may not apply to tanks and containers that are used exclusively to hold materials derived from used oil, such as re-refined lubricants, I have already found that most of the aboveground tanks and containers at the facility were used to store or process used oil. Respondent's assertion in its post-hearing brief that "[a]ll process tanks at the Dearborn Refining facility contain materials that are reclaimed from used oil, and therefore, are not required to be labeled 'used oil'" is unsupported by the evidence in the record, and the regulation clearly requires tanks that are used to process used oil to be labeled. There is no dispute that Dearborn operates a used oil processing facility and that none of the aboveground tanks or containers at the site were labeled with the words "Used Oil" at the time of the June 1999 inspection. Accordingly, I find that Respondent failed to label its aboveground tanks and containers used to store or process used oil with the words "Used Oil" for at least 3 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.54(f)(1).

C. Count III

Count III of the Complaint alleges that Respondent failed to store or process used oil in aboveground tanks and containers in good condition for at least 179 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.54(b)). Section 279.54(b) provides that "[c]ontainers and aboveground tanks used to store or process used oil at processing and re-refining facilities must be: (1) In good condition (no severe rusting, apparent structural defects or deterioration); and (2) Not leaking (no visible leaks)." In the preamble to the final rules, the EPA noted that improper storage was one of the major risks that the used oil management standards sought to address, and requiring tanks and containers to be maintained in good condition would help to minimize potential releases of used oil to the environment. 57 Fed. Reg. at 41576, 41603.

At the hearing, the EPA provided a substantial amount of evidence regarding the condition of Dearborn's used oil aboveground tanks and containers. For example, Ms. Brauer

testified that several tanks and containers at the facility during the June 1999 inspection were rusting, deteriorating, and not well maintained, causing her to question their structural integrity. Tr. I at 84-85, 121, 133-36, 141-42, 148, 150, 152, 154, 164; Tr. II at 72-73; CX #60. Ms. Newman, who attempted to climb and measure the tanks in September 1999 and conducted sampling in January and March 2000, stated that some tanks were "very rusty and corroded" while others were buckling and too unstable to climb. Tr. III at 181-82, 205, 213-20; CX #61. Similarly, Mr. Valentino observed that many of the aboveground tanks and containers were rusting or otherwise in poor condition. Tr. III at 271, 279, 319-20; Tr. IV at 49-64. The EPA also demonstrated that many of the tanks have been at the site since at least 1948, and photographic evidence was provided to corroborate Complainant's testimony. CX #19 at 29; CX #60, 61.

In response, Mr. Moloian contends that the only aboveground tanks in poor condition at the facility are tanks 1, 2, 26, and a couple of the 60-series, which he claimed are not actively used to store or process used oil. Tr. IV at 292-99. Respondent questioned whether the rusting on its tanks and containers was "severe" as provided in Section 279.54(b) (Tr. IV at 49-52, 294), and pointed out that the EPA did not conduct structural integrity tests on the tanks (Tr. II at 95; Tr. IV at 54) or observe the tanks leaking used oil (Tr. II at 93-94; Tr III at 117). Furthermore, Respondent argued that it has been in the process of emptying tanks and eliminating storage capacity at the site, and it questions whether the condition of empty tanks at the facility is relevant to this proceeding. Tr. IV at 256-59; CX #7 at 31-33; Tr. III at 220.

As discussed above, I have already found that most of the aboveground tanks and containers located at the facility are used to store or process used oil. Respondent's assertion in its post-hearing brief that "[a]ll storage tanks with oil and all drums are in good condition" is directly contradicted by Mr. Moloian's own testimony describing Tank 26 as "a very poor tank" that contained "a lot of heavy oil." RPHB at 3; Tr. IV at 295. Similarly, Mr. Moloian admitted that Dearborn placed used oil that had been leaked or dripped into a plastic tote that was completely open at the top. Tr. IV at 224-25, 298-99.

Although the phrase "severe rusting" is not defined or quantified by the used oil regulations, the primary objective of requiring tanks and containers to be in good condition is to prevent the release of used oil to the environment, and "severe rusting," along with apparent structural defects or deterioration, appears to be one indication that the integrity of

a tank is questionable. While structural integrity tests may definitively show whether a tank or container is likely to release used oil, such tests are not required to demonstrate a violation of this requirement and were not conducted by either party. EPA inspectors may not have witnessed used oil leaking from tanks, but the evidence presented regarding the condition of aboveground tanks and containers at the facility and the presence of oil in the surface soils, subsurface soils, and groundwater is persuasive on this issue. Other than the self-serving testimony of Mr. Moloian, Respondent provided no evidence regarding the condition of the aboveground tanks and containers shown by the EPA to be in violation of the used oil management standards. For these reasons, I find that Respondent failed to store or process used oil in tanks and containers in good condition for at least 179 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.54(b)).

D. Count IV

Count IV of the Complaint alleges that Respondent failed to have an adequate communications system for at least 3 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.52(a)(4)). Section 279.52(a)(4) provides that:

> (i) Whenever used oil is being poured, mixed, spread, or otherwise handled, all personnel involved in the operation must have immediate access to an internal alarm or emergency communication device, either directly or through visual or voice contact with another employee, unless such a device is not required in paragraph (a)(2) of this section.
> (ii) If there is ever just one employee on the premises while the facility is operating, the employee must have immediate access to a device, such as a telephone (immediately available at the scene of operation) or a hand-held two-way radio, capable of summoning external emergency assistance, unless such a device is not required in paragraph (a)(2) of this section.

40 C.F.R. § 279.52(a)(4). This regulation is part of the "preparedness and prevention" requirements that are "necessary to ensure that used oil processing and re-refining facilities are maintained and operated to prevent possible fires, explosions, or releases of used oil to the environment." 57 Fed. Reg. at 41594. The EPA believes that the majority of processing and re-refining facilities already have such measures in place "as a part of good business and operational practices," and that the regulations are not significantly different from what is already required by

other federal, state, and local rules. *Id.*

At the time of the June 1999 inspection, the communication devices at Respondent's facility consisted of a telephone in the main office along Wyoming Avenue, a loudspeaker mounted on top of one of the boiler rooms, and an intercom or intra-plant paging system connecting the main office to the blending room. Tr. II at 15-16, 22-26; Tr. IV at 299-301; RX #11; CX #51. During the prehearing exchange, Respondent also submitted invoices for wireless telephones, which were acquired for the facility subsequent to the inspection. Tr. II at 24-26; Tr. IV at 299; CX #51.

The evidence presented by the EPA demonstrated that the facility is spread over approximately six acres and contains numerous large buildings and tanks, such as those on the northwest portion of the site, that could easily prevent visual and voice contact between employees. *See* CX #60. Ms. Brauer testified that given the presence of buildings and tanks on site, "there are many points in the facility at which you cannot maintain eye contact with the office" and "[i]f someone had an accident or injury while transferring oil, it was not apparent that there was any way they could contact someone in the office or in the blending room to seek help." Tr. II at 16, 24. Although there is some dispute as to whether the system connecting the main office with the blending room was a one-way or two-way device, Dearborn never directly challenges Ms. Brauer's observations regarding visual and voice contact at the facility. Tr. IV at 299-301. As a result, it does not appear that Dearborn's employees had "immediate access to an internal alarm or emergency communication device, either directly or through visual or voice contact with another employee," in several active areas of the facility as required by Section 279.52(a)(4)(i).

A stronger requirement exists for situations where a used oil facility is operating with just one employee, who must have immediate access to a device capable of summoning external emergency assistance. 40 C.F.R. § 279.52(a)(4)(ii).[31] Although

[31] All used oil processing and re-refining facilities must have a device capable of summoning emergency assistance under Section 279.52(a)(2)(ii), unless it can show that none of the hazards posed by used oil handled at the facility require such equipment. At facilities with more than one employee on the premises during operations, however, it appears that immediate but *indirect* access to such a device is allowable through visual or voice contact with another employee. 40 C.F.R. § 279.52(a)(4).

the EPA stated in its post-hearing reply brief ("CPHRB") that "[i]t is fair to assume that there are times that one employee is alone in the used oil portion of the facility," no evidence of such activity was presented at the hearing. CPHRB at 14. In fact, when asked by Respondent's counsel if Dearborn allows employees to work alone, Mr. Moloian responded, "Not generally. If they work alone they go to pick up a tool or to go turn a valve. But, any time there's any attaching hoses, doing, you know, some of the major transfers, two people go back there." Tr. IV at 300-01. As such, I find only that employees at Respondent's facility had inadequate access to an internal alarm or emergency communication device for at least 3 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.52(a)(4)(i)).

E. Count V

Count V of the Complaint alleges that Dearborn failed to have an adequate contingency plan in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.52(b)(2)(v)). Section 279.52(b)(2)(v) provides that:

> The plan must include a list of all emergency equipment at the facility (such as fire extinguishing systems, spill control equipment, communications and alarm systems (internal and external), and decontamination equipment), where this equipment is required. This list must be kept up to date. In addition, the plan must include the location and a physical description of each item on the list, and a brief outline of its capabilities.

40 C.F.R. § 279.52(b)(2)(v). The purpose of a contingency plan is to "minimize hazards to human health or the environment from fires, explosions, or any unplanned sudden or non-sudden release of used oil to air, soil, or surface water" from processing and re-refining facilities, and "the variable composition of used oil (e.g. the possibility of very low flash point oil) makes this more of a concern than for other types of oil facilities." 40 C.F.R. § 279.52(b)(1); 57 Fed. Reg. at 41594. In the preamble to the final rules, the EPA stated its belief that the majority of used oil processing and re-refining facilities already have contingency plans and emergency procedures in place as part of good business and operational practices, and that this requirement would not differ significantly from other pre-existing regulations. 57 Fed. Reg. at 41594. In fact, the regulations provide that if a facility has already prepared an SPCC Plan in accordance with 40 C.F.R. Part 112, then "the owner or operator need only amend that plan to incorporate used oil

management provisions that are sufficient to comply with the requirements of this part." 40 C.F.R. § 279.52(b)(2)(ii).

At the time of the June 1999 inspection, Dearborn did not have a contingency plan prepared specifically for compliance with the used oil management standards. Instead, it provided the EPA with an SPCC Plan dated May 27, 1999. Tr. II at 12; CX #7M. Respondent's SPCC Plan states that oil absorbent is "maintained throughout the facility at strategic locations," and Attachment A shows oil absorbent located in one of the boiler rooms, in the wastewater treatment building, adjacent to the 50-series aboveground tanks, and in the blending room. CX #7M at 4, Attachment A. However, Ms. Brauer examined the SPPC Plan during the inspection and could not find oil absorbent in the boiler rooms, wastewater treatment room, or adjacent to the 50-series aboveground tanks. Tr. II at 14-15. She also alleged that Dearborn's contingency plan failed to meet the requirements of Section 279.52(b)(2)(v) since it "did not include a description of the emergency equipment available" at the facility.[32] Tr. II at 73.

Dearborn does not dispute the contentions made by Ms. Brauer, but instead argues that it had oil absorbent at the facility in at least three places at the time of the inspection. Tr. IV at 97-98, 301-03; Tr. II at 201-02. According to Mr. Moloian, Respondent is "allowed to move those things around as I choose. And I'm required to put that on my report and on my SPCC within six months." Tr. IV at 303. Notwithstanding the requirements for SPCC Plans under 40 C.F.R. Part 112,[33] the used oil management regulations clearly state that a contingency plan must include the location of each item on the list of emergency equipment, and must be "immediately amended" whenever the list of emergency equipment changes. 40 C.F.R. §§ 279.52(b)(2)(v), 279.52(b)(4)(v). Furthermore, Respondent failed to include a physical description and brief outline of the capabilities for each item on the list of emergency equipment in Attachment A.

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[32] In reference to the contingency plan, Ms. Brauer further testified that the intra-plant paging system marked on Attachment A was "a one-way communication device" and that the fire extinguishers located in the boiler house had tags indicating that they were last inspected in April 1998. Tr. II at 15-19. While these statements may be relevant to other counts in the Complaint, they do not indicate a violation of Section 279.52(b)(2)(v) and are not considered here.

[33] 40 C.F.R. § 112.5(a) provides that amendments to SPCC Plans "shall be fully implemented as soon as possible, but not later than six months after such change occurs."

For these reasons, I find that Respondent failed to have an adequate contingency plan for at least 3 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.52(b)(2)(v)).

F. Count VI

Count VI of the Complaint alleges that Respondent failed to adequately maintain emergency equipment at its facility for at least 1 day in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.52(a)(3)). Section 279.52(a)(3) provides that "[a]ll facility communications or alarm systems, fire protection equipment, spill control equipment, and decontamination equipment, where required, must be tested and maintained as necessary to assure its proper operation in time of emergency." As another part of the preparedness and preparation requirements for used oil processors and re-refiners designed to minimize the possibility of any fire, explosion, or release of used oil into the environment, the EPA noted that this requirement was merely incremental to those already required by existing regulations. 57 Fed. Reg. at 41594.

Both parties agree that during the June 1999 inspection, the fire extinguishers at the facility had tags indicating that the extinguishers were last serviced in April 1998. Tr. II at 14-20; Tr. IV at 305; CX #51. The EPA contends that the fire extinguisher tags indicate that annual inspection is required, and that Dearborn was in violation of Section 279.52(a)(3) by failing to update the tags within 12 months of April 1998. Tr. II at 14-15, 19-20; Tr. IV at 102-05. However, Dearborn argues that the regulation does not require it to check fire extinguishers at any particular time, but simply to ensure that they are in proper working order. Tr. IV at 305-06; Tr. II at 200-01. Dearborn alleges that its fire extinguishers are checked every month and were working properly at the time of the inspection, and points out that the EPA never tested the fire extinguishers to determine whether they were in working order. Tr. IV at 305-07, 102-03; Tr. II at 200-01.

Section 279.52(a)(3) of the used oil management standards contains only a very general requirement that fire protection equipment be "tested and maintained as necessary to assure its proper operation in time of emergency." More detailed regulations were not enacted most likely because the EPA believed that such measures were already "a part of good business and operational practices" at used oil processing and re-refining facilities and required by local fire regulations, state regulations, and the federal Occupational Safety and Health Act ("OSHA"). 57 Fed. Reg. at 41594. Although the EPA did not

provide any testimony regarding other fire regulations or evidence to show that the fire extinguishers were not in proper working order, the tags clearly state that each extinguisher was serviced in April 1998 and would become "VOID ONE YEAR FROM MONTH PUNCHED." CX #51. As a result, I find that Dearborn failed to adequately maintain its fire extinguishers as necessary to assure their proper operation for at least 1 day in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.52(a)(3)).

G. Count VII

Count VII of the Complaint alleges that Dearborn failed to have an adequate written analysis plan for at least 179 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.55). Section 279.55 provides that used oil processing and re-refining facilities "must develop and follow a written analysis plan describing the procedures that will be used to comply with the analysis requirements of § 279.53," which is the "rebuttable presumption" that used oil containing at least 1,000 ppm total halogens is a hazardous waste. Although Section 279.53 is not incorporated into the Michigan used oil requirements, MAC R. 299.9813(4) and 299.9809(2)(b) provide the same standard.[34]

At a minimum, the written analysis plan must specify whether sample analyses or knowledge will be used to determine if the used oil contains at least 1,000 ppm total halogens. 40 C.F.R. § 279.55(a)(1). If sample analyses are used, the plan must include the sampling method used to obtain the representative samples to be analyzed, the frequency of the sampling performed, whether the analysis will be performed on-site or off-site, and the methods used to analyze used oil for the parameters specified in the rebuttable presumption. 40 C.F.R. § 279.55(a)(2). If knowledge of the halogen content is used to make this determination, then the plan must specify the type of information that will be relied upon.[35] 40 C.F.R. § 279.55(a)(3). By ensuring that used oil processing and re-refining facilities have a thorough knowledge of any used oil handled at the facility, these requirements are designed to address the large number of documented instances where used oil served as a carrier for the illegal disposal of hazardous waste. 57 Fed. Reg. at 41576, 41596.

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[34] For a more detailed discussion of the rebuttable presumption, see Count VIII at 41-49.

[35] MAC R. 299.9813(4) states that knowledge of the halogen content of the used oil should be applied "in light of the materials or processes used."

At the time of the June 1999 inspection, Dearborn provided the EPA with a Waste Analysis Plan that was last updated on October 23, 1989 and made no mention of used oil or total halogens. Tr. II at 28; CX #7AA. Attached to a September 12, 2000 letter, Dearborn later submitted a one-page Waste Analysis Plan updated on October 15, 1999 ("1999 Plan").[36] Tr. II at 53-56; RX #18. The 1999 Plan states that:

> No used or waste oil will be received at this facility unless a 'WASTE CHARACERIZATION REPORT [sic]" has been filled out, signed by the generator and a representative sample has been obtained for inspection...If the load is from a first time generator location or from a generator whose process has changed the load is also analyzed for Halogens, if the halogens are above 1000 ppm then either by MSDS or by testing (F1,F2 scan) it must be verified that the sources of halogens are not halogenated solvents.

RX #18. On the "Generator Waste Characterization Report" form used by Dearborn to pre-approve incoming waste shipments,[37] generators are asked to certify that their "waste contains no polychlorinated biphenyls (PCBs), nor halogens (other than halogenated paraffins) of greater than 1000ppm," and to attach any available test data or Material Safety Data Sheets identifying the waste components. RX #17; CX #7DD.

At the hearing, Respondent argued that its written analysis plan consisted of the 1999 Plan, Waste Characterization Reports, a "Laboratory Report" form, and a "Uniform Hazardous Waste Manifest" form provided by MDEQ. Tr. IV at 235-36, 307-10; RX #14, 17, 18; CX #94. However, none of these documents identify the procedures that will be used to ensure that used oil managed at the facility is not hazardous waste as required by Section 279.55. The 1999 Plan seems to indicate that knowledge of the halogen content from the "Waste Characterization Report" will be

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[36] Dearborn has also alluded to the existence of a written analysis plan dated October 1995, as well as several other possible versions. Tr. IV at 234-35, 311-13. However, these plans were never provided to the EPA or presented at the hearing and thus are not considered here.

[37] This form indicates that it was last modified on November 20, 1996. RX #17; CX #7DD. It replaced the "Generator Waste Profile Sheet" previously used by Dearborn, which did not include any reference to total halogens. Tr. II at 42-43; Tr. IV at 241; CX #7CC.

used in most instances, but sample analyses will be used "if the load is from a first time generator location or from a generator whose process has changed." RX #18. Although Dearborn may sometimes analyze incoming loads of used oil for total halogens,[38] the 1999 Plan does not adequately specify the sampling method used to obtain representative samples to be analyzed, whether the analysis will be performed on-site or off-site, or the methods used to analyze the used oil. Tr. II at 55-56; CX #32.

Furthermore, the Generator Waste Characterization Report only requires generators to certify that their waste contains no halogens of greater than 1,000 ppm "other than halogenated paraffins," instead of a total halogen determination as required by MAC R. 299.9809(2)(b) and Section 279.53, and Ms. Brauer testified that Generator Waste Characterization Reports were not available for about 23 generators for shipments received by Dearborn between June and September 1999. Tr. II at 33-34; RX #17. The Laboratory Report form and Uniform Hazardous Waste Manifest that Dearborn claims to be part of its written analysis plan do not provide any additional information relevant to the requirements of Section 279.55. Accordingly, I find that Respondent failed to have an adequate written analysis plan for at least 179 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.55).

H. Count VIII

Count VIII of the Complaint alleges that Dearborn failed to have an operating license for the storage or disposal of hazardous waste for at least 179 days in violation of MAC R. 299.9502(1). As part of Michigan's general hazardous waste management requirements, MAC R. 299.9502(1) provides that "Part 111 of the [Natural Resources and Environmental Protection Act] requires an operating license for the treatment, storage, and disposal of any hazardous waste," and that "[o]wners and operators of hazardous waste management units shall have an operating license during the active life of the unit, including the closure period." Although Dearborn once had a permit to store hazardous waste, its hazardous waste units have been closed and no such permit has existed since at least 1992. Tr. IV at 226-34; CX #18. Thus, liability under Count VIII will depend upon a finding that Dearborn has stored or disposed of hazardous

[38] Dearborn admits that it does not routinely test incoming loads of used oil for total halogens. Tr. IV at 307-08; CX #7 at 73-74; RX #14.

waste at its facility.[39] The EPA has alleged two separate violations of MAC R. 299.9502(1) that are based on different facts and legal authorities, and these allegations will be addressed separately.

(1) Disposal of lead contaminated soils

Complainant first contends that Dearborn disposed of hazardous waste at its facility without an operating license based on the presence of subsurface soils that exhibit the toxicity characteristic for lead. According to MAC R. 299.9203, "hazardous waste" is defined to include waste that contains lead at a concentration of at least 5 mg/l, which is the toxicity characteristic for lead identified in MAC R. 299.9212 and Table 201a in MAC R. 299.9217.[40] MAC R. 299.9202 defines "waste" as

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[39] In its post-hearing brief, the EPA seeks to establish that Respondent owned and operated a hazardous waste management unit without an operating license as part of the alleged violation in Count VIII. CPHB at 73, 78-80. Although Respondent does not dispute that it owns and operates the facility (Tr. II at 134) and has not challenged the applicability of Section 299.9502(1), the EPA has not alleged in the Complaint that Respondent operated a hazardous waste management unit and does not seek to amend the Complaint to do so. Given that "hazardous waste management unit" is defined under MAC R. 299.9104(f) as "a contiguous land area on or in which hazardous waste is placed," Dearborn's liability under MAC R. 299.9502(1) would turn on the same essential elements that must be established under the EPA's original allegation. In other words, a finding that Dearborn has stored or disposed of hazardous waste at its facility without an operating license is sufficient to establish a violation of MAC R. 299.9502(1), and whether or not Dearborn owned and operated a hazardous waste management unit without an operating license will not be considered.

[40] MAC R. 299.9203(1) provides that "[a] waste, as explained in R. 299.9202, is a hazardous waste if it is not excluded from regulation pursuant to the provisions of R. 299.9204(1) or (2) and if it meets any of the following criteria:
(a) It exhibits any of the characteristics of hazardous waste idenitifed in R. 299.9212."

Under MAC R. 299.9212(4), "A waste exhibits the toxicity characteristic if, using the toxicity characteristic leachate procedure...the extract from a representative sample of the waste contains any of the contaminants listed by the administrator or the director and identified in Table 201a of these rules at a concentration equal to or greater than the representative values given in the tables." Table 201a to MAC R. 299.9217 lists lead at a concentration of 5 mg/l.

"any discarded material," and further defines "discarded material" to include any material that is abandoned by being disposed of, burned or incinerated, recycled, or accumulated, stored, or treated before recycling. "Disposal" is defined by MAC R. 299.9102(y) to include the discharge, deposit, dumping, spilling, leaking, or placing of any hazardous waste into or on any land or water in such manner that the hazardous waste or a constituent of the hazardous waste might enter the environment.

In January 2000, EPA contractor E&E drilled ten soil borings at the facility to depths between eight and twenty feet below ground surface. CX #2. The borings resulted in twenty-nine composite soil samples, collected from four or eight-foot intervals, that were analyzed for total and RCRA metals, copper, zinc, PCBs, total halogens, oil and grease, and pH. *Id.* Analytical results from the soil samples, based on EPA-approved test methods, documented the following lead levels:

Boring location B2, 4-8' depth interval:	7.0 mg/l
Boring location B5, 4-12' depth interval:	7.7 mg/l
Boring location B7, 0-4' depth interval:	5.1 mg/l
Boring location B8, 4-8' depth interval:	21 mg/l
Boring location B10, 4-8' depth interval:	6.9 mg/l
Boring location B10, 8-12' depth interval:	23 mg/l

Tr. I at 81-82, 190-94; Tr. III at 75-79; CX #2. The EPA alleges that Respondent disposed of (i.e. leaked, spilled, discharged, placed) used oil containing lead at the facility, resulting in subsurface soils that exhibit the toxicity characteristic for lead and requiring Dearborn to have an operating license for hazardous waste under MAC R. 299.9502(1). Tr. I at 177-78, 190-95; Tr. II at 112, 124, 134; Tr. IV at 37, 116-17, 121-22.

Dearborn does not dispute that lead is present in used oil or the analytical results showing lead in its subsurface soils, but instead contends that the EPA has not determined that the lead levels were the result of Dearborn's activities and that several other possible sources of contamination[41] have not been ruled out. Tr. II at 114-33; Tr. IV at 314. Respondent claims that it has not disposed of any substance containing lead that would be found in the subsurface soils at the facility, and argues that none of the surface soil samples taken by E&E contained lead at concentrations of 5 mg/l or above since it does not accept any waste that is hazardous. Tr. II at 122; Tr. IV at 313-14.

[41] See discussion above at 26-27.

As noted above, however, Respondent has offered no evidence to support its theories regarding the source of contamination at the facility, which can only be classified as bare assertions, conclusory allegations, or suspicions. In contrast, the evidence presented by Complainant has shown aboveground tanks and containers in poor condition, the presence of used oil in surface soils, subsurface soils, and groundwater, and that the site is not sufficiently impervious to prevent the flow of used oil to the environment. In fact, Mr. Moloian testified that site activities can be "sloppy" and that he "assumed that all of the oil on the ground was due to Dearborn's operations." Tr. IV at 224-25, 244-46, 323.

Moreover, RCRA is a remedial, strict liability statute that is liberally construed, and a party may be liable even in the absence of any affirmative misconduct on its part or if a violation is unintended. *In re Bil-Dry Corp.*, RCRA (3008) Appeal No. 98-4, 9 E.A.D. 575, 609 (EAB, Jan. 28, 2001); *In re Rybond, Inc.*, RCRA (3008) Appeal No. 95-3, 6 E.A.D. 614, 638 (EAB, Nov. 8, 1996); *U.S. v. Production Plated Plastics, Inc.*, 742 F.Supp. 956, 960 (W.D. Mich. 1990), aff'd, 955 F.2d 45 (6th Cir. 1992), cert. denied, 506 U.S. 820 (1995). As a result, there is no need for the EPA to unequivocally establish that Respondent's actions constituted the sole source of lead at the facility. Still, the preponderance of the evidence supports the conclusion that the hazardous constituents in the soil came from used oil that was accepted at the site, and that Respondent disposed of hazardous waste because the used oil containing hazardous constituents was spilled, leaked, discharged, or placed on the land in such a manner that it entered the surface and subsurface soils.[42] *See Strong Steel*, 2002 EPA ALJ LEXIS 57 at *43-50. As such, I find that Dearborn failed to have an operating license for the disposal of hazardous waste for at least 179 days in violation of MAC R. 299.9502(1).

(2) Storage or disposal of hazardous waste in aboveground tanks

The EPA further alleges that Dearborn stored or disposed of hazardous waste in six aboveground tanks[43] at the facility based

[42] Subsurface soil samples taken for the 1982 SME Report found lead concentrations to be "significantly lower than levels considered hazardous" by the EPA. RX #1; Tr. I at 177-78.

[43] At the hearing, testimony on Count VIII was limited to Tanks 5, 12, 17, 59, 62, and 70, which were the only tanks specified in Count VIII of the Complaint and the proposed Compliance Order. Complaint at 27-28, 35; Tr. I at 183-87, 195-206; Tr. II at 4-10. Paragraph 38 of

on sampling results from the June 1999 inspection that implicate the "rebuttable presumption" in MAC R. 299.9809(2)(b).[44] According to MAC R. 299.9809(2)(b):

> Used oil that contains more than 1,000 parts per million total halogens is presumed to be a hazardous waste and is regulated under part 111 of the act and these rules. A person may rebut the presumption by demonstrating that the used oil does not contain hazardous waste. The demonstration may be made by showing that the used oil does not contain significant concentrations of halogenated hazardous constituents that are listed in 40 C.F.R. part 261, appendix VIII.

MAC R. 299.9809(2)(b).[45] In addition, MAC R. 299.9813(4) provides that "[t]he determination [that used oil is not a hazardous waste pursuant to MAC R. 299.9809(2)(b)] shall be made by testing the used oil or applying knowledge of the halogen content of the used oil in light of the materials or processes used."

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the Complaint, which is not incorporated under Count VIII, also alleges that Drum 2, the uniflash tank, and sumps 1 and 2 contained total halogen concentrations in excess of 1,000 ppm, and those allegations are repeated for the uniflash tank and sumps 1 and 2 in Complainant's Motion for Accelerated Decision. Complaint at 10; Complainant's Motion for Accelerated Decision at 48. However, the nature of the rebuttable presumption in MAC R. 299.9809(2)(b) requires that Respondent receive proper notice of the charges, since Respondent bears the burden to show that its used oil tanks and containers do not contain hazardous waste once the presumption has been established. Respondent stated at the hearing that it had only prepared to rebut the presumption for the six tanks alleged in Count VIII. Tr. I at 185, 199. Furthermore, Respondent's objection followed Complainant's attempt to introduce evidence of total halogens for Tank 1, which had not previously been alleged. Tr. I at 183. Since no motion to amend the Complaint had been filed, the EPA was given the opportunity to make an offer of proof for any tanks and containers not included in Count VIII of the Complaint. Tr. I at 187.

[44] The federal used oil management regulations contain a similar provision in 40 C.F.R. § 279.53, which is referenced in the analysis plan requirements of Section 279.55 but is not incorporated into the Michigan program. *See* MAC R. 299.9813(3).

[45] "Hazardous waste" is also defined in MAC R. 299.9203(1)(e) to include "used oil that contains more than 1,000 parts per million total halogens."

Although the EPA did not classify used oil as a hazardous waste when it promulgated the used oil management standards in Part 279, the Agency reiterated its concern over the number of documented instances in which used oil was either deliberately or inadvertently used as a carrier for the illegal disposal of hazardous waste. 57 Fed. Reg. at 41576.[46] Hazardous halogenated compounds were being frequently found in used oil shipments, and the EPA decided that a simple, objective test was needed to determine when used oil has been mixed with hazardous waste "in order to avoid case by case confusion as to when mixing has occurred and to aid in consistent enforcement of the regulation."[47] 50 Fed. Reg. 49164, 49176 (Nov. 29, 1985). This allowed used oil to be regulated under Section 3014 of RCRA as a non-hazardous waste, while ensuring that any "massive" adulteration of used oil with hazardous waste would be defined as such. 50 Fed. Reg. 1684, 1691 (Jan. 11, 1985).

The EPA determined that the 1,000 ppm level correlates sufficiently well with the presence of significant levels of hazardous halogenated spent solvents to justify the use of a presumption. 50 Fed. Reg. at 49176. In promulgating the used oil regulations, the Agency reviewed more than eleven hundred used oil analyses and additional data submitted by commentors, and concluded that used oil will generally contain less than 1,000 ppm of total halogens unless it has been mixed with hazardous constituents or is metalworking oil containing chlorinated additives. *Id.* at 49176-77. For example, 87% of the samples that contained more than 1,000 ppm total halogens were

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[46] The legislative history of Section 3014 of RCRA also demonstrates that Congress was concerned about the problems caused by the mixing of used oil and hazardous waste. See H.R. Rep. No. 96-1415, 96th Cong., 2d. Sess. (Sept. 26, 1980); H.R. Rep. No. 98-198(I), 98th Cong., 1st Sess. (June 9, 1983); H.R. Conf. Rep. No. 98-1133, 98th Cong., 2d. Sess. (Oct. 3, 1984).

[47] This presumption is based in part on the previously codified "mixture rule," which provides that ordinary wastes that are mixed with a hazardous waste are presumptively classified as hazardous waste. 50 Fed. Reg. at 1691; 40 C.F.R. § 261.3(a)(2); Tr. I at 76-78, 206-07; Tr. II at 138-39. Although the mixture rule was later declared invalid by the D.C. Circuit on the ground that the EPA had failed to provide sufficient notice and opportunity for comment on the adoption of the rule, *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991), the EPA repromulgated the mixture rule on an interim basis in March 1992. 57 Fed. Reg. 7628 (Mar. 3, 1992); *see In Re Hardin County, Ohio*, RCRA (3008) Appeal No. 93-1, 5 E.A.D. 189, 191-192 (EAB, Apr. 12, 1993).

also found to contain significant levels of hazardous chlorinated solvents (e.g. more than 100 ppm of any particular solvent). *Id.* at 49177. Thus, the EPA concluded that the 1,000 ppm total halogen level is a valid indicator that used oil has been mixed with a listed hazardous waste. *Id.*

Once the presumption has been established, a used oil processor may rebut the presumption "by showing that the used oil does not contain significant concentrations of halogenated hazardous constituents that are listed in 40 C.F.R. part 261, appendix VIII."[48] MAC R. 299.9809(2)(b). The EPA has stated that used oil "containing less then on the order of 100 ppm of any individual hazardous halogenated compound listed as a hazardous spent solvent (i.e. EPA Hazardous Waste Numbers F001 and F002) should not be presumed to be mixed with a spent solvent." 50 Fed. Reg. at 49176. The EPA reported that "when these compounds are present at such low levels, it is difficult or impossible to pinpoint the source of the contamination" and since "used oil and hazardous halogenated solvents are frequently generated at the same facility...some incidental contamination is probably inevitable." *Id.* On the other hand, the presence of "a hazardous halogenated spent solvent at levels between 100 and 1,000 ppm may indicate mixing with spent solvent depending on circumstances specific to individual cases." *Id.*; Tr. I at 79; Tr. II at 156, 166, 169. If the used oil processor fails to rebut the presumption, however, then the used oil is subject to regulation as a hazardous waste. MAC R. 299.9809(2).

The rebuttable presumption in MAC R. 299.9809(2)(b) does not apply to several types of used oil, most notably, metalworking oils that are processed through a tolling agreement as specified in 40 C.F.R. § 279.24(c).[49] MAC R. 299.9809(2)(b)(i); Tr. II at 34-35. The EPA has recognized that many metalworking oils contain greater than 1,000 ppm total halogens due to the presence of chlorinated paraffins, which are not toxic (i.e. they are not listed as a constituent of hazardous waste in Appendix VIII of Part 261), and not because they are mixed with a halogenated hazardous waste. 57 Fed. Reg. at 41579. Thus, used oil processors that handle metalworking oils and have entered into a tolling agreement are relieved of the responsibility of

[48] Appendix VIII of Part 261 does not include a specific list of halogenated hazardous constituents, but halogenated spent solvents are listed under hazardous waste numbers F001 and F002 in Appendix VII and 40 C.F.R. § 261.31. Tr. I at 51-52, 74-76; Tr. II at 146-50, 195.

[49] This exception is also included in 40 C.F.R. § 279.53(c)(1).

documenting the source of halogens, since the tolling agreement should adequately restrict the handling of the oils, provide incentives for preventing contamination, and assure that the oil will be recycled. *Id.* The rule is clear that the "rebuttable presumption does apply, however, if the oils or fluids are recycled in any other manner or disposed of." MAC R. 299.9809(2)(b)(i).

During the June 1999 inspection, E&E collected liquid samples from several aboveground tanks and containers at the facility. CX #1. Analytical results from the sampling, following EPA-approved test methods, documented the following total halogen levels:

Tank 5: 9,800 ppm[50]
Tank 12: 15,000 ppm
Tank 17: 4,100 ppm
Tank 59: 5,400 ppm
Tank 62: 6,300 ppm
Tank 70: 7,100 ppm

CX #1; Tr. I at 81-82, 218-23. The EPA contends that the test results implicate the presumption under MAC R. 299.9809(2)(b) that used oil has been mixed with a hazardous waste, and Respondent bears the burden to rebut the presumption or otherwise manage the used oil as a hazardous waste. Tr. I at 215, 223.

Dearborn does not dispute the EPA's analytical results showing that samples from six of its aboveground tanks contain total halogen levels greater than 1,000 ppm, but instead argues that the presumption of mixing in MAC R. 299.9809(2)(b) has been rebutted based on the EPA's own test results from June 1999, testing performed by Paragon Laboratories in October 2001, as well as Dearborn's knowledge of its customers' processes. RPHB at 6. Dearborn first notes that MAC R. 299.9809(2)(b) provides that the rebuttal "may be made by showing that the used oil does not contain significant concentrations of halogenated hazardous constituents that are listed in 40 C.F.R. Part 261, appendix VIII." Although the EPA's test results show total halogen levels above 1,000 ppm for six tanks, Dearborn argues that the same results also demonstrate that the tanks contain insignificant levels for each of the F001 and F002 halogenated spent solvents listed in 40 C.F.R. § 261.31 and Appendix VII. Tr. II at 151-96. These are the same hazardous constituents that the EPA

[50] The analytical results were reported as ug/g (micrograms per gram), which is equivalent to ppm. Tr. II at 159.

recommended Dearborn test for in a May 9, 2001 letter, and Respondent contends that it was entitled to rely on that request in order to rebut the presumption. Tr. II at 190-96; CX #32.

Dearborn also argues that the testing conducted by Paragon Laboratories on Tanks 5, 12, 17, and 59 in October 2001 provides further support that its used oil does not contain hazardous waste. RX #15; Tr. IV at 129-38. Ms. Brauer concluded that the "EPA's presumption of mixture has been rebutted only for Tanks 5, 12, 17, and 59 as of October 2001" based on Paragon's testing for the F001 and F002 constituents, and Mr. Moloian stated that the contents of the four tanks had not changed between 1999 and 2001. RX #23; Tr. IV at 324-26.

In addition to testing, Dearborn asserts that knowledge of its customers' processes may be used in rebutting the presumption, and that its written analysis plan provides sufficient information to ensure that used oil contaminated with hazardous waste is not accepted at the facility. Tr. IV at 236-38, 317-22. Mr. Moloian testified that the total halogen levels found in Dearborn's tanks are the result of non-hazardous chlorinated paraffins, which Dearborn uses to formulate metalworking or cutting oils. Tr. IV at 262-64, 274, 317-22. Although not explicitly alleged, Respondent also seemed to suggest that the rebuttable presumption should not apply to Tanks 5, 12, 17, 59, 62, and 70 since they do not contain used oil. Tr. IV at 289, 314-17. In particular, Mr. Moloian stated at the hearing that Tank 5 contained excess rain water and oil,[51] Tank 12 contained diesel fuel, Tank 17 contained partially reclaimed oil,[52] Tank 59 contained reclaimed oil, Tank 62 contained mostly reclaimed engine oil, and Tank 70 contained used oil and rain water. Tr. IV at 289, 314-17, 326.

As discussed above, however, the EPA has established by a preponderance of the evidence that Tanks 5, 12, 17, 59, 62, and 70 were used to store and process used oil. The contents of Tanks 5, 17, 62, and 70 as described by Mr. Moloian fit within the broad definition of used oil in MAC R. 299.9109(p), and Mr. Moloian had testified earlier that Tank 12 contained light ends re-refined from used oil that were never emptied out, while Tank

[51] Mr. Moloian also testified that the contents of Tank 5 did not change between 1999 and 2001. Tr. IV at 325-26.

[52] During his 1999 deposition, Mr. Moloian stated that "Tank 17 is probably half full of used oil, same as all the other tanks, partially reclaimed used oil, unfinished used oil." CX #7 at 143.

59 contained "near finished oil, completely reclaimed oil, but not filtered." CX #7 at 152-58, 270. Furthermore, the constituents found in each of the six tanks are consistent with what would typically be present in used oil, and Mr. Moloian's self-serving testimony was the only evidence offered by Dearborn to prove the contents of its tanks. CX #1, CX #55 at 12. As a result, I find that Tanks 5, 12, 17, 59, 62, and 70 contained used oil and are subject to the rebuttable presumption in MAC R. 299.9809(2)(b).

Although MAC R. 299.9809(2)(b) provides a clear standard for determining when used oil is presumed to be a hazardous waste, it does not provide much certainty for determining when a presumption of mixing has been rebutted. Ms. Brauer, the Regional RCRA Used Oil Expert, recommends that facilities test their used oil for PCBs and the halogenated spent solvents listed as F001 and F002 in Appendix VII to Part 261, and then try to address the possibility that the used oil could have been mixed with any of the other hazardous halogenated constituents in Appendix VIII by knowledge of the process that generated the used oil.[53] Tr. I at 78-79, 210-11; Tr. II at 145-47, 160-62, 166-69, 194-96. At the same time, she acknowledges that several different methods may be employed to rebut the presumption since the "rule doesn't define what is an acceptable rebuttal," and that "there is always some discretion" on the part of the EPA to determine whether the presumption has been rebutted unless all of the hazardous halogenated constituents in Appendix VIII have been tested and found to be non-detect. Tr. I at 78-79, 210-11; Tr. II at 167-69.

In order to assist Respondent in preparing a rebuttal, the EPA provided Dearborn with a draft guidance document authored by Ms. Brauer entitled "Regulatory Framework for Rebutting EPA's Presumption of Used Oil Mixture with a Hazardous Waste" ("Draft Guidance") as an attachment to its August 11, 2000 pre-filing notice letter, as well as a May 9, 2001 letter discussing the steps that Dearborn could take to rebut the presumption. CX #30, 32; Tr. I at 53, 217; Tr. II at 48-49, 140-43, 192, 195. However, the Draft Guidance is of little value here since it has never been published by the EPA, was not made available to Respondent until August 11, 2000, and does not address any

[53] Ms. Brauer's testimony is somewhat inconsistent with her statements in the January 9, 2003 memo that Respondent had rebutted the presumption for Tanks 5, 12, 17, and 59 after submitting test results for the F001 and F002 constituents. RX #23; Tr. IV at 135-36.

distinctions between the federal regulation and the Michigan rule. Tr. II at 140-43, 195; *see In re Coast Wood Preserving, Inc.*, EPCRA Appeal No. 02-01, slip opinion at 29-30. 11 E.A.D. __ (EAB, May 6, 2003). Moreover, the May 9, 2001 letter incorrectly identified which of the halogenated hazardous constituents were tested by E&E in June 1999, and it states only that "[a]t a minimum, EPA would expect that the processor would test for the F001 and F002 constituents" and that Dearborn may use the E&E results "to support its position" that the presumption has been rebutted. Tr. II at 179-95; CX #32.

Nonetheless, I agree with the EPA's conclusion that Dearborn has failed to rebut the presumption in MAC R. 299.9809(2)(b) that the used oil in Tanks 5, 12, 17, 59, 62, and 70 was mixed with a hazardous waste by relying on knowledge provided by its written analysis plan and analytical results from June 1999 and October 2001. Tr. II at 72, 218. As stated above, Dearborn does not routinely analyze incoming loads of used oil for total halogens, and its written analysis plan is inadequate to determine whether the used oil it accepts contains halogenated hazardous waste. Tr. II at 44-45, 57. Ms. Brauer's testimony that "about 23 generators did not have generator waste characterization reports available" for shipments received at Dearborn between June and September 1999 further undermines Respondent's argument that it can rely on its written analysis plan to prevent hazardous waste from entering the facility. Tr. II at 33; Tr. IV at 237, 319-20.

In fact, Dearborn's failure to have an adequate written analysis plan may explain why it did not analyze the split samples it was given in June 1999 or test any of the tanks presumed to contain hazardous waste until October 2001. Tr. II at 72; Tr. III at 280; CX #7 at 462. Although MAC R. 299.9809(2)(b) does not provide an explicit deadline for used oil processors to rebut the presumption of mixing, there is no allegation that Respondent was not given a reasonable amount of time to demonstrate that its used oil did not contain hazardous waste. Respondent admits that the Paragon results for Tanks 5, 12, 17, and 59 are not sufficient to rebut the presumption prior to October 2001, and the contents of Tanks 62 and 70 were never analyzed by Respondent. Tr. IV at 137.

As a result, Dearborn seeks to rely on the E&E test results from June 1999 to demonstrate that its used oil did not contain significant concentrations of halogenated hazardous constituents. While E&E did in fact test all of the halogenated spent solvents listed under hazardous waste numbers F001 and F002 in 40 C.F.R. § 261.31 and Appendix VII (except chlorinated fluorocarbons), Ms. Brauer testified that the analytical results showed some

hazardous constituents at potentially significant levels. Tr. II at 165-66, 171. More importantly, Dearborn failed to demonstrate, either by testing or by knowledge, that the used oil did not contain significant concentrations of any other halogenated hazardous constituent listed in 40 C.F.R. part 261, Appendix VIII. Tr. II at 72, 218. Although Dearborn asserts that the total halogen levels in its used oil are the result of chlorinated paraffins for its metalworking oils, the rebuttable presumption clearly applies to such oil since it is not being processed through a tolling agreement as specified in 40 C.F.R. § 279.24(c). MAC R. 299.9809(2)(b)(i); Tr. II at 39; Tr. IV at 298. In the absence of any additional evidence, Dearborn has failed to rebut the presumption in MAC R. 299.9809(2)(b) that the used oil in Tanks 5, 12, 17, 59, 62, and 70 is a hazardous waste. As a result, I find that Dearborn has stored[54] hazardous waste in aboveground tanks without an operating license for at least 179 days in violation of MAC R. 299.9502(1).

I. General Defenses Raised by Respondent

Although Respondent did not explicitly raise the defense of "selective enforcement," it presented several arguments at the hearing regarding the EPA's "overbearing and overreaching attitude" in pursuing an administrative complaint against Dearborn that will be addressed in this context.[55] Tr. III at 120-21. Specifically, Dearborn alleged that the EPA's 1999 inspection and subsequent enforcement action resulted from a 1998 SPCC inspection checklist prepared by Ms. Roseanne Ellison which falsely stated that "[t]he ground on most of the facility is covered with oil" and "[t]here is caked oil as deep a[s] one foot thi[c]k around the tanks in the water treatment area." CX #79 at 5; Tr. III at 114, 118-26; CX #7 at 451-55. Dearborn also

[54] "Storage is defined by MAC R. 299.9107(cc) as "the holding of hazardous waste for a temporary period at the end of which the hazardous waste is treated, disposed of, or stored elsewhere." As discussed above, Dearborn's assertion that it does not store used oil is without merit. Tr. IV at 274-75, 278, 325-26, 335.

[55] In its Answer, Respondent also stated under the heading "Defenses and Basis for Opposing Relief" that "[t]he complaint is not a bona fide attempt to enforce the law, but is a training exercise for EPA Region 5 employees at the expense of respondent." Answer at 7. In its post-hearing reply brief ("RPHRB"), Respondent stated that its "history of compliance or good faith attempts to comply greatly outweigh EPA's overbearing, overreaching, no holds barred conduct in its training exercise using Dearborn Refining as the guinea pig." RPHRB at 1.

questioned why its facility was distinguished from other potential sites of concern in the greater Detroit area, and why the EPA proceeded with the June 1999 multimedia inspection just five days after Mr. Moloian was hospitalized for a heart attack and two weeks after the used oil management standards became federally enforceable in Michigan. Tr. II at 90-91, 198-200; Tr. III at 84-104; Tr. IV at 11-14, 88-89, 255, 345-47; Tr. V at 3-5. Finally, Mr. Moloian testified that the EPA's involvement at the facility since 1998 has been at least partly responsible for a decline in business. Tr. VC at 10-12, 20.

Dearborn would bear a heavy burden in establishing a sufficient claim of selective enforcement, as courts have traditionally accorded the government a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions. *See Wayte v. U.S.*, 470 U.S. 598, 607-08 (1985); *Futernick v. Sumpter Township*, 78 F.3d 1051, 1058 (6th Cir. 1996) ("Legislatures often combine tough laws with limited funding for enforcement. A regulator is required to make difficult, and often completely arbitrary, decisions about who will bear the brunt of finite efforts to enforce the law. As a result, even a moderately artful complaint could paint almost any regulatory action as both selective and mean-spirited."). A prima facie selective enforcement defense requires proof that (1) the government "singled out" a violator while other similarly situated violators were left untouched, and (2) the selection was in bad faith, i.e., based on such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights. *U.S. v. Bustamante*, 805 F.2d 201, 202 (6th Cir. 1986); *Borland v. U.S.*, 125 F.Supp.2d 212, 218 (E.D. Mich. 2000).

Based on the evidence presented in this proceeding, Dearborn's unsupported allegation of overbearing and overreaching by the EPA fails to establish a sufficient claim of selective enforcement or any other valid defense to liability. Ms. Ellison and Mr. Valentino cited several factors in selecting Dearborn for a multimedia inspection, including the facility's location in an environmental justice area under the Lower Rouge/Southwest Detroit pilot project, Dearborn's capacity for storing used oil and its failure to self-report under Oil Pollution Act regulations, concerns expressed by MDEQ regarding the facility, and Michigan's Part 201 list of sites targeted for remediation. Tr. III at 64-69, 94-104, 115; Tr. IV at 11-14, 196-97.

Dearborn was given 12 days advance notice of the June 1999 inspection, and was informed about the type of documents that Complainant would be seeking. Tr. III at 252-62. The EPA also

expressed concern for Mr. Moloian's health and provided assistance to Dearborn in subsequent months to complete its information gathering and to explain any alleged violations of the used oil management standards, which were promulgated in 1992 and have been enforceable in Michigan since 1996. Tr. II at 48-50; Tr. III at 280-83; Tr. IV at 89, 167-70, 179-93; CX #24, 25, 27, 30, 32, 49. Although Mr. Valentino admitted that the presence of Mr. Moloian would have "greatly facilitated the inspection," many aspects were not affected by Mr. Moloian's absence and I do not fault the EPA for deciding to proceed on the scheduled date considering the extensive planning involved for an inspection with multiple participants. Tr. III at 262-64; Tr. IV at 11-14, 194-97. Given the importance of the preparedness and prevention requirements in the used oil management standards, Respondent's failure to provide the EPA with much of the requested materials and information during the inspection only raises further questions about Dearborn's ability to respond to an emergency situation when Mr. Moloian is absent from the facility.

As for the other defenses raised in the Answer, I find that Respondent did not provide any evidence or authority at the hearing or in its post-hearing briefs to support such claims, and they are therefore deemed to be waived. Moreover, many of the "Defenses and Other Basis for Opposing Relief"[56] identified by Respondent are not defenses at all, but are more in the nature of arguments or claims of possible mitigating factors, and some are without merit.

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[56] Respondent's Answer set forth the following:

1. Respondent has complied with all applicable law.
2. Complainant has waived its rights.
3. Complainant is estopped.
4. Complainant fails to state a claim.
5. Penalties are not authorized.
6. Penalties are excessive.
7. Violations of law, if proved, are not as severe as claimed in complainant's proposed penalties.
8. The complaint is not a bona fide attempt to enforce the law, but is a training exercise for EPA Region 5 employees at the expense of respondent.
9. Respondent has good cause not to comply with the proposed compliance order because doing so will waive its rights to judicial review.
10. Many items required by the proposed compliance order are moot.
11. Complainant's position is not substantially justified under 5 U.S.C. § 504(a)(1).

VI. Penalty

According to the penalty provision in Section 3008(a)(3) of RCRA:

> Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation of a requirement of this subchapter. In assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

42 U.S.C. § 6928(a)(3). Pursuant to the Rules of Practice, the EPA bears the burden of proof to show that any penalty sought is appropriate.[57] *See In re John A. Capozzi*, RCRA (3008) Appeal No. 02-01, slip op. at 28, 11 E.A.D. __ (EAB, Mar. 25, 2003).

In proposing a penalty of $2,910,524.94, the EPA employed the RCRA Civil Penalty Policy dated October 1990,[58] which was designed by the Agency to guide its implementation of the statutory penalty factors in Section 3008(a)(3). *See Carroll Oil*, slip op. at 25. The stated purposes of the policy are to:

> ensure that RCRA civil penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and mantained.

RCRA Civil Penalty Policy at 5. While the policy is not binding on ALJs, the EAB has emphasized that the Agency's penalty policies should be applied whenever possible because such policies "assume that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner." *In re M.A. Bruder & Sons*, RCRA (3008) Appeal No. 01-04, slip op. at 21, 10 E.A.D. __ (EAB, July 10, 2002).

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[57] "The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a).

[58] The 1990 RCRA Civil Penalty Policy has been revised and superceded by the RCRA Civil Penalty Policy issued on June 23, 2003.

A. RCRA Civil Penalty Policy Methodology

In accordance with the penalty policy methodology, the EPA calculated (1) a gravity-based component to measure the seriousness of the violations; (2) a multi-day component for violations lasting more than one day; and (3) applied several adjustment factors to reflect particular circumstances surrounding the violations. CX #47, 57; RCRA Civil Penalty Policy at 2. However, the EPA declined to add the appropriate economic benefit gained by Respondent through noncompliance.

For the gravity-based component, the EPA determined a base "matrix value" for each violation, and then adjusted this value based on several "fine tuning" factors. First, the EPA selected a base matrix value by ranking two violation criteria - the "potential for harm" and "extent of deviation from requirement" - among the categories of "major," "moderate," and "minor," and then locating the cell on the grid where those rankings intersected. Tr. III at 289-96; RCRA Civil Penalty Policy at 12-19. Additionally, the EPA considered five fine tuning criteria (seriousness of the violation relative to other violations in the same matrix cell; efforts at remediation or the degree of cooperation; the size and sophistication of the violator; the number of days of violation; and other relevant matters) to better adapt the penalty amount to the gravity of the violation and the surrounding circumstances. Tr. III at 296-98; RCRA Civil Penalty Policy at 19.

The EPA then calculated a multi-day component for each violation exceeding one day by selecting the same matrix cell location that was used in calculating the gravity-based component and multiplying that figure by the number of days of violation. Tr. III at 307-11; RCRA Civil Penalty Policy at 22-25. Violations that were believed to be ongoing were capped at 180 days.[59] Tr. III at 307-08; RCRA Civil Penalty Policy at 23. Finally, the EPA applied several adjustment factors for each violation (good faith efforts to comply/lack of good faith; degree of willfulness and/or negligence; history of noncompliance; ability to pay; environmental projects; and other unique factors), as well as a 10% increase in accordance with the

[59] The Complaint alleged 179 days of violation for Counts I, III, VII, and VIII, but the civil penalty was calculated for 180 days of violation. Assessing a civil penalty for 179 days of violation on these four counts would reduce the total penalty by $15,438.75. Respondent has not challenged the penalty calculation on this basis.

Debt Collection Improvement Act of 1996 ("DCIA"), 28 U.S.C. § 2416. Tr. III at 311-15; RCRA Civil Penalty Policy at 30-40.

B. Penalty Calculation for Counts I-VIII

On Count I, the EPA considered both potential for harm and the extent of deviation to be major, which placed the violation in the highest cell of the gravity-based matrix ($20,000-$25,000). Tr. III at 290-96; CX #57. Starting from the midpoint of the cell (the fiftieth percentile, or $22,500), the EPA chose to adjust the penalty upward by 10% to reflect the seriousness of the violation in relation to other "major-major" violations (Counts VII & VIII); upward by 10% to reflect Dearborn's lack of efforts at remediation or degree of cooperation; downward by 5% based on the size and sophistication of the company; and upward by 15% for the number of days of violation. Tr. III at 296-301. That placed Dearborn at the eightieth percentile within the matrix cell range, resulting in a gravity-based penalty of $24,000. Tr. III at 301.

For the multi-day component, the EPA determined the amount of the eightieth percentile in the major-major cell of the multi-day matrix ($4,200), and then multiplied that number by 179 to represent the additional days of violation, resulting in a multi-day penalty of $751,800. Tr. III at 307-11. The sum of the gravity-based and multi-day components for Count I ($775,800) was then adjusted upward by 5% ($38,790) to reflect Dearborn's history of noncompliance, and that figure ($814,590) was further increased by 10% ($81,459) to comply with the DCIA. Tr. III at 311-15. As a result, the total penalty for Count I was calculated to be $896,049.[60]

On Count II, the EPA determined the potential for harm to be moderate and the extent of deviation to be major, and then adjusted upward from the midpoint of the moderate-major cell by 10% to reflect Dearborn's lack of efforts at remediation for a gravity-based penalty of $9,800. Tr. III at 318. The corresponding figure in the moderate-major cell of the multi-day matrix ($1,480) was multiplied by 2 to represent the additional

[60] Mr. Valentino testified at the hearing that the 10% DCIA increase "should be applied to the gravity-based and the multi-day penalty," rather than the adjusted penalty. Tr. III at 313-14. This would have resulted in a 10% DCIA increase of $77,580 (increasing the gravity-based and multi-day component total from $775,800 to $853,380), and a 5% upward adjustment for history of noncompliance of $42,669, but the total penalty remains unchanged at $896,049.

days of violation, resulting in a multi-day penalty of $2,960. As with Count I, the 5% upward adjustment for history of noncompliance and the 10% DCIA increase were then applied to obtain a total penalty of $24,737.80.

On Count III, the EPA determined that the potential for harm was major and the extent of deviation from the regulatory program was moderate. Tr. III at 319-20. The EPA then adjusted upward from the midpoint of the major-moderate cell by 10% to reflect the lack of efforts at remediation, by 15% for the number of days of violation, and downward by 5% for the size and sophistication of the violator, resulting in a gravity-based component of $18,500. The corresponding figure in the multi-day matrix ($3,025) was multiplied by 179 to represent the additional days of violation, resulting in a multi-day component of $541,475. The same adjustment factors and DCIA increase were then applied, and the total penalty for Count III was calculated to be $646,771.13.

On Count IV, the EPA determined that the potential for harm and the extent of deviation were moderate. The EPA then adjusted upward from the midpoint of the moderate-moderate cell by 5% to reflect the seriousness of the violation in relation to other moderate-moderate violations (Count V), and downward by 5% for both the degree of cooperation and the size and sophistication of the violator, resulting in a gravity-based component of $6,350. The corresponding figure in the multi-day matrix ($857.50) was then multiplied by 2 to represent the additional days of violation, producing a multi-day component of $1,715. The same adjustment factors and DCIA increase were then applied, and the total penalty for Court IV was calculated to be $9,315.08.

On Count V, the EPA determined that the potential for harm and the extent of deviation were moderate, and then adjusted downward from the midpoint of the moderate-moderate cell by 5% to reflect the size and sophistication of the violator, resulting in a gravity-based component of $6,350. The corresponding figure in the multi-day matrix ($857.50) was then multiplied by 2 to represent the additional days of violation, resulting in a multi-day component of $1,715. The same adjustment factors and DCIA increase were then applied, and the total penalty for Count V was calculated to be $9,315.08.

On Count VI, the EPA determined that the potential for harm and extent of deviation were both minor, and then adjusted downward from the midpoint of the minor-minor cell by 15% to reflect the degree of cooperation and 5% based on the size and sophistication of the violator, resulting in a gravity-based

component of $220. No multi-day component was calculated for this violation,[61] and application of the adjustment factors and DCIA increase resulted in a total penalty of $254.10.

On Count VII, the EPA determined that the potential for harm and the extent of deviation from the regulatory program were both major. Tr. III at 322-23. The EPA then adjusted downward from the midpoint of the major-major cell by 5% for both the degree of cooperation and the size and sophistication of the violator, and upward by 5% to represent the number of days of violation, resulting in gravity-based component of $22,500. The corresponding figure in the multi-day matrix ($2,800) was then multiplied by 179 to represent the additional days of violation, producing a multi-day component of $501,200. The same adjustment factors and DCIA increase were then applied, and the total penalty for Count VII was calculated to be $604,584.75.

On Count VIII, the EPA determined that the potential for harm and the extent of deviation from the regulatory program were both major.[62] Tr. III at 324-26. The EPA then adjusted upward from the midpoint of the major-major cell by 5% to represent the seriousness of the violation in relation to other major-major violations and 15% for the number of days of violation, and downward by 5% for both efforts at remediation and the size and sophistication of the violator, resulting in a gravity-based component of $23,000. The corresponding figure in the multi-day matrix ($3,400) was then multiplied by 179 to represent the additional days of violation, producing a multi-day component of $608,600. The same adjustment factors and DCIA increase were then applied, and the total penalty for Count VIII was calculated to be $729,498.

C. Respondent's Challenges to the Penalty Calculation

At the hearing, Dearborn made several allegations challenging the EPA's application of the RCRA Civil Penalty

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[61] According to the 1990 RCRA Civil Penalty Policy, multi-day penalties are mandatory for major-major, major-moderate, and moderate-major violations; presumptive for major-minor, moderate-moderate, and minor-major violations; and discretionary for moderate-minor, minor-moderate, and minor-minor violations. RCRA Civil Penalty Policy at 23.

[62] Although Mr. Valentino considered the halogen content of the uniflash tank, sumps 1 and 2, and two drums in his analysis, it does not appear to have affected either the classification of Count VIII as a major-major violation or the total penalty calculated.

Policy.[63] However, the EPA has fairly and consistently followed the policy in calculating the gravity-based component, multi-day component, and adjustment factors in this proceeding and I find no reason to alter the total penalty on that basis. Tr. IV at 77-127. As discussed above, the EPA has established by a preponderance of the evidence that most of the aboveground tanks and containers at the facility were used to store or process used oil, and they were properly considered in calculating the penalty for Counts I-III. Tr. IV at 77-81, 83, 94-95. While Mr. Valentino had some difficulty at the hearing recalling certain aspects of the penalty calculation for Count V, the proposed penalty narrative adequately explains how the penalty amount for this violation was determined. Tr. IV at 99-100; CX #57. Respondent may consider the failure to have an adequate written analysis plan in Count VII to be a mere "paperwork violation," but the analysis plan is a crucial part of the used oil management standards since it ensures that a used oil processor has a thorough knowledge of the contents of any used oil handled at its facility. Tr. IV at 113; 57 Fed. Reg. at 41596. For Count VIII, the penalty policy is clear that the storage of hazardous waste without a permit is the type of violation that poses a major potential for harm and a major deviation from the regulatory requirements. Tr. IV at 123-24; RCRA Civil Penalty Policy at 48-49.

Although Dearborn has shown that groundwater beneath the facility is not potable and that no surface water courses flow directly from the site to the nearby Rouge River or Baby Creek, the potential for harm resulting from a violation encompasses both the risk of human and environmental exposure that may be posed by hazardous constituents, as well as the adverse effect that noncompliance may have on statutory or regulatory purposes. Tr. II at 80, 83-85, 91-93; Tr. III at 26, 29, 36-37, 96, 107-09; Tr. IV at 17, 292; RCRA Civil Penalty Policy at 13-15. As a result, the EPA was not required to demonstrate actual harm to human health or the environment in calculating the civil penalty. Similarly, the fact that Dearborn is located in an industrial setting provides no basis for reducing the civil penalty. *See In re Pepperell Associates*, CWA Appeal Nos. 99-1 & 99-2, 9 E.A.D. 83, 117-18 (EAB, May 10, 2000).

In regard to the adjustment factors, Dearborn questioned the 5% upward adjustment based on Respondent's history of

[63] Respondent did not address the EPA's application of the 1990 RCRA Civil Penalty Policy in its post-hearing briefs, but it did propose a civil penalty of $223.10 for Count II.

noncompliance since MDEQ had determined in 1997 that Dearborn was in compliance with RCRA, and previous complaints against Dearborn were unrelated to used oil, were filed more than ten years ago, and had been resolved. Tr. IV at 67-77; CX #45. However, the upward adjustment for history of noncompliance was based on two complaints that were filed by the EPA under RCRA against Dearborn in 1986 and 1990, as well as letters from MDEQ identifying deficiencies and violations of Michigan law. Tr. III at 311-12; Tr. IV at 69, 74-77, 149-53, 159-66; CX #8, 18, 42, 57. This adjustment is in accordance with the RCRA Civil Penalty Policy, which provides that "a history of noncompliance can be established even in the absence of similar violations, where there is a pattern of disregard of environmental requirements contained in RCRA or another statute," and that "a 'prior violation' includes any act or omission for which a formal or informal enforcement response has occurred (e.g., EPA or State notice of violation, warning letter, complaint, consent agreement, final order, or consent decree)." RCRA Civil Penalty Policy at 35.

Respondent also questioned whether it was proper for the EPA to provide just a 5% reduction for size and sophistication of the violator because of Dearborn's ability to hire outside expertise and counsel. Tr. IV at 138-42. However, there were several other factors that the EPA considered in making this determination, including the volume of used oil handled by the facility, the fact that Mr. Moloian was identified as an expert, and because the used oil management standards had been promulgated in 1992 and enforceable in Michigan since 1996. Tr. III at 305-06; Tr. IV at 138-39; CX #57 at 2-3. Furthermore, the fact that Dearborn is a small business and employs just a few workers does not automatically justify any reduction of the penalty. *See, e.g., John A. Capozzi*, slip op. at 27.

D. Ability to Pay

Since the statutory penalty factors in Section 3008(a)(3) of RCRA are restricted to the seriousness of the violation and good faith efforts to comply, a respondent's "ability to pay" is not part of the EPA's prima facie burden in calculating an appropriate civil penalty. *Carroll Oil*, slip op. at 36-38; *In re Central Paint & Body Shop, Inc.*, RCRA Appeal No. 86-3, 2 E.A.D. 309, 313-14 (CJO, Jan. 12, 1987) ("RCRA, however, does not include ability to pay as one of the factors that EPA must consider in assessing a penalty, and Congress certainly knew how to include such a factor in an environmental statute if it so desired. The logical conclusion is that ability to pay is not an element of EPA's proof"). In order to be considered by the EPA,

ability to pay must be raised and substantiated as an affirmative defense by the Respondent.[64] *Carroll Oil*, slip op. at 37.

According to the RCRA Civil Penalty Policy, "The burden to demonstrate inability to pay rests on the respondent, as it does with any mitigating circumstances...If the respondent fails to fully provide sufficient information, then compliance/enforcement personnel should disregard this factor in adjusting the penalty." RCRA Civil Penalty Policy at 36.[65] The policy also provides that:

> The Agency generally will not assess penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability of a violator to pay a penalty. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially troubled business. EPA reserves the option, in appropriate circumstances, to seek penalties that might put a company out of business."

RCRA Civil Penalty Policy at 36.

Since the EPA did not specify a proposed penalty in the Complaint, the Prehearing Order dated April 29, 2002 provided that:

> If Respondent intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business, Respondent shall furnish supporting

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[64] Ability to pay is not treated as an affirmative defense in the traditional sense that financial hardship would completely bar the imposition of a penalty, but as a potential mitigating consideration when assessing a civil penalty. *Carroll Oil*, slip op. at 37 n. 25. Under the Rules of Practice, "The respondent has the burdens of presentation and persuasion for any affirmative defenses." 40 C.F.R. § 22.24(a).

[65] The RCRA Civil Penalty Policy does not actually contemplate the consideration of a respondent's ability to pay outside of the context of settlement negotiations. *Carroll Oil*, slip op. at 38 n. 26.

documentation such as certified copies of financial statements or tax returns.[66]

Prehearing Order at 3. At that time, Dearborn had already provided the EPA with federal corporate tax returns from 1997, 1998, and 1999, as well as financial statements for 1994/1995, 1995/1996, and 1997/1998. CX #7II-KK, 39A-E. In its initial prehearing exchange ("CPHE"), the EPA requested that Dearborn provide additional information regarding the facility and its relationship to Chemserve Corporation so that it could determine the validity of any inability to pay claim. CPHE at 5-7.

Respondent declined to provide the information requested by the EPA in its prehearing exchange ("RPHE"), stating that it "sent reams of financial documents to complainant since 1999 when complainant targeted respondent," that Chemserve "is an unrelated business," and that the EPA had used information about its debtors and creditors "to scare away respondent's customers." RPHE at 3. However, Respondent did include a federal corporate tax return for the year 2000 and a financial statement for 1999/2000, which it claims "show unequivocally that respondent is unable to pay complainant's proposed penalty...or any penalty." RX #19, 20; RPHE at 3-4.[67] Subsequently, Respondent provided a federal corporate tax return for 2001. RX #22.

On August 26, 2002, the EPA submitted its rebuttal prehearing exchange ("CRPHE"), which specified a proposed penalty of approximately $2.9 million. EPA stated that it "was unable to ascertain an appropriate amount to reflect Respondent's ability to pay because the Respondent failed to provide information which the Complainant requested in its Prehearing Exchange," and as a result, the proposed penalty was not adjusted for this factor. CRPHE at 5; CX #57 at 3-4.

On November 22, 2002, the EPA filed a Motion to Strike Defenses along with a Motion to Compel Discovery Related to Respondent's Inability to Pay Defense which sought to strike

[66] Section 22.19(a)(4) of the Rules of Practice provides that "[i]f the proceeding is for the assessment of a penalty and complainant has not specified a proposed penalty, each party shall include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty." 40 C.F.R. § 22.19(a)(4).

[67] Complainant had not proposed a penalty at that time, and Respondent was apparently referring to a figure discussed during settlement negotiations.

Respondent's inability to pay defense based on a lack of supporting documentation or, in the alternative, compel discovery of such documentation. By Order dated January 3, 2003, I denied the EPA's Motion to Strike Defenses in order to provide Respondent with an opportunity to support its arguments at the hearing. *Dearborn Refining Co.*, 2003 EPA ALJ LEXIS 10 at *6-9. In a conference call with the parties on January 24, 2003, I orally denied Complainant's Motion to Compel Discovery on the ground that ability to pay is an affirmative defense under RCRA for which Respondent bears the burden of proof, requiring the production of information at that stage would unreasonably delay the proceedings, and the EPA had not demonstrated a sufficient interrelatedness between Dearborn and Chemserve.[68]

Dearborn's evidence on its inability to pay claim consisted primarily of federal corporate tax returns from 1997 through 2001, financial statements from 1995 through 2000, and the testimony of Mr. Moloian. On its federal tax returns, the annual income reported by Dearborn varied from [**Asserted Confidential Business Information ("CBI")**

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In fact, Dearborn's inability to pay claim appears to rely heavily on financial statements prepared by Parker, Wittus and Company, P.L.C. which show a [**CBI**

] CX #39D-E; RX #20; Tr. VC at 5, 10, 14-15. However, it is significant that the financial statements are unaudited, and the EPA has raised several legitimate concerns regarding the significance of the reported numbers. Tr. VC at 4, 147-48, 153, 166-69; CX #39D at 1 ("All information included in these financial statements is the representation of the management of Dearborn Refining Company...We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them"). For example, the [**CBI**

[68] However, I noted that EPA would have wide latitude on cross-examination of Respondent's witnesses at the hearing to explore the relationship between Dearborn and Chemserve.

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[**CBI**

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In fact, the EAB has found that the kind of financial information that Dearborn submitted to the EPA is not sufficient

69 [**CBI**

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70 [**CBI**

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to show an inability to pay the proposed penalty. In *Bil-Dry*, the EAB held that a respondent's unverified tax returns, unsupplemented by audited financial statements, did not provide the type of detailed analysis necessary to substantiate an inability to pay claim. *Bil-Dry*, 9 E.A.D. at 613-14; *see also Carroll Oil*, slip op. at 40 ("the fact that Carroll Oil has frustrated efforts to develop a more comprehensive understanding of its financial situation, instead salting the record selectively, leaves us less than confident that Carroll Oil has painted an accurate or complete picture"). Furthermore, Mr. Moloian's self-serving testimony regarding the financial condition of the company was unsupported by evidence in the record and is entitled to little weight. *See Bil-Dry*, 9 E.A.D. at 614. As a result, I find that Dearborn has failed to provide sufficient detailed information to satisfy its burden of proof on the affirmative defense of ability to pay, and thus is not entitled to a penalty reduction on this basis.

E. Relationship Between Dearborn, Chemserve, and Mr. Moloian

When calculating a civil penalty, the EAB has held that, under certain circumstances, the EPA may examine the financial condition of a related company or individual to determine whether they may be a legitimate source of funds affecting the respondent's ability to pay. *Carroll Oil*, slip op. at 40-45 (holding that the close financial relationship between Carroll Oil and Pershing Service is relevant to a proper consideration of ability to pay, since the companies' joint financial arrangement presumably conferred a financial advantage and a possible source of financial support for respondent); *In re New Waterbury, Ltd.*, TSCA Appeal No. 93-2, 5 E.A.D. 529, 546-50 (EAB, Oct. 20, 1994) ("the record clearly supports the Region's reliance on [owner Trevor] Roberts' and Winston Management's financial status to show that inability to pay should not bar imposition of a penalty").

In its initial prehearing exchange and Motion to Compel Discovery Related to Respondent's Inability to Pay, the EPA sought to obtain more detailed financial information about Dearborn and its relationship with Chemserve Corporation. The EPA stated that this information was needed to "determine the validity of any inability to pay claim by the Respondent," since "[p]revious information submitted by the Respondent was either out of date, incomplete, or presented Complainant with questions regarding the true financial condition of the Respondent, its relationship with an affiliated corporation (Chemserve) and thus its ability to pay a penalty." CPHE at 6; Motion to Compel Discovery at 4. Respondent declined to provide the materials

requested by the EPA, stating that it had already "sent reams of financial documents to complainant," that the EPA had used information about its debtors and creditors "to scare away respondent's customers," and that Chemserve is "an unrelated business." RPHE at 3.

At the hearing, the EPA established several links between Dearborn and Chemserve, and provided some insight regarding Mr. Moloian's control over both companies.[71] For example, Mr. Moloian serves as the president, treasurer, and majority shareholder of both Dearborn and Chemserve, and he and his wife constitute the entire board of directors for both companies. Tr. VC at 29-33, 69-73, 79-80. Dearborn and Chemserve are [**CBI**

[71] However, I sustained Respondent's objection to the EPA's introduction of evidence regarding the personal assets of Mr. Moloian because of corporate "veil piercing" concerns. Tr. VC at 130-34, 214-29; *see Coast Wood*, slip op. at 16-18.

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Nonetheless, I need not determine whether the financial resources of Chemserve may be a legitimate source of funds affecting Respondent's ability to pay, since Respondent has failed to sustain its burden of proof on this affirmative defense. Had the EPA been provided with more detailed information regarding the relationship between Dearborn and Chemserve, this factor may have been proper for the EPA to consider. However, the consequences of this information shortfall must fall upon Dearborn since it bears the burden of presentation and persuasion to demonstrate an inability to pay. *See Carroll Oil*, slip op. at 44-45. Accordingly, I find that Dearborn did not provide sufficient information regarding its finances and relationship to Chemserve to dispel any suggestion that Chemserve could be a source of financial support to Dearborn and affect its ability to pay the penalty.

F. Economic Benefit

After determining the gravity-based component, multi-day component, and adjusting for case specific circumstances, the final step in calculating a penalty under the RCRA Civil Penalty Policy is adding the appropriate economic benefit that respondent has gained through noncompliance.[72] RCRA Civil Penalty Policy at 1, 25-30. In fact, a "fundamental purpose of the policy is that economic incentives for noncompliance are to be eliminated. If violators are allowed to profit by violating the law, there is little incentive to comply. Therefore, it is incumbent on all enforcement personnel to calculate economic benefit," especially when a violation results in a "significant" economic benefit to

[72] Although Section 3008 of RCRA does not reference economic benefit in its list of penalty factors, courts have recognized that economic benefit is a relevant consideration in determining penalties under RCRA. *See, e.g., U.S. v. WCI Steel, Inc.*, 72 F.Supp.2d 810, 828 (N.D. Ohio 1999) (citing *U.S. v. Ekco Housewares*, 62 F.3d 806, 814 (6th Cir. 1995).

the violator. *Id.* at 25. The policy also states that at a minimum, the EPA should "recover any significant economic benefits resulting from failure to comply with the law. If violators are allowed to settle for a penalty less than their economic benefit of noncompliance, the goal of deterrence is undermined." *Id.* at 32-33.

Given the type and length of the violations alleged by the EPA, the economic benefit of Dearborn's noncompliance with the used oil and hazardous waste management standards would most likely be considered significant. For example, Mr. Valentino testified that "[s]ome of the counts, specifically Count One, would entail a considerable expenditure, if you're looking at secondary containment." Tr. III at 329. The RCRA Civil Penalty Policy provides a few examples of "regulatory areas for which violations are particularly likely to present significant economic benefits," including "improper land disposal of hazardous waste" and "clean-up of discharges." RCRA Civil Penalty Policy at 25; Tr. IV at 22-25. Dearborn's failure to store or process used oil in good condition tanks and containers and the lack of a written analysis plan may also have resulted in significant cost savings to the company. However, the EPA declined to calculate an economic benefit component in assessing a penalty for Respondent, stating that it had "insufficient information to accurately assess" this factor, but would adjust the penalty upon receipt of the cost documentation required to perform this analysis. CX #57 at 3-4; Tr. III at 329-30.

G. Appropriate Civil Penalty Amount

In analyzing the EPA's determination of an appropriate penalty, I note that the rules governing this proceeding require ALJs to "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act," and also to "consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b). Although EPA's penalty calculation has for the most part involved a fair and reasonable application of the RCRA Civil Penalty Policy methodology, its justification for excluding the economic benefit component is not particularly convincing, and I do not believe that a $2.9 million penalty is appropriate to achieve the broader goals of the policy in this matter.

The penalty policy provides that "[e]nforcement personnel are encouraged to use whatever cost documentation is available to calculate RCRA compliance costs," and if the numbers are disputed, "the burden will then shift to the respondent to present cost documentation to the contrary." RCRA Civil Penalty

Policy at 30 n. 10. At the same time, the EPA had already calculated a $2.9 million penalty without adding an economic benefit component, and increasing the penalty further does not seem appropriate given the totality of the circumstances in this case.

Although the EPA declined to adjust the proposed penalty based on Dearborn's ability to pay, Mr. Valentino testified that the penalty he calculated "does strike me as a large sum of money for a company of that size," and had stated earlier that "[m]ore than likely, however, the money is probably not there for [Dearborn] to finance an investigation and cleanup" of potential contamination at the facility. Tr. IV at 22-23, 142-45; CX #5 at 5. Respondent may not have sustained its burden of proof to establish the affirmative defense of inability to pay, but it is important to recognize that Dearborn is not a large corporation with infinite resources.

In that regard, a primary concern for both parties should be to ensure that compliance with the used oil and hazardous waste management standards is expeditiously achieved and maintained. There is no evidence in the record to indicate what the compliance costs may be, but the violations alleged by EPA are serious and will likely impose a significant burden on Respondent. Clearly, the RCRA Civil Penalty Policy's objectives of deterring violations and eliminating the economic incentives for noncompliance would be defeated if penalties were simply offset by a respondent's cost of compliance. *See In re Rogers Corp.*, TSCA Appeal No. 98-1, 9 E.A.D. 534, 565-67 (EAB, Nov. 28, 2000); *In re B & R Oil Co.*, RCRA (3008) Appeal No. 97-3, 8 E.A.D. 39, 58-60 (EAB, Nov. 18, 1998). However, I believe that those objectives, as well as the other main goals of the penalty policy, would be better achieved by imposing a reduced civil penalty in this matter.

Accordingly, Respondent is hereby assessed a civil penalty of $1,250,000. I believe that this amount is appropriate for the gravity of the violations committed and the nature of Dearborn's operations, which involve a significant amount of used oil storage and processing as well as the presence of hazardous waste in its aboveground tanks and subsurface soils. This penalty also reflects the efforts taken by Mr. Moloian over the past few years to reduce the amount of used oil stored at the facility and to eliminate several aboveground tanks from operation. Furthermore, this amount is sufficient to serve as a deterrent and to ensure that Respondent achieves compliance with the used oil and hazardous waste management regulations. Finally, I note that a strict application of the 1990 RCRA Civil Penalty Policy may not

be appropriate in this matter, given that most of the violations deal exclusively with the used oil management rules and the EPA has decided that used oil should not be listed as a hazardous waste. 57 Fed. Reg. at 41566.

VII. Conclusions of Law

1. Respondent is a “person” as defined by MAC R. 299.9106(i).

2. Respondent is an “owner” and “operator” of a “facility” as those terms are defined by MAC R. 299.9106(g), MAC R. 299.9106(f), and MAC R. 299.9103(q).

3. Respondent’s facility is involved with the “processing” of “used oil” as those terms are defined in MAC R. 299.9106(t) and MAC R. 299.9109(p).

4. Respondent is a “used oil processor/re-refiner” as defined by MAC R. 299.9109(z), and as such, Respondent is subject to the used oil management regulations in MAC R. 299.9809 and MAC R. 299.9813.

5. Most of the tanks at Respondent’s facility were used to store or process used oil and were “used oil aboveground tanks” and “used oil existing tanks” as those terms are defined by MAC R. 299.9109(q) and MAC R. 299.9109(u).

6. Several of the 55-gallon drums at Respondent’s facility were used to store or process used oil and were “containers” as defined by MAC R. 299.9102(o).

7. Respondent failed to have adequate secondary containment for its existing aboveground tanks used to store or process used oil for at least 179 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.54(d)).

8. Respondent failed to label its aboveground tanks and containers used to store or process used oil with the words “Used Oil” for at least 3 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.54(f)(1)).

9. Respondent failed to store or process used oil in aboveground tanks and containers in good condition for at least 179 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.54(b)).

10. Respondent failed to have an adequate communications system for at least 3 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.52(a)(4)(i)).

11. Respondent failed to have an adequate contingency plan for at least 3 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.52(b)(2)(v)).

12. Respondent failed to adequately maintain its emergency equipment for at least 1 day in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.52(a)(3)).

13. Respondent failed to have an adequate written analysis plan for at least 179 days in violation of MAC R. 299.9813(3) (40 C.F.R. § 279.55).

14. Respondent's operations resulted in the "storage" and "disposal" of "hazardous waste" at its facility as those terms are defined by MAC R. 299.9107(cc), MAC R. 299.9102(y), and MAC R. 299.9203.

15. Respondent failed to rebut the presumption in MAC R. 299.9809(2)(b) that the used oil in Tanks 5, 12, 17, 59, 62, and 70 was a hazardous waste.

16. Respondent failed to have an operating license for the storage and disposal of hazardous waste for at least 179 days in violation of MAC R. 299.9502(1).

17. The total civil penalty of $1,250,000 for Respondent's violations is authorized and in accordance with statutory penalty criteria in Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), and the applicable penalty policy issued under RCRA. *See* 1990 RCRA Civil Penalty Policy; 40 C.F.R. § 22.27(b)

18. Respondent failed to meet its burdens of presentation and persuasion on the affirmative defense of ability to pay. *See* 40 C.F.R. § 22.24(a); 42 U.S.C. § 6928(a)(3).

19. The total civil penalty of $1,250,000 is appropriate for Respondent's violations of the used oil management regulations in MAC R. 299.9813 (40 C.F.R. Part 279, Subpart F) and the hazardous waste management requirements in MAC R. 299.9502(1).

ORDER

1. Respondent Dearborn Refining Company is assessed a civil administrative penalty in the amount of $1,250,000.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after the effective date of the

Final Order by submitting a cashier's check or certified check in the amount of $1,250,000, payable to the "Treasurer, United States of America," and mailed to:

EPA Region 5
(Regional Hearing Clerk)
P.O. Box 70753
Chicago, IL 60673

3. A transmittal letter identifying the subject case title and EPA docket number (RCRA-05-2001-0019), as well as Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalty within the prescribed statutory period after entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 31 C.F.R. § 901.9.

5. Respondent Dearborn Refining Company is hereby ORDERED to comply with the attached Compliance Order pursuant to Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

Appeal Rights

This Order constitutes an Initial Decision as provided in Section 22.17(c) of the Rules of Practice, 40 C.F.R. § 22.17(c). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, or the Environmental Appeals Board elects, sua sponte, to review this decision.

COMPLIANCE ORDER

Respondent is hereby ORDERED, pursuant to authority in Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), Sections 22.27(a) and 22.37(b) of the Consolidated Rules of Practice, 40 C.F.R. §§ 22.27(a) and 22.37(b), and based on the foregoing determination of violations, to comply with the following requirements immediately upon the effective date of this Initial Decision:

1. Within ninety (90) calendar days from the effective date of this Initial Decision, Respondent shall submit a closure plan, pursuant to 40 C.F.R. Part 264, Subpart G, to the Michigan Department of Environmental Quality ("MDEQ"), which must address the closure of aboveground storage tanks 5, 12, 17, 59, 62, and

70,[73] and all soils contaminated with hazardous waste. The closure plan shall contain a closure schedule and activities that are consistent with applicable and enforceable state and federal regulations, statutes, and orders. Respondent shall submit a courtesy copy of the closure plan to the U.S. EPA at such time as it submits the closure plan to MDEQ. Respondent shall complete closure of the tanks and contaminated soils in accordance with the approved closure plan and applicable and enforceable state and federal regulations, statutes, and orders.

2. Within one hundred twenty (120) calendar days from the effective date of this Initial Decision, Respondent shall commence construction of sufficiently impervious secondary containment for all existing aboveground tanks that are used to store or process used oil in accordance with MAC R. 299.9813(3) (40 C.F.R. § 279.54(d)).

3. Within three hundred sixty (360) calendar days from commencing construction pursuant to paragraph 2 of this section, Respondent shall complete construction of sufficiently impervious secondary containment for all existing aboveground tanks that are used to store or process used oil in accordance with MAC R. 299.9813(3) (40 C.F.R. § 279.54(d)).

4. Within thirty (30) calendar days from the effective date of this Initial Decision, Respondent shall permanently label all tanks and containers used to store or process used oil with the words "Used Oil" in accordance with MAC R. 299.9813(3) (40 C.F.R. § 279.54(f)(1)).[74]

5. Within one hundred twenty (120) calendar days from the effective date of this Initial Decision, Respondent shall use only aboveground tanks and containers in good condition, with no severe rusting, apparent structural defects, or deterioration, to store or process used oil in accordance with MAC R. 299.9813(3) (40 C.F.R. § 279.54(b)).

6. Respondent shall immediately, upon the effective date of this Initial Decision, maintain all facility alarm systems, fire

[73] If the EPA has in fact determined that Respondent rebutted the presumption that the used oil in Tanks 5, 12, 17, and 59 is a hazardous waste as of October 2001, those tanks would not be subject to this section. *See* RX #23.

[74] It is unclear from the record if the aboveground tanks and containers used to store or process used oil have subsequently been labeled with the words "Used Oil." *See* Tr. IV at 278.

protection equipment, and spill control equipment to assure its proper operation in time of an emergency pursuant to MAC R. 299.9813(3) (40 C.F.R. § 279.52(a)(3)).

7. Within forty-five (45) calendar days from the effective date of this Initial Decision, Respondent shall prepare and submit to the U.S. EPA a written analysis plan that fully complies with the requirements of MAC R. 299.9813(3) (40 C.F.R. § 279.55).

8. Within ninety (90) calendar days from the effective date of this Initial Decision, Respondent shall complete and submit to the U.S. EPA a total halogen determination for the contents of all aboveground tanks that contain used oil. If the contents of any of these tanks are found to have a total halogen concentration greater than 1,000 ppm, and Respondent cannot adequately rebut the presumption that the used oil is a hazardous waste under MAC R. 299.9809(2)(b), Respondent shall, within sixty (60) calendar days of the completion of the total halogen determination, submit a supplemental closure plan to MDEQ which identifies any such aboveground tanks. The supplemental closure plan shall contain a closure schedule and activities which are consistent with applicable and enforceable state and federal regulations, statutes, and orders for the closure of these tanks. Respondent shall send a courtesy copy of the supplemental closure plan to the U.S. EPA at such time as it submits the supplemental closure plan to MDEQ. Respondent shall complete closure of these tanks in accordance with the approved closure plan and applicable and enforceable state and federal regulations, statutes, and orders.

9. To the extent that such tanks are not already subject to other legally enforceable orders, Respondent shall, immediately upon completion of the total halogen determination in paragraph 8 of this section, comply with all applicable regulations at 40 C.F.R. Parts 260-268 and 279 based on the total halogen results.

10. Respondent shall achieve and maintain compliance with all requirements and prohibitions governing the storage of hazardous waste applicable to treatment, storage, or disposal facilities codified at or incorporated by MAC Part 3, TSD Requirements (40 C.F.R. Part 264).

11. Respondent shall notify the U.S. EPA in writing upon achieving final compliance with all the conditions of this Compliance Order within fifteen (15) calendar days from the date it achieves compliance. If Respondent has not taken or completed any requirement of this Compliance Order, Respondent shall notify the U.S. EPA of the failure, its reasons for the failure, and the

proposed date for compliance within (10) calendar days after the due date set forth in this Compliance Order.

12. Respondent shall submit all reports, submissions, and notifications required by this Compliance Order to:

U.S. Environmental Protection Agency, Region V
Waste, Pesticides & Toxics Division
Enforcement and Compliance Assurance Branch
Attention: Michael Valentino (DE-9J)
77 West Jackson Boulevard
Chicago, IL 60604-3590

13. Failure to comply with any requirements of this Compliance Order shall subject the Respondent to liability for a civil penalty of up to twenty-seven thousand, five hundred dollars ($27,500) for each day of continued noncompliance with the deadlines contained in this Compliance Order. The U.S. EPA is authorized to assess such penalties pursuant to RCRA Section 3008(c), 42 U.S.C. § 6928(c).

_____
Barbara A. Gunning
Administrative Law Judge

Dated: August 15, 2003
Washington, DC

In the Matter of Dearborn Refining Company, Respondent
Docket No. RCRA-05-2001-0019

CERTIFICATE OF SERVICE

I certify that the foregoing **Initial Decision**, dated August 15, 2003, was sent this day in the following manner to the addressees listed below.

_____
Maria Whiting-Beale
Legal Staff Assistant

Dated: August 18, 2003

Original and One Copy By Pouch Mail to:

Sonja Brooks-Woodard
Regional Hearing Clerk
U.S. EPA, Region V
77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590

Copy by Pouch Mail to:

Richard J. Clarizio, Esquire
James J. Cha, Esquire
Assistant Regional Counsel
U.S. EPA, Region V
77 West Jackson Boulevard, C-14J
Chicago, IL 60604-3590

Copy by Certified Mail Return Receipt to:

Jeffrey K. Haynes, Esquire
L. Rider Brice, Esquire
Beier Howlett, P.C.
200 East Long Lake Road, Suite 110
Bloomfield Hills, MI 48304-2361