UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of | ) | |
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| Taylor Lumber & Treating, Inc. | ) | Docket No. 10-97-0091-RCRA |
| | ) | |
| Respondent | ) | |
| | ) | |

**Order Denying Complainant's Motion For Partial Accelerated Decision**

**Resource Conservation and Recovery Act (RCRA),** 42 U.S.C. §§ 6901 to 6992k, as amended. Complainant, U. S. Environmental Protection Agency, filed a Motion for Partial Accelerated Decision pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22.20(a). **Held:** Complainant's Motion for Partial Accelerated Decision is Denied as Complainant has failed to demonstrate that no genuine issues of material fact exist, and that Complainant is entitled to judgement as a matter of law.

Before: Stephen J. McGuire Date: July 28, 1998

Administrative Law Judge

Appearances:

For Complainant: Jennifer Byrne
Assistant Regional Counsel
U.S. Environmental Protection

Agency

Region 10
1200 Sixth Ave.
Seattle, Washington 98101
(206) 553-0050

For Respondent: Jerry B. Hodson
Lynne A. Perry
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**I. Introduction**

Taylor Lumber & Treating, Inc. (Respondent) is an Oregon corporation operating a wood-treatment facility in Sheridan, Oregon. Respondent's facility generates hazardous waste in its wood treatment operations using pentachlorophenol, creosote, and a chemonite solution containing arsenic acid, copper salts, zinc, and ammonia. These are hazardous wastes listed under 40 C.F.R. § 261.31(a), as hazardous waste from non-specific sources given hazardous waste numbers F032, F034, and F035.

Three inspections were conducted on Respondent's premises prior to the issuance of the Complaint in this proceeding. A Tax Credit Inspection of the facility was conducted by EPA on or about March 25, 1993; a Visual Site Inspection was conducted by EPA on or about November 17, 1993, and the Oregon Department of Environmental Quality conducted an inspection on April 24, 1996. During each of these inspections, Complainant alleges that Respondent's tram carts were observed off the drip pad and wood-treating chemicals from the tram carts were observed on the ground around the tram carts.

On October 23, 1997, EPA filed an initial Complaint charging Respondent with violating RCRA on three counts as follows: Count one, failure to minimize tracking of hazardous waste off the drip pad, 40 C.F.R. §265.443(j); Count two, disposal of hazardous waste without a permit, Or. Rev. Stat. § 466.005(4).; and Count three, failure to comply with closure requirements, 40 C.F.R. § 265.112, § 265.445. Respondent filed its Answer on November 21, 1997, generally denying the material allegations of the Complaint. On June 11, 1998, Complainant filed a Motion for Leave to File First Amended Complaint in order to clarify allegations and statements in the original Complaint. Respondent had no objection in its response filed June 22, and the undersigned granted Complainant's Motion in a June 29, 1998 Order Granting Complainant's Motion to File First Amended Complaint.

On June 15, 1998, Complainant filed a Motion for Partial Accelerated Decision contending that no genuine issues of material fact remain and Complainant is entitled to judgment as a matter of law. With regard to Count I, Complainant first argues that Respondent admits in it's Answer of paragraph 10 in the Complaint that its tram carts were observed off the drip pad and that wood-treating chemicals from the tram carts were observed on the ground around the tram carts. Second, a 1994 RCRA Facility Assessment notes that a small railcar contaminated with treatment chemicals was being stored on the soil at the time of the Visual Site Inspection. Third, photos taken during the EPA Tax Credit Inspection reveal tram carts being stored off the drip pad. Fourth, Complainant presents an affidavit of James Billings, an inspector who observed the tram carts off the drip pad and the wood-treating chemicals on the ground. Fifth Complainant contends that Respondent has admitted that it is standard practice to move the tram carts off the drip pad onto

the soil north of the drip pad.

In its June 26 Response to EPA's Motion for Partial Accelerated Decision, Respondent argues that factual issues preclude the granting of Complainant's Motion.[(1)] Respondent's affidavit of Leo Godsey contradicts the information provided by EPA's inspection. The affidavit alleges a disputed issue of fact in stating that EPA's Exhibit A photographs indicate a substance appearing to be "either hydraulic or motor oil residue in stormwater from vehicles operated in Taylor's storage yard, not wood treating chemicals" as EPA contends.

Further, Respondent asserts that the overall drip pad operations are at issue and this requires further facility-specific information on the operation of Taylor Lumber. Respondent supports this contention by language in the final rule of Subpart W indicating that "methods for effectively preventing such migration of contaminants will vary depending on plant configuration and other factors." See Final Rule at 55 Fed Reg 50,450, 50,464 (1990). The regulation itself also indicates that the management of incidental and infrequent drippage in storage yards are not applicable to this subpart, 40 C.F.R. § 265.440(c). Whether EPA's claims of drippage are infrequent or incidental are unresolved issues of fact.

In addition, Respondent argues that the regulation at issue, 40 C.F.R. § 265.443(j) requires that the tracking of hazardous waste be minimized, as opposed to eliminated. This language requires an examination of Respondent's facility operations to determine the extent to which the facility operates through its drip pad operations, to minimize the tracking of hazardous waste.

## II. Standard For Accelerated Decision

The Consolidated Rules of Practice, § 22.20(a) authorizes the Administrative Law Judge to "render an accelerated decision in favor of the Complainant or Respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law as to all or any part of the proceeding."

It is well-established that this procedure is analogous to the motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. In the Matter of CWM Chemical Services, Inc., Docket No. TSCA-PCB-91-0213, TSCA Appeal No. 93-1, 1995 EPA App. LEXIS 20; 6 E.A.D. 1, (May 15, 1995); and In the Matter of Harmon Electronics, Inc., RCRA Docket No. VII-91-H-0037, 1993 RCRA LEXIS 247, (August 17, 1993).

The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment. Adickes V. Kress, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (l0th Cir., 1994). A simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. In the Matter of Rickford Inc., Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (November 28, 1994).

The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits and other evidentiary materials submitted in support or opposition to the motion. Calotex Corp. v. Catret, 477 U.S. 317, 324 (1986); 40 C.F.R. § 22.20(a); F.R.C.P. 56(c). Upon review of the evidence in a case, even if a judge believes that summary judgment is technically proper, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. See, Roberts v. Browning, 610 F.2d 528, 536 (8th Cir. 1979).

Respondent has raised issues of fact through its affidavits contradicting EPA's evidence and its discussions of the language of the regulation at issue. A hearing is therefore necessary to fully develop the record on the drip pad operations of Respondent's facility. Among other issues to be developed at hearing are: a determination of whether the contaminants found on the Respondent's premises at the time of the inspection were, in fact, wood-treating chemicals as EPA claims; a determination of whether Respondent's efforts to "minimize" the tracking of hazardous waste sufficiently satisfy the requirements of 40 C.F.R. § 265.443(j); and further information on the frequency and incidence of drippage at the facility must be examined at the hearing.

**Order**

Accordingly, pursuant to 40 C.F.R. § 22.20 of the Consolidated Rules of Practice, Complainant's Motion for Partial Accelerated Decision is **DENIED.**

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Stephen J. McGuire
Administrative Law Judge

Washington, D. C.

1. EPA also filed a reply memorandum in support of its Motion for Partial Accelerated Decision on July 24, 1998.

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In the Matter of Taylor Lumber and Treating, Inc., Respondent
EPA Docket No. 10-97-0091-RCRA

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Complainant's Motion For Partial Accelerated Decision**, dated July 28, 1998, was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to: Mary Shillcutt
Regional Hearing Clerk
U.S. EPA
1200 Sixth Avenue
Seattle, WA 98101

Copy by Regular Mail to:

Attorney for Complainant: Jennifer MacDonald, Attorney .

Jennifer Byrne, Attorney
Assistant Regional Counsels

U.S. EPA (ORC-158)
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Seattle, WA 98101

Attorney for Respondent: Jerry B. Hobson, Esquire
Lynne A. Perry, Esquire
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111 S. W. Fifth Avenue
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Maria Whiting-Beale
Legal Staff Assistant

Dated: July 28, 1998