UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
	)	
PETRO WEST, INC.,	)	Docket No. II-RCRA-95-0306
	)	
	)	
Respondent	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR ACCELERATED DECISION

Resource Conservation and Recovery Act of 1976, As Amended.

This proceeding involves a Motion by Complainant, the U.S. Environmental Protection Agency, for Accelerated Decision pursuant to Part 22.16(a) and 22.20(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Sec. 22.21(a). **Held:** Based on the conclusion that no genuine issue of material fact exists, and that Complainant is entitled to judgment as a matter of law, its Motion for Accelerated Decision on Liability is **GRANTED. Before:**

Stephen J. McGuire Date: March 6, 1998 Administrative Law Judge

Appearances:

For Complainant:

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For Respondent:

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Mayaguez, Puerto Rico 00681-0294

I. INTRODUCTION

On January 28, 1998, Complainant, the U.S. Environmental Protection Agency, filed a Motion For Accelerated Decision on Liability against the Respondent, Petro West, Inc., in this proceeding under Section 3008 of the Solid Waste Disposal Act, as Amended (42 U.S.C. 6928). The stated basis for the motion is that

Complainant is entitled to judgment as a matter of law on all four Counts contained in the Complaint bearing Docket No. II-RCRA-95-0306, as there exists no genuine issue of material fact to be heard on liability at an evidentiary hearing.

An administrative Complaint in this case was initiated by EPA on June 29, 1995, pursuant to Section 3008 of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. Sec. 6901 et seq.("RCRA"). Section 3008 of RCRA, 42 U.S.C.

Sec. 6928, authorizes the Administrator to enforce violations of the Act and the regulations promulgated pursuant to it. Complainant in this proceeding, Conrad Simon, Director of the Air & Waste Management Division of the U.S. Environmental Protection Agency, Region II, has been duly delegated the authority to institute this action.

The Complaint, in its entirety, asserts four counts of alleged violations and proposes a total civil penalty of $72,000 as follows:

COUNT I

Complainant alleges that Respondent did not comply with the notification requirements of RCRA Section 3010, and 40 C.F.R. Sec. 279.42(a), by failing to notify EPA of its used oil activities before transporting more than seventy-eight thousand (78,000) gallons of used oil from South West Fuel, Inc., in Guanica, Puerto Rico to its facility in Mayaguez, Puerto Rico between March 30, 1994 and May 12, 1994.

Count I also alleges that Respondent transported said used oil during the period in question before obtaining an EPA identification number as required by 40 C.F.R. Sec. 279.42(a).

COUNT II

Complainant alleges that Respondent did not comply with 40 C.F.R. Sec. 279.51(a), as used oil processors who have not previously complied with the notification requirements of RCRA Section 3010 must comply with these requirements and obtain an EPA identification number before they begin to process any used oil. Respondent is alleged to have processed more than seventy-eight thousand (78,000) gallons of used oil from South West Fuel Inc., between March 30, 1994 and May 12, 1994 before notifying EPA of its used oil activities.

Count II also alleges that Respondent processed said used oil during the period in question before obtaining an EPA identification number as required by 40 C.F.R. Sec. 279.51(a).

COUNT III

Complainant alleges that Respondent did not comply with 40 C.F.R. 279.73(a), as used oil marketers are required to notify EPA and obtain an EPA identification number before they begin to market any used oil. Complainant alleges that Respondent marketed more than seventy-eight thousand (78,000) gallons of used oil it had received from South West Fuel, Inc., between March 30, 1994 and May 12, 1994 before notifying EPA of its used oil activities.

Count III also alleges that Respondent marketed said used oil before obtaining an EPA identification number as required by 40 C.F.R. Sec. 279.73(a).

COUNT IV

Complainant alleges that Respondent did not comply with 40 C.F.R. Sec. 279.55, which requires owners or operators of used oil processing and re-refining facilities to develop a written analysis plan describing the procedures that they will use to comply with the used oil analysis requirements of Sec. 279.53 and, if applicable, Sec. 279.72.

Count IV alleges that Respondent did not develop an analysis plan to evaluate the used oil it had received from South West Fuel, Inc., between March 30, 1994 and May 12, 1994. Such failure is in violation of 40 C.F.R. Sec. 279.55.

Based on the violations referenced above the Complaint sought proposed civil penalties as follows:

For violation of Counts I, II, and III.....$49,500

For violation of Count IV.....$22,500

Total $72,000

Subsequent to the issuance of the Complaint, on June 30, 1995, EPA served, by certified mail, return receipt requested, a true and correct copy of the Complaint upon Mr. Robin Gonzales, President of Petro West pursuant to 40 C.F.R. Sec. 22.05 (b)(1)(I).

On or about March 14, 1997, after more than twenty months of negotiations, Complainant filed a Motion For Entry of a Default Order with the Regional Administrator. In that Motion, Complainant alleged that Respondent, despite numerous requests, had not filed its Answer. Complainant thereafter sought an Order from the Regional Administrator finding that Respondent was liable for the four violations cited in the Complaint.

Respondent, in response to the Default Motion, filed a Motion for an Extension of Time to Respond to the underlying Complaint with the Regional Administrator. Respondent alleged, inter alia, that it had good and valid defenses to the allegations contained in the Complaint and that it had recently hired an attorney who needed additional time to prepare an Answer.

On or about May 5, 1997, the Regional Administrator granted Respondent's request for an extension of time to no later than May 12, 1997. Thereafter, on or about May 20, 1997, eight days after the deadline, Respondent filed its Answer to the Complaint.

On July 23, 1997, an Order was issued by the undersigned setting forth prehearing procedures. Respondent was directed to file, no later than October 24, 1997, its prehearing exchange or a statement that it intended to forgo the presentation of answering evidence. As of November 4, 1997, Respondent had failed to file either its prehearing exchange or said statement with the Regional Hearing clerk.

Thereafter, on November 4, 1997, Complainant filed an Application For Entry Of A Default Order On Liability against Respondent pursuant to 40 C.F.R. Sec. 22.17(b) of the Rules of Practice for Respondent's failure to comply with the prehearing order of the Administrative Law Judge ("ALJ").

In response, Respondent, on November 10, 1997, filed a Motion Requesting an Extension of Time to Comply with the Prehearing Order. On November 13, 1997, the undersigned issued an Order granting Respondent's request for an extension and holding Complainant's Motion for Partial Default on Liability in abeyance. Respondent was given to no later than December 15, 1997, to file its prehearing exchange.

On December 19, 1997, Complainant moved that it's underlying Motion For Default be granted as Respondent had once again failed to comply with the prehearing order of the ALJ by failing to file its prehearing exchange. Thereafter, on December 23, 1997, Respondent filed its prehearing exchange requesting that it be accepted as late-filed for good cause shown. On January 9, 1998, the undersigned issued an Order Denying Complainant's Motion for Default and Granting Respondent's Motion To Accept Late-Filed Pre-Hearing Exchange.

On January 21, 1998, the undersigned issued an Order which inter alia, granted Complainant's request to file a Motion for Accelerated Decision. Thereafter, Complainant, on January 28, 1998, filed its Motion for Accelerated Decision on liability. Respondent filed its Response in opposition to the Motion on February 13, 1998, and Complainant filed a rebuttal on February 23, 1998.

In support of this Order, and upon review of the entire record, the undersigned makes the following findings for purposes of this decision, pursuant to 40 C.F.R. Sec. 22.20(b) of the Consolidated Rules of Practice:

II. FINDINGS OF FACT

1. Petro West, Inc., Respondent, is a Puerto Rico corporation.

2. Respondent is a "person" as defined in Section 1004(15) of RCRA, 32 U.S.C. Section 6903(15), and 40 C.F.R. Sec. 260.10 and 270.2.

3. Pursuant to the authority of Sections 3004 and 3014 of RCRA, 42 U.S.C. Sections 6924 and 6935, EPA promulgated regulations at 40 C.F.R. Part 279 Subparts E, F, and H establishing federal standards for used oil, used oil transporters, used oil processors/refiners and used oil fuel marketers.

4. "Used oil" refers to "any oil that has been refined from crude oil or any synthetic oil that has been used and as a result of such use is contaminated by physical or chemical impurities." 40 C.F.R. Sec. 279.1.

5. A "used oil transporter" is any person who transports used oil, any person who collects used oil from more than one generator and who transports the collected oil, and any person who owns or operates a used oil transfer facility. 40 C.F.R. Sec. 279.40(a).

6. "Processing" refers to "chemical or physical operations designed to produce from used oil, or to make used oil more amenable for production of, fuel oils, lubricants, or other used oil-derived products. Processing includes, but is not limited to: blending used oil with virgin poertoleum products, blending used oils to meet fuel specification, filtration, simple distillation, chemical or physical separation and refining." 40 C.F.R. Sec. 279.1.

7. A "used oil processor/refiner" is any owner and operator of a facility that processes used oil. 40 C.F.R. Sec. 279.50.

8. A "used oil fuel marketer" is any person who directs a

shipment of off specification used oil from its facility to a used oil burner and any person who first claims used oil that is to be burned for energy recovery meets

the used oil fuel specification set forth in 40 C.F.R. Sec. 279.11. 40 C.F.R. 279.70.

9. As a result of an used oil spill that occurred at Corporacion de Azucarera's ("Sugar Corporation") Guanica Mill Facility in Guanica, Puerto Rico in May 1994, EPA issued an information request letter to Mr. Humberto Escabi-Trabal ("Escabi-Trabal"), President of South West Trading Company ("SWT")on June 28, 1994.[(1)] SWT was a company that had made payments on a lease that South West Fuel ("SWF"), also owned by Escabi-Trabal, had entered into with the Sugar Corporation permitting SWF to store used oil in Sugar Corporation's above-ground tanks.

10. EPA's information request also sought all information since March 8, 1993, concerning the used oil SWF received from all sources, where SWF stored such oil, the entity transporting the oil, the time it was transported, and who received such oil.

(See, Exhibit A).

11. By letter dated August 26, 1994, Escabi-Trabal responded to the information request on behalf of SWT, wherein it asserted that between 1989 and 1994, SWF had received used oil only from an entity known as the Puerto Rico Used Oil collectors ("PRUOC") and from Hidrocarburos and had stored this used oil in Tank No. 5 (Moy Affidavit at para. 11). SWT also stated that two laboratory analyses, one dated August 1989 and the other dated October 1992, indicated the levels of Cadmium in the used oil SWF received and placed in Tank No. 5 exceeded the regulatory limit of 2 parts per million ("ppm") under 40 C.F.R. Sec. 279.11. Those tests reveal that levels of Cadmium reached levels as high as 9.6 ppm. (Moy Affidavit at para. 12). Moreover, SWT stated that Petro West transported seventy-eight thousand (78,000), gallons of used oil, in ten shipments, from Tank No. 5 to its facility in Mayaguez, Puerto Rico from March 30, 1994 to May 12, 1994 (Moy Affidavit at para. 12; Exhibit B).

12. Subsequent split samples were taken of the used oil in Tank No. 5 in June 1994, by both EPA and the Sugar Corporation, owner of Tank No. 5. Each of the three analyses performed by EPA indicated that the used oil remaining in Tank No. 5 exceeded the ppm regulatory limit for lead set forth in 40 C.F.R. 279.11 (See, Moy Affidavit at para. 19; Exhibit M). Similarly, two out of the three analyses performed by the Sugar Corporation revealed that the used oil remaining in Tank No. 5 exceeded the regulatory limit (Moy Affidavit at 19; Exhibit N).

13. Thereafter, EPA issued, on February 27, 1995, an information request letter to Petro West, wherein the latter, on April 20, 1995, responded and admitted, that it had not submitted its Notification of Used Oil Activity until June 6, 1995 and that it had transported the seventy-eight thousand gallons of used oil from the Guanica Mill facility to its Mayaguez facility (Moy Affidavit at para. 16). Petro West further admitted that its own analyses of the used oil were not performed until "*after the referred shipment dates*" (emphasis added), and that it had "blended" this used oil with existing fuel oil and "marketed" the resulting processed oil during the March 30, 1994 through May 12, 1994 period (Id.).

14. Petro West provided further information on May 27, 1995, concerning the used oil in Tank No. 5. Specifically, it provided EPA with a December 6, 1994 analysis and three additional analyses, performed in March 1994; in May 1995; and an analysis performed on a sample collected in August 1992, which revealed Cadmium levels in excess of 9.6 mg/kg (Exhibit F).

15. Petro West's responses to EPA's information requests to determine the Respondent's used oil handling practices admit various facts as to its corporate existence, the transportation to and storage of used oil at its Mayaguez facility, its failure to notify EPA of its used oil activities and to have obtained an EPA identification number. Respondent does not dispute that what it received from SWF and what it blended, stored, and shipped to industrial facilities for burning was "used oil" as defined in 40 C.F.R. Section 279.1.[(2)]

16. Rather, Respondent bases its opposition to Complainant's Motion for Accelerated Decision on the central "material fact" of whether the used oil at issue is an "on specification" or an "off specification" used oil. For the reasons discussed below, Respondent's arguments are an inadequate defense to the issue of liability for the violations contained in the Complaint.

III. DISCUSSION

Section 22.20(a) of the Rules of Practice, 40 C.F.R. 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 through a long line of decisions by the Office of Administrative Law Judges and the Environmental Appeals Board (EAB), that this procedure is analogous to the motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See, e.g., In re CWM Chemical Serv.,TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995); and Harmon Electronics, Inc., RCRA No. VII-91-H-0037 (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. 3rd 526, 528 (10th Cir., 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. In re Bickford, Inc., TSCA No. V-C-052-92 (November 28, 1994).

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

Respondent's letters of April 20, 1995 and May 27, 1995, as noted (See Findings of Fact 13 and 14), admit to having transported used oil from Tank No. 5, processed and blended such oils with existing fuel oils it was storing in its tanks and thereafter marketed and sold said used oil for use in industrial boilers during the period between March 30, 1994 and May 12, 1994 (Moy Affidavit at para.16; Respondent's April 20, 1995 letter). Counts I through IV of the Complaint allege violations of the regulations contained in 40 C.F.R. Part 279, which were published in the *Federal Register* on September 10, 1992 (57 Fed. Reg. 41612), and which became effective on March 8, 1993.

Part 279 applies to all used oil that is being recycled (40 C.F.R. Section 279.10). Pursuant to these provisions, there is a rebuttable presumption that Respondent's used oil handling activities is regulated by the Part 279 regulations. Used oil identified as "on specification" used oil, which is burned for energy recovery, is specifically excluded from the Part 279 requirements if it meets the conditions of 40 C.F.R. Section 279.11, which provides:

> "[u]sed oil burned for energy recovery, and any fuel produced from used oil by processing, blending, or other treatment, is subject to regulation under this part *unless it is shown* not to exceed *any* of the allowable levels of the constituents and properties in the specification

shown in Table 1...."(Emphasis added).

Respondent has failed to present sufficient evidence that rebuts the presumption that its used oil activity was subject to 40 C.F.R. Part 279.

In addition to Respondent's admissions, EPA's issuance in June 1995 of an EPA Used Oil Identification number, further demonstrates the necessary factual elements to establish Respondent's liability as alleged in the Complaint. These admissions and those contained in Respondent's Answer, unequivocally demonstrate the absence of any genuine issue of material fact and prove the facts necessary to find EPA entitled to judgment as a matter of law on the issue of liability.

Respondent did not have an EPA identification number at the time of the transportation of the used oil in question, but claimed that it did not realize that an EPA identification number was required as it was not informed by the Department of Transportation("DOT") that a RCRA identification number was needed to transport used oil (See, Moy Affidavit at para. 16; Respondent's letters of April 20, 1995 and July 31, 1995). Respondent avers that it did not notify EPA, of its used oil activities during the referred to period, but only subsequently obtained an EPA identification number on June 26, 1995 for all used oil activities (Moy Affidavit at para. 13; Exhibit L; Respondent's July 31, 1995 letters).

Respondent further admits that it blended the used oil it received and subsequently sold such oil for use in industrial blenders (Moy Affidavit at para. 16; Respondent's April 20, 1995 letter and July 31, 1995 letter). Moreover, in paragraph 11 of its Answer, Respondent states that it had "incidentally marketed some on specification oil during the aforementioned dates [March 30, 1994 through May 12, 1994]". As previously noted however, the used oil that Respondent received from SWF exceeded the 2 ppm maximum established by 40 C.F.R. Section 279.11 Table 1. (See, Respondent's May 27, 1995, response; Moy Affidavit at para. 18).

Five of the six analyses performed by EPA and the Sugar Corporation (See, Findings of Fact Nos. 11 and 12), reveal that the used oil stored in Tank No. 5 and transported by Respondent to its Mayaguez facility exceeded the regulatory thresholds for either Cadmium or lead (Moy Affidavit at para. 19; Exhibits M and N). In addition, the only relevant sampling results provided in May 1995 by Respondent also demonstrates that the used oil it received between March and May 1994 exceeded the regulatory threshold for Cadmium (Moy Affidavit at para. 18; May 27, 1995 information request and attached analysis dated August 7, 1992).

Respondent argues in its prehearing exchange and opposition to Complainant's Motion for Accelerated Decision, that the oil it transported was in fact, on specification used oil and is thus exempt from Part 279.11 regulation. However, in its April 20, 1995 information response, Respondent admitted that it did not analyze the used oil it received from SWF until "after the referred date".

Respondent in its prehearing exchange, submitted two test results that purport to prove that the used oil it received from SWF was on specification used oil. The first analysis was dated March 11, 1994, and the second, May 10, 1995. These tests were submitted by Respondent in its May 27, 1995, response to an EPA information request letter.

The March 11, 1994, analysis was performed to determine whether the used oil Respondent would be receiving from SWF could be burned for energy recovery or had to be disposed of as a hazardous waste. This test however, did not measure any of the 40 C.F.R. Section 279.11 parameters (Exhibit F, Attachment II). As such, it does not substantiate Respondent's argument that said used oil was on specification used oil(See, Moy Affidavit at para. 18).

As to the May 10, 1995, analysis, although indicating that the used oil tested was on specification used oil, it does not specifically relate to any of the used oil Respondent received from the period of March 30, 1994 to May 12, 1994, and does not even demonstrate that such oil was received from SWF. As such, the May 1995 analysis similarly cannot support Respondent's claim that it had received on

specification used oil from SWF.

Finally, reference is made in the record to a December 6, 1994, test which was apparently conducted upon "blended" oil that Respondent had sold to an individual known as Martinez, which, in fact, was not the used oil that it had received from SWF (See, Finding of Fact 14). This used oil is identified as residual oil collected and sampled by Martinez at his facility and apparently was never even introduced by Respondent in its prehearing exchange materials (See, EPA's Memorandum in Support of Motion at Footnote 42).

The only probative test results available in this record relating to Tank No. 5, are the 1989 and 1992 analyses submitted by Escabi-Trabal, the 1992 analysis submitted by Respondent in its May 1995 information request response, and the 1994 split samples (See, Findings of Fact 11, 12 and 14). Each of these analyses conclusively show that the used oil from Tank No. 5 exceeded the requirements for on specification used oil as set forth in Table 1 of Part 279.11 of the regulations, and as such, must be legally considered as off specification used oil.

As none of the analyses relied upon by Respondent supports its claim that the used oil it transported, processed and marketed was on specification used oil, Respondent has failed to rebut the presumption that its used oil activity is subject to 40 C.F.R. Part 279.11.

Even were the undersigned to conclude that material facts remained in dispute as to whether the used oil in question was on specification used oil, Respondent would still fail to show that it was excluded from the requirements of Part 279. Section 279.11 specifically excludes from regulation on specification used oil only if "the person making that showing complies with Section 279.72, 279.73 and 279.74(b)".

As previously noted, in its April 20, 1995, information response, Respondent admitted that it did not submit a Notification of Used Oil Activity during the period in question as required by 40 C.F.R. Section 279.73(a)(See Finding of Fact 13), and never submitted a Notification of Hazardous Waste Activity (Moy Affidavit at para. 14). Having failed to meet, if nothing more, the notification requirement at 279.73, Respondent cannot claim the 279.11 exclusion to avoid the used oil regulatory requirements.

Respondent's liability under Count I of the Complaint, i.e., that Respondent failed to notify EPA of its used oil activities and to have obtained an EPA identification number in violation of 40 C.F.R. Section 279.42(a) has been established. Respondent has admitted that between March 30, 1994 and May 12, 1994, it "incidentally transported" used oil from Tank No. 5 in Guanica to its facility in Mayaguez (See, April 20, 1995 information request response; Answer at 9,13, and 17). As such, Respondent is deemed to be a "used oil transporter" as defined in Part 279.1.

Respondent has also admitted in its April 20, 1995, response that it did not hold any licenses or permits to manage used oil.

Rather, Respondent's first notification of used oil activity was on or about June 6, 1995 (Finding of Fact 13), which culminated in issuance of an EPA identification number on June 26, 1995, some 13 months after it has received and transported used oil from SWF (See, Moy Affidavit at para.13; Exhibit L).

Respondent's admitted failure to have complied with the requirements of 40 C.F.R. Section 279.42(a), therefore renders it liable, under Count I, pursuant to Section 3008(g) of RCRA, 42 U.S.C. Section 6928(g).

With respect to Count II of the Complaint, which alleges Respondent's failure to notify EPA of its used oil processing activities, in violation of 40 C.F.R. Section 279.51(a), Respondent has admitted that it "blended" and "filtered" the used oil received from SWF "during the referred period". These admissions emanate from Respondent's April 20, 1995 information request response previously noted, wherein Respondent conceded that it had not notified EPA of its processing activities before June 26, 1995.

Respondent therefore meets the regulatory requirements of a "used oil processor" pursuant to Part 279.50(a), which states in pertinent part..."Processing includes, but is not limited to blending used oil with virgin petroleum products, blending used oil to meet the fuel specification, filtration, simple distillation, chemical or physical separation and re-refining".

As a processor of used oil, Respondent was required, by 40 C.F.R. Section 279.51(a), to have notified EPA of its used oil processing activities and to have obtained an EPA identification

number before beginning to process any used oil. This requirement existed both because of Respondent's filtration activities and its failure to submit its Notification of Used Oil Activity, which subjected it to Part 279 without any ability to rebut the presumption of Section 279.11. As such, Respondent's failure to comply with this requirement makes it liable under Count II of the Complaint pursuant to Section 3008(g) of RCRA, 42 U.S.C. Section 6928(g).

Count III of the Complaint alleges that Respondent failed to notify EPA of its used oil marketing activities and to have obtained an EPA identification number before beginning to market used oil in March 1994 in violation of 40 C.F.R. Section 279.73(a). Part 279 Subpart H defines a "fuel marketer" as any person who "directs a shipment of off specification used oil from their facility to a used oil burner." Part 279.70(a).

As previously noted in this decision, the used oil transported to Respondent's facility from Tank No. 5, was by definition, "off specification", given the fact that pertinent test analyses showed Cadmium or Lead exceeded the regulatory limits described at Table 1 of Part 279.11. Respondent has conceded in its Answer (at Para. 11, 28), and the April 20, 1995 and July 31, 1995 information request responses that it "marketed" and sold such used oil for burning "in the boilers of our clients". As previously noted, Respondent did not notify EPA of its used oil marketing activities or acquire an EPA identification number before beginning to market used oil in March 1994.

Thus, as a "marketer of used oil", Respondent was required, pursuant to 40 C.F.R. Section 279.73(a), to have notified EPA of its marketing activities and to have obtained an EPA identification number before selling used oil for energy recovery. Respondent's admitted failure to have complied with this requirement renders it liable under Count III, pursuant to Section 3008(g) of RCRA, 42 U.S.C. Section 6928(g).

Finally, Count IV of the Complaint alleges that Respondent failed to develop a written analysis to analyze the used oil it received from SWF, pursuant to 40 C.F.R. Section 279.55, which requires in pertinent part: "Owners or operators of used oil processing and refining facilities must develop and follow a written analysis plan describing the procedures that it will use to comply with the used oil analysis requirements of Section 279.53 and, if applicable, Section 279.72".

As previously noted Respondent has admitted in its April 20, 1995, information request response that it did not analyze the used oil it received from SWF until after "the referred date".

Similarly, in its July 31, 1995, response, Respondent asserted that "[w]e did not have an analysis plan..."

As a "processor of used oil", Respondent was therefore required, pursuant to 40 C.F.R. Section 279.55, to have developed and followed a written analysis plan to analyze the used oil it received from SWF. Thus, Respondent's admitted failure to have complied with this requirement renders Respondent liable under Count IV, pursuant to Section 3008(g) of RCRA, 42 U.S.C. Section 6928(g).

Respondent's February 13, 1998, response in opposition to Complainant's Motion for Accelerated Decision, alleges that material facts exist with respect to whether the used oil Respondent transported to its facility was off specification used oil. Notwithstanding Respondent's attempt to characterize the used oil transported to

its facility as on specification oil, the test analyses relied upon by Respondent in support of such argument are inadequate to establish a relevant relationship to its facility during the time period in question and along with its own admissions, fail to rebut the clear findings of the relevant test analyses herein described.

Thus, Respondent's proffered evidence in support of its opposition to Complainant's motion does not demonstrate that triable issues remain which would defeat the Motion for Summary Judgment. See, Pharmo Bio, Inc. v. TNT Holland Motor Express Inc., 102 F. 3rd 914, 916 (7th Cir. 1996). As such, Complainant, as moving party, has met its burden under Adickes v.Kress, supra, by showing that there exists no genuine issue of material fact, and that it is entitled to judgment on liability as a matter of law.

Finally, Respondent, in its proposed prehearing exchange, offered as a defense to the alleged violations, its good faith efforts to comply upon learning of the regulations in issue; its history of compliance with local regulations; that its unwillful actions were based on ignorance; that no harm resulted from the violations; and on its inability to pay the proposed civil penalties assessed by EPA.

However, the Environmental Appeals Board in In re Rybond, 1996 RCRA LEXIS 13 (November 8, 1996), affirmed that such arguments do not preclude the imposition of RCRA liability. "RCRA is a remedial strict liability statute which is construed liberally...therefore [Respondent's] lack of knowledge....is not a defense to the allegations of the complaint. For the same reasons, Rybond's efforts to bring the facility into compliance upon notification of the existence [of a violation], while commendable, do not constitute a defense to the allegations in the Complaint" [Emphasis supplied]. Id. At 52.

Although these arguments might well speak to mitigation of any penalties assessed against Respondent, it has failed to demonstrate that EPA is not entitled to judgment on liability as a matter of law.

IV. CONCLUSIONS OF LAW

1. Respondent is a used oil "transporter" as that term is defined in 40 C.F.R. part 279.40.

2. Respondent is in violation of 40 C.F.R. Sec. 279.42(a) for its failure to file a Notification of Used Oil Activity and obtain an EPA transporter identification number prior to transporting used oil to its Mayaguez facility.

3. Respondent is a used oil "processor" as that term is defined in 40 C.F.R. Part 279.50.

4. Respondent is in violation of 40 C.F.R. Sec. 279.51(a), for its failure to file a Notification of Used Oil Activity and obtain an EPA identification number prior to processing any used oil at its Mayaguez facility.

5. Respondent is a used oil "fuel marketer" as that term is defined in 40 C.F.R. Part 279.70.

6. Respondent is in violation of 40 C.F.R. Sec. 279.73(a), for its failure to notify EPA of its marketing activities and to obtain an EPA identification number before it marketed used oil from its Mayaguez facility.

7. Respondent is in violation of 40 C.F.R. Sec. 279.55 for its failure to develop an analysis plan to evaluate the used oil it had received from South West Fuel, Inc.

V. ORDER

Pursuant to 40 C.F.R. Sec. 22.20 of the Consolidated Rules of Practice, Complainant's Motion For Accelerated Decision on Liability is **GRANTED.**

As the penalty phase of this proceeding remains in issue, **an evidentiary hearing for the determination of an appropriate penalty will be held beginning at 9:00 a.m., on Tuesday, April 21, 1998, in San Juan, Puerto Rico.**

Stephen J. McGuire
Administrative Law Judge

Date: March 6, 1998
Washington, D.C.

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1. See, Affidavit of Ton H. Moy, Complainant's Exhibit K at para. 10, which is contained as an attachment to Complainant's Memorandum in support of its Motion for Accelerated Decision as part of Exhibits A through N.

2. For example, Respondent's April 20, 1995 response to EPA's information request noted ["we were offered used oil..."]. Similarly, in its July 31, 1995 response it indicated that ["At that time we frangly(sic) did not know the used oil should comply with 40 C.F.R. 279.11..."].