**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

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| **In the Matter of** | ) | |
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| **Consumers Recycling, Inc.,** | ) | **Docket Nos. CAA-5-2001-002** |
| | ) | **CWA-5-2001-006** |
| | ) | **RCRA-5-2001-008** |
| **Respondent** | ) | **MM-5-2001-001** |

**ORDER ON CROSS-MOTIONS FOR ACCELERATED DECISION**

A Complaint initiating this proceeding was issued February 15, 2001, and an Amended Complaint in this matter was filed on March 30, 2001, by the Directors of the Air and Radiation Division, Chief of the Enforcement and Compliance Assurance Branch in the Waste Pesticides and Toxics Division, and the Superfund Division of the United States Environmental Protection Agency, Region 5 (Complainant). The Amended Complaint was issued under Section 113 (d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d); Section 311(b)(6) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(b)(6), as amended by the Oil Pollution Act of 1990 ("OPA"); and 3008(a) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended ("RCRA"), 42 U.S.C. § 6928(a). Respondent, Consumers Recycling, Inc. ("Respondent" or "Consumers"), was charged in the Amended Complaint with two counts of violating Section 113(a)(3) of the CAA, for disposing of refrigeration and air conditioning units or parts thereof without either recovering refrigerant (chlorofluorocarbon (CFC) or other ozone depleting substances) from the units or verifying that refrigerant had been evacuated from the units previously, in violation of 40 C.F.R. § 82.156(f), and for failure to maintain or retain records of disposal or verification statements for such units, in violation of 40 C.F.R. § 82.166(i) and (m). The Respondent was also charged with violating Section 311(b) of the CWA, for failure to have a Spill Prevention, Control and Countermeasures (SPCC) plan for its above ground petroleum tanks, in violation of 40 C.F.R. § 112.3(b). In addition, the Respondent was charged with two counts of violating RCRA, for failure to submit to EPA or the Michigan Department of Environmental Quality (MDEQ) a notification of used oil processing activities or to have an EPA identification number, in violation of 40 C.F.R. § 279.51(a) and Michigan Administrative

Code (MAC) § 299.9813(3) and (7), and for failure to have a written waste analysis plan, in violation of 40 C.F.R. § 279.55 and MAC § 299.9813(3) and (7).

For the alleged CAA violations, Counts I and II, Complainant proposed to assess a penalty of $93,500 for each count for a total of $187,000. For the alleged CWA violation, Count III, it was proposed to assess Respondent a penalty of $15,270, and for the alleged RCRA violations, Counts IV and V, it was proposed to assess Respondent a penalty of $10,450 for each count for a total of $20,900. Thus, the total proposed penalty is $223,170.

Consumers answered under date of April 23, 2001, asserting that it did not dispose of any appliances without first ensuring that they were tagged as stating that refrigerants had been removed, and asserting that Consumers was not required to submit notification of used oil processing activities. Consumers admitted, however, that it did not have a SPCC plan and a written waste analysis plan. Respondent contested the amount of the penalty as inappropriate and requested a hearing.

Thereafter, the parties exchanged prehearing information as directed by a letter-order, dated June 6, 2001.

On November 5, 2001, Complainant filed a Motion for Accelerated Decision, alleging that Respondent was liable as a matter of law as to all five counts in the Amended Complaint. As support for the motion, Complainant enclosed a Memorandum of Law in Support of Complainant's Motion for Accelerated Decision ("Complainant's Motion") and a Statement of Undisputed Material Facts ("Complainant's Statement of Facts"). Complainant asserted that no genuine issue of material fact exists as to Respondent's liability, and that, pursuant to 40 C.F.R. § 22.20(a) of the Consolidated Rules of Practice, 40 C.F.R. Part 22,[1] Complainant is entitled to judgment as a matter of law that Respondent is liable for each of the violations alleged in the complaint.

On November 6, 2001, Respondent submitted a Motion for Accelerated Decision ("Respondent's Motion") and a Brief in Support ("Respondent's Brief"), requesting judgment in its favor

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[1] The Consolidated Rules of Practice provide, at 40 C.F.R. Section 22.20(a), in part: "The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of a 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."

that it is not liable for the alleged CAA and RCRA violations, Counts I, II, IV and V, and, presumably in the alternative, that no penalty, or a greatly reduced penalty, be assessed for those counts. Under date of November 26, 2001, Complainant filed a Response to Respondent's Motion ("Complainant's Response").

By way of background, Consumers owns and operates a facility located at 7777 West Chicago Avenue, Detroit, Michigan, which receives scrap metal and household appliances. Answer ¶ 19. Respondent segregates scrap items into piles, sorts through the piles to collect certain metals, and compresses or crushes and bales the remaining items in the pile. Answer ¶¶ 20, 33. During the time period relevant to the Amended Complaint, Respondent had on its premises twelve above-ground storage tanks containing various types of fuel and oil, including diesel fuel, hydraulic and lubricating oil, used oil, and waste oil. Additionally, during the relevant time period, Respondent maintained at its facility a 1,000 gallon capacity drum catch basin used to collect oil from 55-gallon drums containing scrap metal, which Respondent receives from its customers.

## I. COUNT I

Subchapter VI of the CAA addresses the protection of stratospheric ozone, and Section 608, 42 U.S.C. § 7671g, authorizes EPA to promulgate regulations establishing standards and requirements regarding the use and disposal of class I and class II substances. Such substances, listed in Section 602 of the CAA and implementing regulations, are thought to cause or contribute to harmful effects on the stratospheric ozone layer. Accordingly, EPA promulgated regulations including those at 40 C.F.R. Part 82 Subpart F, 40 C.F.R. §§ 82.150-82.166, which apply, inter alia, to "persons disposing of appliances." The term "appliance" is defined in Section 601(a) of the CAA and in 40 C.F.R. § 82.152 as "any device which contains and uses a class I or class II substance as a refrigerant and which is used for household or industrial purposes, including any air conditioner, refrigerator, chiller, or freezer." The term "small appliance" is defined as "any of the following products that are fully manufactured, charged, and hermetically sealed in a factory with five (5) pounds or less of refrigerant: refrigerators and freezers designed for home use, room air conditioners . . . and drinking water coolers." 40 C.F.R. § 82.152.

Count I alleges that Respondent disposed of refrigeration and air conditioning units or parts thereof without either recovering refrigerant from the units or verifying that refrigerant had been evacuated from the units previously, in

violation of 40 C.F.R. § 82.156(f). Section 82.156(f) provides as follows:

> Effective July 13, 1993, persons who take the final step in the disposal process (including but not limited to scrap recyclers and landfill operators) of a small appliance, room air conditioning, MVACs or MVAC-like appliances must either:
> (1) Recover any remaining refrigerant from the appliance in accordance with paragraph (g) or (h) of this section, as applicable; or
> (2) Verify that the refrigerant has been evacuated from the appliance or shipment of appliances previously. Such verification must include a signed statement from the person from whom the appliance or shipment of appliances is obtained that all refrigerant that had not leaked previously has been recovered from the appliance or shipment of appliances in accordance with paragraph (g) or (h) of this section, as applicable. This statement must include the name and address of the person who recovered the refrigerant and the date the refrigerant was recovered or a contract that refrigerant will be removed prior to delivery.

The Amended Complaint alleges (at ¶ 34) that on July 15, 1999, there were six refrigerators, air conditioners or parts thereof in three large piles of mixed scrap at Respondent's facility, and that Respondent was not sorting through these piles prior to compressing or baling the scrap. The Amended Complaint further alleges (at ¶¶ 35, 36) that since January 1, 1996, Respondent received at least six loads of small appliances for disposal, and an unknown number of small appliances mixed in loads of scrap contained in roll-off boxes.

**A. Complainant's Arguments**

Complainant asserts that it is entitled to accelerated decision, and that no genuine issues of material fact exist as to Respondent's liability, based on admissions in Respondent's Answer, a declaration of the EPA inspector who inspected Respondent's facility on July 15, 1999 (Complainant's Prehearing Exhibit ("CX") 18), and responses to EPA's requests for information from Consumers (CX 1), Refrigeration Services, Inc., ("RSI") (CX 2), and Environmental Specialty Services, Inc. ("ESS") (CX 3), from which companies Respondent allegedly received small appliances.

Complainant says that Respondent is a "person[] who [took] the final step in the disposal process" within the meaning of 40 C.F.R. § 82.156(f), based on EPA's request for information as to suppliers that provided appliances and/or MVACs to Respondent for

disposal, recycling or recovery, and Respondent's response thereto, listing RSI and ESS. CX 1 ¶ 15. Complainant also relies on a statement in RSI's response to EPA's request for information, that Respondent supplied RSI with a dumpster "so long as [Respondent] was allowed use of the scrap metal disposed of by RSI in the dumpster," and that the dumpster was periodically delivered to RSI's premises "for the disposal of appliances and miscellaneous parts." CX 2 Response Nos. 5, 6. In addition, Complainant relies on a statement in ESS's response to EPA's request for information, that ESS supplied Respondent with window air conditioners for scrap, and that ESS sold scrap to Respondent on one occasion. CX 3 Response Nos. 5, 6, 14.

Complainant also alleges that Respondent did not "recover any remaining refrigerant" or verify, either by contract or by separate statements, that the refrigerant had been evacuated previously. Complainant cites the Declaration of Joseph Cardile, dated October 26, 2001,CX 18, which states, inter alia, that during an inspection of Respondent's facility on July 15, 1999, he observed parts of six appliances and a possible seventh, which were refrigerators and air conditioners, in the piles of scrap. *Id.* He did not see any tags on the appliances. *Id.* ¶¶ 8-11. He states further that during the inspection, Maynard Blach, plant manager, indicated that Consumers conducted a visual inspection of the small appliances received to determine whether the appliances contain refrigerant, and that Consumers did not collect verification statements from its suppliers showing that refrigerant had been recovered from the appliances. *Id*. ¶ 14. Mr. Cardile states further that Mr. Black did not produce any copies of tags, stickers or other written means of verifying recovery. *Id.*

Complainant points to the admissions in Respondent's Answer that from January 1, 1996 to November 1, 2000, Consumers did not recover any refrigerant from the small appliances it received, and that it did not have a contract with any suppliers for the recovery of refrigerants prior to delivery of the small appliances to Respondent. Answer ¶¶ 32a, 32c. Respondent further admitted that it accepted appliances from RSI, which would tag appliances indicating that the refrigerant had been drained, but that Consumers did not collect statements from other suppliers. Answer ¶ 32b. Complainant asserts that a blank example tag it obtained from RSI does not include a signed statement of the person recovering the refrigerant that it has been recovered in accordance with 40 C.F.R. § 82.156(g) or (h). CX 16.

Complainant acknowledges a letter, dated November 17, 2000,

signed by ESS and Respondent, stating in part that ESS "certifies that all refrigerant ... that has not leaked previously will be recovered from appliances to be delivered under this contract of sale prior to delivery." Attachment to CX 1 and 3. Complainant, however, argues that the letter is not a contract, considering its plain language, that it was only for certain shipments, and that ESS, in response to EPA's information request, referred to the letter but denied that it had a contract with Respondent. CX 3 Response Nos. 14, 16. Complainant points out that the Preamble to the rule, 40 C.F.R. Part 82 Subpart F, states that the contract option was available to lessen the burden [of compliance] where there was reliability in the recovery because of the long-term nature of the relationship between the final disposer and supplier. 58 Fed. Reg. 28660, 28704 (May 14, 1993). Complainant argues that there was no long-term relationship between ESS and Respondent. Moreover, Complainant says, the letter does not qualify as a statement verifying recovery of refrigerant, because the letter does not include the name and address of the person performing the recovery, and a signature of that person certifying compliance with standards in 40 C.F.R. § 82.156(g) or (h). Complainant also points out that the letter is dated after Respondent's receipt of the small appliances.

Complainant asserts ( Motion at 13, 19-20 and Response at 6) that Consumers failed to comply with 40 C.F.R. § 82.156(f) for at least 2225 small appliances, i.e.,the six appliances observed during the July 15 inspection, 1665 window air conditioners from ESS, and at least 554 appliances from RSI. In support of this assertion, Complainant presents several documents: Consumers' response to the request for information, which states that since 1996, the total volume received from RSI is less than six loads (CX 1 Response No. 20); a service log of refrigerant removal for RSI's appliances (CX 2, last attachment); calculations from RSI's and ESS's records of refrigerant reclamation by other companies (CX 2, last attachment; CX 3, attachment pp. 5-9, 11-32; CX 18 ¶¶ 19, 20); and ESS's invoices showing refrigerant reclamation from a total of 1665 window air conditioning units (CX 3, attachment pp. 1, 3). Complainant requests judgment as a matter of law that Respondent violated Section 82.156(f)for at least 2225 small appliances consisting of refrigerators or window air conditioners.

**B. Respondent's Arguments**

Respondent's position is that Complainant has not made a prima facie case because it has not shown that the appliances observed during the inspection or received subsequently actually contained refrigerants, or that the appliances observed during

the inspection were disposed of by Respondent. Respondent asserts that it has a policy of not accepting appliances containing refrigerants, and that it did not dispose of any used appliance which did not clearly exhibit a sticker or tag confirming that all refrigerants had been previously removed in accordance with 40 C.F.R. § 82.156. If it did receive an appliance that was not tagged, "the appliance was set aside and made available to Consumers' employees for their personal use or placed for use in break rooms at the Consumers' facility." Respondent's Motion at 5.

Respondent asserts that it did not admit, in its response to EPA's request for information, that it received appliances "for disposal." According to Respondent, "EPA has set forth no evidence that Consumers was the final person in the disposal process, rather, Consumers recycled only appliances where refrigerant had already been removed." Respondent's Motion at 5.

Respondent also sets forth arguments in mitigation of the penalty, urging that if its arguments as to liability are rejected, it should be granted an accelerated decision "regarding the excessive amount of the penalty that is requested by EPA." Respondent's Motion at 6. Respondent argues that Complainant has not established twelve separate violations because it has not shown that the appliances observed during the inspection were for disposal rather than reuse and were from separate shipments, or that each appliance represented a separate transaction.

**C. Discussion**

The Consolidated Rules of Practice provide, in pertinent part, that an accelerated decision may be rendered "as to any or all parts of a proceeding, without further hearing ... if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a), supra note 1. Upon a respondent's motion for accelerated decision, dismissal may be granted on the basis of the complainant's failure to establish a prima facie case or other grounds which show no right to relief on the part of complainant. *Id.*

An accelerated decision is in the nature of summary judgment. As stated by the D.C. Circuit, "the movant is entitled to an accelerated decision only if it presents 'evidence so strong and persuasive that no reasonable fact finder is free to disregard it'" Rogers Corporation v. EPA, No. 00-1542, 2002 U.S. App. LEXIS 58 at * 19 (D.C. Cir., Jan. 4, 2002)(*quoting* BWX Technologies, Inc., RCRA Appeal No. 97-5, 2000 EPA App. LEXIS 13, at *38-39 (EAB, Apr. 5, 2000). "Evidence not too lacking in

probative value must be viewed in the light most favorable to the party opposing the motion." *Id.* In addition, all reasonable inferences from the facts must be drawn in a manner most favorable to the nonmovant. *See, e.g.,* In re Peter C. Varrasso, 37 F.3d 760, 763 (1st Cir. 1994); Azrielli v. Cohen Law Offices, 21 F.3d 512, 517 (2nd Cir. 1994).

Where the parties file cross motions for accelerated decision, both may claim that no genuine issues of material fact exists as to liability. That does not mean that accelerated decision must be granted in favor of one of the parties. The summary judgment principles must be applied separately to each of the pending motions for accelerated decision. As stated by the Sixth Circuit, "summary judgment in favor of either party is not proper if disputes remain as to material facts," and "the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Taft Broadcasting Co. v. United States, 929 F.2d 240, 248 (6th Cir. 1991). The D.C. Circuit stated, "An accelerated decision, like the grant of summary judgment, is inappropriate when there is a disputed issue of material fact giving rise to conflicting inferences and a choice among them would amount to a fact finding," although it acknowledged that "a fact finder may be entitled, on cross motions for accelerated decision, to decide among reasonable inferences where the evidence is fully developed." Rogers, *supra.* As stated by the Third Circuit, "[i]f ... there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment." In re Japanese Electric Products Antitrust Litigation, 723 F.2d 238, 256 (3rd Cir. 1983), *rev'd on other grounds, sub nom.* Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

As to Respondent's Motion, Respondent may aver "an absence of evidence to support the nonmoving party's case," upon which the burden of production shifts to Complainant. Varrasso, 37 F.3d at n. 1 (*quoting* Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)), Azrielli, 21 F.3d at 516. To avoid accelerated decision in Respondent's favor, Complainant must come forth with evidence that would be sufficient, if all reasonable inferences were drawn in its favor, to find for Complainant on that issue at trial. *See,* Azrielli, 21 F.3d at 516-517.

To establish a prima facie case, Complainant must present evidence showing: (1) that Respondent is a person who took the final step in the disposal process of small appliances; and (2)

that Respondent failed either to recover any remaining refrigerant from the appliance or to verify that the refrigerant had been evacuated from the appliance or shipment of appliances previously by a signed statement from the person from whom the appliance or shipment of appliances is obtained that all refrigerant which had not leaked previously had been recovered from the appliance or shipment of appliances in accordance with paragraph (g) or (h), and with either the name and address of the person who recovered the refrigerant and the date the refrigerant was recovered or a contract that refrigerant will be removed prior to delivery.

Complainant need not show that the appliances actually contained refrigerants at the time they were received by Consumers; Complainant need only show that they were "small appliances" as defined by 40 C.F.R. § 82.152: products that were fully manufactured, charged and hermetically sealed in a factory with refrigerant, including refrigerators and window air conditioners. The text of the regulations, *e.g.,* 40 C.F.R. § 82.156, referring to appliances as such even after refrigerant is evacuated, indicates that such products do not cease to constitute regulated "appliances" after the appliances are drained of refrigerant. Moreover, the Preamble to the regulations states that, even for equipment that arrives at the scrap facility already crushed, and in which it "may safely be presumed that refrigerant is no longer present," the scrap recycler still has responsibility to obtain the certification. 58 Fed. Reg. 28660, 28704 (May 14, 1993). Nevertheless, Complainant has produced evidence that the appliances observed during the inspection included their evaporators and condensers, compressors, tubing, ducts, and/or coils. CX 18. There is no question that appliances received by Respondent, *e.g.,* room air conditioners and refrigerators, were "small appliances" subject to the verification requirements of Section 82.156(f).

As to the first element of its case, Complainant has established that Respondent took the final step in the disposal process for at least some of the small appliances at issue. The term "disposal" is defined in 40 C.F.R. § 82.152, in pertinent part, as "the process leading to and including ... [t]he disassembly of any appliance for reuse of its component parts." Section 82.156(f) expressly includes scrap recyclers as "persons who take the final step in the disposal process." Respondent admits that it receives scrap and engages in "recycling of small appliances." Answer ¶ 19; Respondent's Motion ¶ 1. Complainant's exhibits show that since January 1, 1996, Respondent received small appliances for disposal, recycling or recovery. CX 1 Response 15; CX 2 Response Nos. 5 and 6; CX 3 Response Nos. 5,

6, 14. With respect to appliances he observed in the scrap piles during the inspection, Mr. Cardile states that "[n]one of the refrigerators had any doors on them," that two were "severely dented," and that "none of the refrigerators or air conditioners could be used other than for salvage parts."Declaration, CX 18 ¶¶ 8, 9, 13. For purposes of ruling on Respondent's Motion, it is reasonable to draw an inference that these appliances were disassembled for use of their component parts. Complainant has also presented documents showing that Respondent accepted other small appliances for scrap recycling. CX 1 Response Nos. 15, 17, 20, 22; CX 2 Response No. 6; CX 3 Response Nos. 5, 6. Therefore, Complainant has presented evidence that is sufficient to find that Respondent took the last step in the process of disposal of small appliances, as contemplated by Section 82.156(f).

As to the second element, Respondent admitted that it did not recover refrigerant from the appliances. Thus the question is whether Complainant has shown that Respondent failed to verify that the refrigerant had been evacuated previously, by a signed statement from the supplier that refrigerant has been properly recovered, either with the name and address of the person who recovered the refrigerant and the date it was recovered, or with a contract that refrigerant will be removed prior to delivery. Considering Mr. Cardile's description of the appliances he observed during the inspection, his statement that he did not see any tags on the appliances he observed, and Respondent's admission that from January 1, 1996, until November 1, 2000, Consumers did not collect statements from suppliers verifying refrigerant recovery and did not have any contracts with suppliers requiring recovery of refrigerant prior to delivery (Answer ¶ 32.c), an inference can be drawn in favor of Complainant, that Respondent failed to verify that refrigerant had been evacuated from the appliances prior to their disposal or recycling for scrap.

Accordingly, Respondent's Motion for Accelerated Decision as to Count I of the Amended Complaint will be denied.

Complainant having established a prima facie case, the next question is whether there is any genuine issue of material fact which would preclude granting Complainant's Motion as to Count I. Consumers asserts that "it is clear that there is no genuine issue of material fact regarding Consumer's liability on Count I," but argues that it is *not* liable. Respondent's Brief at 5. To be determined is whether any genuine issue of material fact exists as to whether Respondent *is* liable, drawing reasonable inferences in favor of Respondent.

As to refrigerators it received from RSI, Respondent says that they were inspected for stickers indicating refrigerant had been drained, and if they did not have stickers, "those items would have been refused and returned to the shipper (if shipped on a Consumer's Truck)." CX 1 Response No. 17. Respondent asserted that with respect to refrigerators received in a roll-off box, where a refrigerator has no tag, "the unit is set aside and made available to [Consumers'] employees for their use," and that Respondent also has placed such units in its break rooms. CX 1 Response No. 21. Respondent's Prehearing Exchange statement indicates that Respondent proposes to have Maynard Blach, Consumers' plant supervisor, and Norbert Wierszewski, president of Consumers, testify as to those assertions.

Consistent with those assertions, RSI's response to EPA's request for information stated that it "always removed all refrigerants prior to placing material in [Consumer's] dumpster," that RSI's shop coordinator verified refrigerant recovery and placed a recovery certification tag on the appliance, and that appliances would not be released from RSI's premises without a completed certification tag." CX 2 Response Nos. 6, 15.

As to appliances received from ESS, ESS stated in response to EPA's request for information, that it sold scrap to Respondent on only one occasion, that ESS relied on a subcontractor to evacuate refrigerant from its appliances, and that the subcontractor certified evacuation by placing a tag on the appliances. CX 3 Response Nos. 5, 11, 14. Attachments to ESS's response include the letter dated November 17, 2000 and documents which appear to be invoices from the subcontractor representing that it reclaimed refrigerant from ESS's appliances in the months prior to November 17, 2000. An inference can be drawn that the letter dated November 17, 2000 applies to the one occasion ESS claims to have sold scrap to Consumers.

The letter appears to constitute "a contract that refrigerant will be removed prior to delivery" as required by Section 82.156(f)(2). The letter refers to EPA authorizing "certification by contract," expressing Consumers' intent that the letter constitutes such a contract. The letter includes an exchange of promises: Consumer's implied promise to purchase the appliances from ESS and ESS's promise to recover all refrigerant from appliances prior to delivery. It is signed by Consumers and signed as "accepted by" ESS. It refers to the "safe disposal requirements' for refrigerant containing appliances as outlined by EPA" and requests ESS to certify that "all refrigerant ... will be recovered from appliances ... prior to delivery." Attachments to CX 1 and 3.

ESS's statement (CX 3 Response No. 14) that it does not have a written contract with Consumers is not dispositive of whether the November 17, 2000 letter was a "contract" within the meaning of 40 C.F.R. § 82.156(f)(2). Complainant's mere assertion that ESS and Respondent were not in a long-standing relationship does not render the a contract insufficient under 40 C.F.R. § 82.156(f). Neither the regulation nor its Preamble indicates that a long-term relationship between the parties is a prerequisite to a contract. The Preamble merely states, "[t]he agency believes that the contract option is appropriate for businesses such as the automotive dismantlers to streamline transactions in cases where they maintain a long-standing business relationships with the scrap dealers." 58 Fed. Reg. 28660, 28704 (May 14, 1993). In sum, the November 17, 2000 letter appears to be consistent with the contract option of Section 82.156(f)(2), as interpreted by EPA in the Preamble, which states in pertinent part:

> [T]he Agency believes flexibility is important in this program to allow for the variability of local circumstances. As a result, the Agency has modified the requirements of a certification between two parties to allow for a single certification for a shipment of equipment or other similar provisions, such as a contract between two parties stating that one party has the responsibility to remove refrigerant from equipment before delivery.

*Id.*

As to the appliances observed during the July 15, 1999 inspection, the fact that the appliances were in piles of scrap at Respondent's facility without certification tags merely leads to an inference – but does not establish as an undisputed fact--that Respondent violated that requirement to verify that refrigerant had been evacuated. The regulation Respondent is charged with violating only requires that Respondent verify that refrigerant has been evacuated from the appliances previously; it does not include any time limitation, such as a requirement that such verification occur prior to arrival of the appliances at the facility. Obviously the verification must occur prior to the appliance actually being disposed of, or recycled for scrap. The evidence does not establish that respondent had disposed of or recycled the appliances at the time of the inspection. Mr. Cardile merely "assumed," based on the fact that two balers were in operation, that the appliances he observed "were eventually going to be bricked or bailed [sic]." CX 18 ¶ 13. Respondent, on the other hand, asserted that "these units were pulled from the scrap pile and placed in service" at its facility. CX 1 Response No. 29. It is possible that, at the time of the inspection, Respondent had intended to inspect the appliances in

the piles to verify whether refrigerant had been previously evacuated, but had not yet done so, and had not yet decided to dispose of or recycle the appliances for scrap. Because the evidence is not fully developed, and conflicting inferences can be drawn from the existing evidence, Complainant is not entitled to a finding that Respondent was in violation of Section 82.156 as to the appliances observed by Mr. Cardile on July 15, 1999.

Viewing the evidence in light most favorable to Respondent, and drawing inferences in its favor, appliances received from RSI and ESS were tagged with refrigerant recovery certifications, ESS certified by contract that refrigerant would be recovered prior to delivery of appliances, and Respondent inspected the small appliances it received, accepting for recycling only those with such tags, and either refusing and returning those that were not tagged, or offering them for its employees' personal use or for its break rooms.

The remaining question is whether certification tags placed on appliances by RSI complied with the content requirements for verification statements: "a signed statement from the person from whom the appliance or shipment of appliances is obtained that all refrigerant that has not leaked previously has been recovered from the appliance ... in accordance with paragraph (g) or (h) of this section," and "the name and address of the person who recovered the refrigerant and the date the refrigerant was recovered." 40 C.F.R. § 82.156(f)(2). In response to the request for information, Respondent stated that the tags from RSI were actually stickers that adhered to the appliance; that appears to be the reason that Respondent did not produce any such tags or stickers to demonstrate compliance with Section 82.156(f). CX 1 Response No. 20. The blank tags Complainant asserts were received from RSI are entitled "certification", include RSI's address[2] and a license number, and include blank spaces marked "freon recovered," the date, and "technician." CX 16; Motion at 18. It appears that Consumers contemplated such tags would be filled out with the date of refrigerant recovery, the amount of refrigerant recovered, and the signature of the person who recovered the refrigerant. CX 16; CX 2 Response No. 15.

The fact that the blank certification tags (CX 16) did not recite that refrigerant removal was "in accordance with 40 C.F.R. § 82.156(g) or (h)" does not render the tags insufficient on

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[2] RSI states that it removed the refrigerants from appliances, so RSI's address presumably is the business address of the person who removed the refrigerant. CX 2 Response No. 6.

their face under Section 82.156(f)(2). Sections 82.156(g) and (h) set the standards as to the amount of refrigerant that must be recovered. The amount of refrigerant marked by the technician individually on the tags as having been recovered may indicate compliance with those provisions; more evidence is required before any determination can be made as to the sufficiency of RSI's tags.

In sum, the evidence is not fully developed, and gives rise to conflicting inferences as to facts which are material to the issue of Respondent's liability for Count I of the Amended Complaint. Therefore,an accelerated decision is not appropriate as to Count I.

Complainant requests that Respondent be found liable for failing to comply with 40 C.F.R. § 82.156(f) as to at least 2225 small appliances, thereby committing 2225 separate violations. This request is denied, because genuine issues of material fact exist as to the number of small appliances which were actually disposed of or recycled by Respondent, and the number of those which Respondent asserts were returned or used by its employees.

## II. COUNT II

The Amended Complaint charges Respondent in Count II with failure to "maintain or retain records of its disposal or verification statements for the appliances" identified in Count I, as required by 40 C.F.R. § 82.166(i) and (m), which provide as follows:

> (i) Persons disposing of small appliances, MVACs and MVAC-like appliances must maintain copies of signed statements obtained pursuant to § 82.156(f)(2).
> * * * *
> (m) All records required to be maintained pursuant to this section must be kept for a minimum of three years unless otherwise indicated. Entities that dispose of appliances must keep these records on-site.

### A. Arguments of the Parties

Complainant points to Respondent's admission in its Answer that from January 1, 1996 until November 1, 2000, it did not collect statements verifying refrigerant recovery from suppliers other than RSI and that it did not have refrigerant recovery contracts from any suppliers. Answer ¶¶ 32.b and 32.c. Complainant asserts that Respondent has failed to produce any copies of any tags from appliances received from RSI. Therefore, Complainant says that it is entitled to judgment as a matter of law that Respondent failed to comply with 40 C.F.R. § 82.166(i)

and (m) with respect to at least 2225 appliances.

In addition to reiterating that it did not dispose of any appliances that contained refrigerants, Respondent argues that Count II is merely a repetitious allegation of Count I. Respondent asserts that if it disposed of an appliance without a certification tag, it cannot be penalized for both failing to receive the document and for failure to maintain a document it never received. Respondent contends that the arguments and proof in support of liability for Counts I and II are the same. Citing to the standard for multiplicitous counts in Blockburger v. United States, 284 U.S. 299 (1932), "whether each [statutory] provision requires proof of a fact which the other does not," Respondent asserts that it never received any records to maintain, which result in the same proof being required for both counts. Consumers argues that one is not required to maintain records it has never received, and that Sections 82.156 and 82.166 are in essence both record keeping requirements.

In response, Complainant argues that merging the violations alleged in Counts I and II would thwart Congressional and EPA intent, would reduce the effectiveness of the regulations in maximizing recapture and recycling of refrigerant, and would dilute the responsibility of the person who finally disposes of appliances. Complainant emphasizes the serious health risks and environmental harm associated with CFC emissions, through destruction of the stratospheric ozone layer, and EPA's concern with verifying that refrigerant was not vented into the atmosphere. Complainant asserts correctly that the Blockburger test applies where a single act could violate two statutory provisions, but here there are two separate acts. Nevertheless, applying the Blockburger standard, Complainant argues that Count II is distinct from Count I because EPA must establish the elements of Count I plus show that the verification statements were not retained for three years. To illustrate, Complainant notes that if Respondent could prove that it had received tags with the required information, but did not maintain them, then it would be in violation of Section 82.166(i)and (m) but not Section 82.156(f). On the other hand, Complainant states, a final disposer which obtains and retains verification statements but knows that the supplier did not properly recover the refrigerant, would have complied with Sections 82.166(i) and (m) but violated Section 82.156(f).

**C. Discussion**

There is no question that the requirements of Section 82.156(f) are distinct from Sections 82.166(i) and (m). The

former is in essence a requirement to comply with either Section 82.156(f)(1) by recovering refrigerant, or to comply with Section 82.156(f)(2) by verifying refrigerant recovery prior to disposal. Section 82.166(i) and (m) are recordkeeping requirements, to maintain documents. However, the recordkeeping requirements of Section 82.166(i), and in this case, also Section 82.166(m), are triggered by, and are completely dependent upon, compliance with Section 82.156(f)(2). That is, if Respondent complied with Section 82.156(f)(2) by obtaining verification statements, then it is also required to comply with Sections 82.166(i) and (m), by maintaining the statements.

The EAB has held that the "unit of violation" for the purpose of determining the number of counts or violations that may result or be charged from any proscribed conduct is essentially a matter of statutory construction. McLaughlin Gormley King Co., FIFRA Appeal Nos.95-2 through 95-7, 6 EAB 339 (EAB,1996). The EAB held that where a certification that a designated study had been conducted in accordance with Good Laboratory Practice Standards (GLPS) was false, the unit of violation [information] for the purpose of FIFRA § 12(a)(2)(Q) was the certification and the mere fact that the study may not have complied with GLPS in several respects did not give rise to multiple violations.

Here, as we have seen, CAA § 608(a) authorizes the Administrator to promulgate regulations establishing standards and requirements regarding the use and disposal of class I substances during the service, repair, or disposal of appliances and industrial process refrigeration. Section 608(b) is entitled "Safe disposal" and provides in pertinent part:

> The regulations under subsection(a) of this section shall establish standards and requirements for the safe disposal of class I and class II substances. Such regulations shall include each of the following-
>
> (1) Requirements that class I or class II substances in bulk appliances, machines or other goods shall be removed from each such appliance, machine or other good[s] prior to the disposal of such items or their delivery for recycling....

The quoted statutory provision makes it clear that the regulations to be issued providing for removal of class I or class II substances from appliances prior to disposal will apply to each such appliance, which prima facie provides the unit of violation. The regulation (§ 82.156(f), ante at 6), however,

clearly provides that the person taking the final step in the disposal process must either: (1) recover any remaining refrigerant from the appliance in accordance with paragraph (g) or (h) of this section, as applicable; or (2) verify that the refrigerant has been evacuated from the appliance or shipment of appliances previously. Being written in the alternative, it is obvious that a person may not be charged with a violation of both § 82.156(f)(1) and (f)(2) as to the same appliances. Here, Consumers has made no contention that it recovered or attempted to recover any refrigerant from any of the appliances received at its facility and the issue as alleged in Count I is that it failed to verify that the refrigerant had previously been evacuated. Verification is accomplished by signed statements in accordance with § 82.156(f)(2) or by a contract that the refrigerant will be removed prior to delivery [to the disposer's facility].[3] The unit of violation, failure to verify that the refrigerant had been evacuated from each appliance prior to disposal, is analogous to the false certification in McLaughlin Gormley King and may not result in multiple counts for the same appliance simply because Sections 82.166(i) and (m) require the maintenance and retention of verification statements.

Moreover, in several policy documents, EPA has clearly indicated that where an act of noncompliance is completely dependent on another act of noncompliance, only one violation should be charged. For example, the PCB Penalty Policy, dated April 9, 1990, p. 13 states that failure to inspect polychlorinated biphenyl (PCB) transformers normally will result in lack of records of inspection; in such cases only one violation – failure to inspect – should be charged, despite the fact that the acts violate two separate regulatory requirements. *See,* 40 C.F.R. §§ 761.30(a)(1)(xii), 761.30(a)(1)(ix). The RCRA Penalty Policy, dated October 1990, states at 21:

> In general, penalties for multiple violations may be less likely to be appropriate where the violations are not independent or substantially distinguishable. Where a charge derives from or merely restates another charge, a separate penalty may not be warranted. * * * * There are instances where a company's failure to satisfy one statutory or regulatory requirement either generally or necessarily leads to the violation of numerous other independent regulatory requirements.* * * * In cases such as these where multiple violations result from a single initial

[3] It is of interest that the regulation as written does not require that copies of contracts be retained.

> transgression, assessment of a separate penalty for each distinguishable violation may produce a total penalty which is disproportionately high.

Similarly, the Enforcement Response Policy for the Federal Insecticide Fungicide and Rodenticide Act (FIFRA)(April, 1990), provides as follows:

> A separate civil penalty ... shall be assessed for each independent violation of the Act. A violation is independent if it results from an act (or failure to act) which is not the result of any other charge for which a civil penalty is to be assessed, or if the elements of proof for the violations are different. Dependent violations may be listed in the complaint, but will not result in separate civil penalties.

Where such "dependent violations," *i.e.,* an act of noncompliance dependent on another act of noncompliance, are both alleged in a complaint, proof of either one may serve as the basis for a single penalty.[4] In Lazarus, Inc., 7 E.A.D. 318, 382 (EAB, 1997), the respondent was charged in three counts (for three different time frames) with both failure to inspect PCB transformers and to maintain records of the transformer inspections. Although the respondent presented evidence that it performed the inspections, the Environmental Appeals Board (EAB) upheld the violations for failure to maintain complete records of the inspections. On its face, this is a perversion of the penalty policy because respondent would be charged with only one violation per time frame had he failed to conduct the inspections.

The policies cited above provide guidance in the present matter, as there is nothing in Section 113 of the CAA,[5] the

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[4] The amount of penalty assessed for the violation may be adjusted to reflect whether a violation of one or both requirements was proven.

[5] Section 113(d)(1)(B) of the CAA, which should be read in conjunction with § 608(b) supra, authorizes a civil penalty to be assessed against a person "whenever ... the Administrator finds that such person ... has violated or is violating any ... requirement ... of this subchapter ... including ... a requirement ... of any rule... promulgated ... under this chapter ...." This statutory text could be construed as authorizing separate penalties for each requirement violated: Section 82.156(f)(2) and Sections 82.156(i) and (m). However, as noted

applicable regulations, or the CAA Stationary Source Civil Penalty Policy to the contrary.[6] For the reason noted and applying such guidance, Respondent cannot be liable for separate violations of failure to verify refrigerant by obtaining verification documents, and failure to retain the documents.

A review of the regulation does not reveal any requirement to prepare or maintain documentation as to refrigerant recovery for each small appliance, or shipment thereof from which the refrigerant has been evacuated in accordance with § 82.156(f)(1). If Respondent had intended to recover refrigerant with its own refrigerant recovery equipment, in accordance with § 82.156(f)(1), but failed to do so, Respondent would be in violation of § 82.156(f)(1), but would have no duty to comply with, and thus could not be charged with a violation of,§§ 82.166(i) and (m). It is not logical to assess one penalty for a violation of § 82.156(f)(1), but two for violations of §§ 82.156(f)(2) and 82.166(i) and (m).

Consequently, Respondent cannot be charged with two separate violations of 40 C.F.R. § 82.156(f) and 40 C.F.R. §§ 82.166(i) and (m). Therefore, the allegations of Count II are merged with the allegations of Count I.

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previously, it is reasonable to read § 608(b) in conjunction with § 113(d)(1)(B) and to regard the unit of violation as each appliance or the documentation (lack thereof) that it has been evacuated prior to disposal.

[6] The CAA Stationary Source Civil Penalty Policy (at 12-14) does not discuss dependent violations, but only refers generally to assessing separate penalties for separate violations.

**III. COUNT III**

The Amended Complaint charges Respondent in Count III with failure to prepare and have at its facility a Spill Prevention, Control and Countermeasures (SPCC) Plan from at least July 1, 1996 to June 30, 2000, in violation of 40 C.F.R. § 112.3(b), and in violation of Section 311 of the CWA, 33 U.S.C. § 1321. Section 311(j)(1)(C) of the CWA authorizes EPA to issue regulations "establishing procedures ... and other requirements for equipment to prevent discharges of oil ... from onshore facilities ... and to contain such discharges ...," and Section 311(b)(6) of the CWA provides for administrative penalty assessment against any owner, operator or person in charge of a facility who fails to comply with such regulation issued under subsection 311(j). The pertinent regulatory provision, 40 C.F.R. § 112.3(b), provides as follows:

> Owners and operators of onshore ... facilities that become operational after the effective date of this part [January 10,1974] and that ... could reasonably be expected to discharge oil in harmful quantities, as defined in 40 CFR Part 110, into or upon the navigable waters of the United States or adjoining shorelines, shall prepare an SPCC Plan ... within six months after the date such facility begins operations.

In turn, Part 110 defines the discharge of oil in such quantities as may be harmful, as including those which "[v]iolate applicable water quality standards" or "[c]ause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines." 40 C.F.R. § 110.3. Facilities are exempt from the requirement of 40 C.F.R. § 112.3 if the "storage capacity, which is not buried, ... is 1320 gallons or less of oil, provided no single container has a capacity in excess of 660 gallons." 40 C.F.R. § 112.1(d)(2)(ii).

Also exempt are "[o]nshore ... facilities which, due to their location, could not reasonably be expected to discharge oil into or upon the navigable waters of the United States or adjoining shorelines." Such determination "shall be based solely upon a consideration of the geographical, locational aspects of the facility (such as proximity to navigable waters or adjoining shorelines, land contour, drainage, etc.) and shall exclude consideration of manmade features such as dikes, equipment or other structures which may serve to restrain, hinder, contain, or otherwise prevent a discharge of oil from reaching navigable waters ...."

Respondent admitted in its Answer (¶¶ 40, 41, 82) that since at least July 21, 1999, it had above ground storage tanks (ASTs) with a storage capacity of greater than 660 gallons of oil and a total above ground storage capacity of more than 1,320 gallons of oil. In addition, Respondent admitted that the 1,000 gallon capacity drum catch basin existed at its facility since at least December 31, 1995, and that the basin collected cutting oil from the drums. Answer ¶¶ 38, 47. Respondent also admitted in its Answer that from at least July 1, 1996 to June 30, 2000, it did not have an SPCC plan. Answer ¶ 86. Respondent prepared an SPCC plan on or about July 7, 2000. CX 5.

There is no question that Consumers is the owner or operator of an "onshore facility," which is defined in 40 C.F.R. § 112.2 as "any facility of any kind located in, on or under any land within the United States ... which is not a transportation-related facility." Respondent's has owned and operated the facility since April 1983. Amended Complaint and Answer ¶ 21. The remaining question is whether Respondent's facility "could reasonably be expected to discharge oil in harmful quantities, as defined in 40 CFR Part 110, into or upon the navigable waters," considering geographical, locational aspects of the facility.

Consumers' SPCC plan states that Consumers used as much as 3,000 gallons of diesel fuel on a weekly basis. CX 5 p. 3. During an inspection of Respondents facility on July 21, 1999, the EPA inspector, Ross Powers, observed oil stains on the ground at the facility and water run-off patterns to the street and to the Detroit sewer system. CX 19 ¶¶ 13, 15, 16. Respondent's facility is located within the water drainage district serviced by the City of Detroit combined sewer system. Amended Complaint and Answer ¶ 23; CX 5 p. 7. The topography of Respondent's facility slopes, and surface water runoff flows, from south to north, toward the storm water drains and city storm sewer located along West Chicago Road. Amended Complaint and Answer ¶¶ 42, 43; CX 19 ¶11. According to the EPA inspector, Consumers has a floor drain in its maintenance shop, and the area around the drain was heavily stained with oil, and was within twenty feet of three of Respondent's ASTs. CX 19 ¶¶ 9, 10 (Declaration of Ross Powers). There are four storm drains/sewers on the facility's property, and on the adjoining street, one city sewer which is within 30 feet of the Respondent's drum catch basin. Amended Complaint and Answer ¶¶ 25, 26; CX 6; CX 19 ¶¶ 11, 12, 13. Complainant alleged, and provided supporting evidence, that these drains connect to the City of Detroit combined sewer system, and that water from these drains may be directed to either the Detroit River via the City of Detroit Waste Water Treatment Plant or, under certain storm events, directly to Baby Creek and the Rouge

River. Amended Complaint ¶¶ 27, 28, 29; CX 5 p. 6-7; CX 6; CX 19 ¶¶ 6, 14. The EPA inspector stated that as little as one pint of oil may cause a sheen or film on water. CX 19 ¶ 17. He also stated that Baby Creek is a tributary of the Rouge River, which is a tributary of the Detroit River, and stated facts, including recreational use, indicating that the latter rivers are navigable waters of the United States. CX 19 ¶ 18.

Complainant has supported with evidence its allegation (Amended Complaint ¶ 81) that due to its location, Respondent's facility could reasonably be expected to discharge oil in harmful quantities into or upon a navigable water of the United States. Respondent did not respond to Complainant's Motion for Accelerated Decision with respect to Respondent's liability for Count III. Accordingly, there are no genuine issues of material fact with respect to Respondent's liability for Count III, and Complainant is entitled to judgment as a matter of law that by failing to prepare an SPCC plan, Respondent violated 40 C.F.R. § 112.3(b) and Section 311 of the CWA.

## IV. COUNTS IV and V

The Amended Complaint charges Respondent in Count IV with failure, from June 1, 1999 to February 28, 2001, to submit to the Michigan Department of Environmental Quality (MDEQ) or EPA an EPA notification form (EPA Form 8700), or to have an EPA identification number, as required by Sections 299.9813(3) and (7) of the Michigan Administrative Code (MAC) and 40 C.F.R. § 279.51. Count V charges Respondent with failure to prepare a waste analysis plan as required by MAC § 299.9813(3) and (7) and and 40 C.F.R. § 279.55.

Pursuant to Section 3006 of RCRA, EPA may authorize a state to administer and enforce a hazardous waste program in lieu of the Federal hazardous waste program under RCRA. EPA authorized the State of Michigan's used oil management rules, at MAC §§ 299.9800 *et seq.* 63 Fed. Reg. 57912 (December 28, 1998). These rules became federally effective and enforceable on June 1, 1999. EPA may bring an enforcement action for violations of RCRA where the violation occurs in a state with a hazardous waste program authorized by EPA, pursuant to Section 3008(a)(2) of RCRA.

"Used oil" is defined in the regulations as "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." MAC § 299.9109(o); 40 C.F.R. § 279.1. Similarly, the term "used oil" is defined in RCRA § 1004(36) as: "any oil which has been – (A) refined from crude oil, (B) used,

and (C) as a result of such use, contaminated by physical or chemical impurities."

Sections 299.9813(3) and (7) of the MAC require a used oil processor to comply with 40 C.F.R. §§ 279.51 and 279.55, which provide as follows:

> § 279.51(a)
> *Identification numbers*. Used oil processors and re-refiners who have not previously complied with the notification requirements of RCRA Section 3010 must comply with these requirements and obtain an EPA identification number.
> (b) *Mechanics of notification.* A used oil processor or re-refiner who has not received an EPA identification number may obtain one by notifying the Regional Administrator of their used oil activity by submitting either:
> (1) A completed EPA Form 8700-12 ...; or
> (2) a letter requesting an EPA identification number.
>
> * * * *
>
> § 279.55
> Owners and operators of used oil processing ... facilities must develop and follow a written waste analysis plan .... [and] must keep the plan at the facility.

The standards for used oil processors, set forth in MAC § 299.9813 and 40 C.F.R. Part 279 Subpart F, §§ 279.50-279.59, include the requirements for notification and a written waste analysis plan. The standards for used oil generators, set forth in MAC § 299.9810 and 40 C.F.R. Part 279 Subpart C, do not include those requirements. Therefore, EPA must establish that Respondent is a "used oil processor," and not merely a "generator" of used oil, to establish liability for Counts IV and V.

The applicable regulations define the term "processing" as follows:

> 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 petroleum products, blending used oils to meet the fuel specification, filtration, simple distillation, chemical or physical separation and re-refining.

MAC § 299.9109(t); *see also*, 40 C.F.R. §§ 279.1, 279.50(a) (virtually the same text except the words "but is not limited to" are substituted for "all of the following"); MAC § 299.9109(z)

(defines used oil processor/re-refiner as a facility that processes used oil).

The pleadings establish that the 1,000 gallon capacity drum catch basin was used to collect cutting oil from 55-gallon drums containing scrap metal received by Respondent, and that Respondent punched drainage holes in the drums and allowed the oil to empty into the catch basin. Amended Complaint and Answer ¶¶ 47, 49, 50, 51. The disputed issue is whether Respondent is a "used oil processor."

**A. Arguments of the Parties**

Complainant asserts that the cutting oil drained from the 55-gallon drums is "used oil" based on the description, in Respondent's SPCC plan, of the oil collected in the drum catch basin as "used oil." CX 5 p. 4. Complainant submits the Declaration of Sue Rodenbeck Brauer, RCRA Regional Used Oil Expert, who states that EPA found in a study, published in the Federal Register, Vol. 56 No. 184 (September 23, 1991) that cutting oil, which is metalworking oil, "sometimes contained arsenic, barium, cadmium, chromium, lead, and benzo(b)fluoranthene." CX 20 ¶ 8.

Complainant asserts that Respondent is a "processor" of used oil on the basis that Respondent punched drainage holes in the 55-gallon drums and allowed the liquid contents, including cutting oil, to flow into the drum catch basin. Complainant says that "these are clearly a series of acts performed to effect the purpose of changing the physical state of the used oil" and "may also result in changing the chemical state of the used oil" and therefore constitute "chemical or physical operations involving used oil," within the regulatory definition of "processing." Complainant's Motion at 41.

Complainant argues that Respondent is not merely a "generator" of used oil, which is not subject to requirements of notification or a waste analysis plan. Complainant asserts that Respondent did not produce the used oil, and that Consumers' supplier - the entity from which Respondent received the drums of scrap metal -- was the person who first caused the used oil to be regulated. In support, Complainant presents an EPA memorandum, dated November 17, 1993, from Bruce R. Weddle, Acting Director of the EPA's Office of Solid Waste, which states that oil coated steel turnings would be regulated as used oil "if they were visibly dripping with used oil but not if all the used oil had been drained off," and that the machine shop which removed the oil from the steel turnings would be a used oil "generator." CX

15.

Respondent argues first that the oil contained on the metal chips in the 55-gallon drums was not "used oil." Respondent asserts that it received the metal chips in the 55-gallon drums, after the manufacturer of the metal chips had drained the chips of used oil, by spin drying. Respondent's Memorandum at 14. The amount of oil Respondent drained from any drum is ranges from one quart to one gallon. *Id.* at 15. Thus, Respondent contends that its activities are exempt in accordance with MAC § 299.9809(c) and 40 C.F.R. § 279.10(c)(1), which exempt "materials containing or otherwise contaminated with used oil from which the used oil has been properly drained or removed to the extent possible such that no visible signs of free-flowing oil remain in or on the material." *Id.* at 15.

Second, Respondent argues that it did not conduct any used oil processing activities. Respondent asserts that it merely drained any additional minimal amounts of residual oil from the metal chips, and that this act does not constitute "physical separation" of the oil, but merely separation of the oil from the metal chips. Further, Respondent argues, it does not filter the oil or change it to make it more amenable for future production. Respondent asserts that the oil processing was done by Safety-Kleen.

**C. Discussion**

The parties do not dispute that the scrap metal in the 55-gallon drums "had residual coatings of certain types of cutting oils," that Respondent punched drainage holes in the drums and thereby separated the oil from the metal chips or turnings contained in the drums, which took from one hour to overnight. Complainant's Statement of Material Facts ¶¶ 84, 109, 111, 115; Amended Complaint and Answer ¶¶ 38, 49, 50, 51. According to Complainant's Regional Used Oil Expert, Ms. Brauer, the cutting oil drained from the drums at Consumers was "used oil," based on the fact that cutting oil is used to cool or lubricate a metalworking tool and the metal being worked. CX 20 ¶ 8. It is undisputed that Safety-Kleen removed the liquid from the drum catch basin, transported it to Safety-Kleen's facility and re-refined it to produce commercial and industrial products. Complainant's Statement of Material Facts ¶¶ 84, 109, 111, 115; Amended Complaint and Answer ¶¶ 52, 53.

Complainant has shown *prima facie* that the cutting oil drained from the 55-gallon drums fits the regulatory definition of "used oil." *See*, 57 Fed. Reg. 41566 (Sept. 10, 1992)(the

definition of used oil "covers the majority of oils used as lubricants, coolants ... or for similar uses and are likely to get contaminated through use."). Respondent has not asserted any specific facts or provided any evidence that the oil drained from the drums does not meet the definition of used oil. Respondent's assertions that the drums had been initially drained of oil prior to receipt at its facility, and that Consumers drained only an additional quart to a gallon of oil from each drum, may exempt the contents of the drums as received by Consumers from the definition of "used oil," but does not exempt the oil drained by Consumers from the definition of "used oil." The exemption in the State regulation, MAC § 299.9809(2)(c), provides, in pertinent part:

> The following materials are not subject to regulation as used oil...:
> (c) A material that contains, or is otherwise contaminated with, used oil if the used oil has been properly drained or removed to the extent possible so that visible signs of free-flowing oil do not remain in or on the material and the material is not burned for energy recovery.

Similarly, 40 C.F.R. § 279.10(c) provides in part as follows:

> (1) ... materials containing or otherwise contaminated with used oil from which the used oil has been properly drained or removed to the extent possible such that no visible signs of free-flowing oil remain in or on the material:
> (i) Are not used oil and thus not subject to this part.
> * * * *
> (3) Used oil drained or removed from materials containing or otherwise contaminated with used oil is subject to regulation as used oil under this part.

Thus, it is the material remaining after the oil has been drained which is exempt, not the drained oil itself.

The next question is whether Respondent was a "processor", or merely a "generator" of used oil.[7] The regulatory definition of "processing," and in particular, the listed example of "physical separation," could encompass the act of draining oil

[7] Complainant suggests in a footnote that Respondent "may be liable for non-compliance with the generator requirements ... if this Court determines that it was exclusively a generator of used oil." Complainant's Memorandum n. 19. Respondent is not charged with violating generator requirements in this proceeding, so any such non-compliance is not relevant to this Order.

from other materials. However, the term “draining” notably does not appear in the definition of “processing, but does appear in the regulatory provisions defining the scope of used oil generators *vis a vis* processors (MAC §§ 299.9109(x) and 299.9813(c); 40 C.F.R. § 279.20), and defining the scope of used oil (MAC § 299.9809(2)(c) and 40 C.F.R. § 279.10(c)). As to the scope of used oil generators, the Federal regulations provides in pertinent part as follows:

> **§ 279.20 Applicability.**
> (a) *General.* **** A used oil generator is any person, by site, whose act or process produces used oil or whose act first causes used oil to become subject to regulation.
> * * * *
> (b) *Other applicable provisions.*
> (2) (i) * * * *
> (ii) Generators who perform the following activities are not processors provided that the used oil is generated on-site and is not being sent off-site to a burner of on- or off-specification used oil fuel.
> * * * *
> (D) Draining or otherwise removing used oil from materials containing or otherwise contaminated with used oil in order to remove excessive oil to the extent possible pursuant to § 279.10(c); * * * *

Similarly, the State regulations provide, at Sections 299.9109(x) and 299.9813(c), in pertinent part:

> R. 299.9109
> * * * *
> (x) ‘Used oil generator’ means any person, by site, whose act or process produces used oil or whose act first causes the used oil to become subject to regulation.
> * * * *
> R. 299.9813
> * * * *
> (c) A used oil generator who performs any of the following activities is not a processor if the used oil is generated on-site and is not being sent off-site to a burner of specification or off-specification used oil fuel:
> * * * *
> (iv) Draining or otherwise removing used oil from materials that contain, or are otherwise contaminated with, used oil to remove excessive oil to the extent possible pursuant to the provisions of R. 299.9809(2)(c).

In turn, MAC § 299.9809(2) provides, in part:

> (2) The following materials are not subject to regulation as used oil under the provisions of R. 299.9810 to R. 299.9816, but may be subject to regulation as hazardous waste ...:
> * * * *
> (c) A material that contains, or is otherwise contaminated with, used oil if the used oil has been properly drained or removed to the extent possible so that visible signs of free-flowing oil do not remain in or on the material and the material is not burned for energy recovery.

Similarly, 40 C.F.R. § 279.10(c) provides as follows, in part:

> (c) *Materials containing or otherwise contaminated with used oil.* (1) Except as provided in paragraph (c)(2) of this section, materials containing or otherwise contaminated with used oil from which the used oil has been properly drained or removed to the extent possible such that no visible signs of free-flowing oil remain in or on the material:
> (i) Are not used oil and thus not subject to this part
> * * * *
> (3) Used oil drained or removed from materials containing or otherwise contaminated with used oil is subject to regulation as used oil under this part.

It may be presumed, from these explicit references to "drainage" in defining generators of used oil, that the neighboring definition of "processing," which has no reference to drainage, was intended to exclude drainage. Russello v. United States, 464 U.S. 16, 23 (1983)(Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") This presumption may be applied to the quoted Federal regulations as well to the quoted State regulations, which are based upon and closely resemble the Federal regulations.

Beyond a presumption, the regulations expressly distinguish a generator from a processor on the basis of draining used oil if: (1) it is generated on-site, (2) it is not sent off-site for burning, (3) it is being separated from other materials for the purpose of removing excessive oil (*i.e.*, visible signs of free-flowing oil), and (4) the other materials are not burned for energy recovery. The undisputed facts of this case establish that at least criteria (2), (3) and (4) are met. The first criterion requires further analysis.

In the Preamble to the March 4, 1994 amendments to 40 C.F.R. Part 279, EPA has expressed clearly and in detail its intent to distinguish generators who merely drain used oil, from processors of used oil:

> Since the promulgation of the September 10, 1992 Used Oil Management Standards [40 C.F.R. Part 279], a number of parties have raised concerns regarding the definition of used oil processor and the types of activities that are covered by that definition. The commenters are concerned that a broad construction of the term processor inappropriately includes a number of very basic on-site generator activities that the Agency did not intend to regulate under the used oil processor standards * * * . EPA agrees that activities such as these, when performed by the generator, were not intended to be covered under the used oil processor standards because used oil processing is not their primary purpose, as explained below in greater detail. In fact, too broad an interpretation of the processor definition may discourage environmentally beneficial recycling and waste minimization activities by imposing an unwarranted regulatory burden on owners and operators that EPA did not intend to regulate as used oil processors.
>
> Therefore, today's rule revises the used oil management regulations to clarify the Agency's intent regarding the definition of a used oil processor by specifying those on-site maintenance, filtering, and separation activities that are not, and were not intended to be subject to the used oil processing standards. Under today's rule, generators who only handle used oil in a manner specified under § 279.20(b)(2)(ii) are not processors provided that the used oil is generated on-site and is not being sent directly off-site to a burner of on- or off-specification used oil fuel.* * * *
>
> Activities that EPA did not intend to include under the definition of used oil processor are described below. **EPA does not believe that the activities identified in § 279.20(b)(2)(ii) should be subject to the used oil processor standards because used oil processing is not the primary purpose of these activities** i.e., the primary purpose of these activities is not to produce [a product or item] from used oil or to make it more amenable for the production of used oil derived products, and the Agency does not expect that these limited activities will pose the same kinds of environmental problems that may occur at processor facilities. Instead, in these cases, the act of mixing,

> filtering, separating, **draining** etc., **used oil by the generator constitutes a basic step that is incidental or ancillary to a primary activity which is distinct from used oil processing**.
> * * * *
> Today's rule clarifies that the Agency does not consider the removal of used oil from materials containing or contaminated with used oil in order to remove excess oil in accordance with § 279.10(c) to be used oil processing. The production of used oil derived products is clearly not the primary reason for removing used oil from materials containing or contaminated with used oil. Instead, **the activity is conducted primarily to clean the materials** (**e.g.**, machine tools, **scrap metal**, etc.) **prior to** reuse, **recycling**, or disposal **and is therefore not subject to the used oil processing standards** as clarified by today's rule. However, in removing the used oil from the materials, the owner or operator becomes a used oil generator subject to the Part C used oil generator standards.

59 Fed. Reg. 10550, 10555-10557 (March 4, 1994)(footnote omitted, emphasis added). Thus, EPA distinguishes generators from processors on the basis of the primary purpose of their activities. The undisputed facts show that Respondent removed oil from the scrap metal for the primary purpose of cleaning the metal prior to recycling it. Furthermore, the recycling of scrap metal is clearly an "environmentally beneficial recycling and waste minimization activit[y]," which EPA did not intend to discourage by subjecting it to the regulation of a used oil processor.

The remaining question is whether the used oil was generated on-site, that is, whether Respondent produced used oil or whether its act of draining of used oil from the scrap metal contained in the drums is an act which "first causes the used oil to become subject to regulation." MAC § 299.9109(x); 40 C.F.R. § 279.1. From the uncontested fact that there was merely "residual" cutting oil on the metal chips, and the uncontested length of time elapsed in draining the oil from the chips, it may be inferred that there were no visible signs of free-flowing oil remaining in or on the metal chips, and thus the metal chips as received by Respondent were not "used oil" under MAC § 299.9809(2)(c) and 40 C.F.R. § 279.10(c). In that case, the used oil drained from the drums was first generated on-site at Consumer's facility.

Complainant's Regional Used Oil Expert states, however, based on her experience and review of documents in this matter, that the supplier did not remove used oil to an extent that no visible signs of free-flowing oil remained in or on the metal chips, because free-flowing liquid in the drums still drained out by the force of gravity at Respondent's facility. CX 20 ¶ 4.D. She states that Consumers was not the used oil generator because its supplier was the generator, indicating that the supplier was the person whose act produced used oil or first caused it to become subject to regulation, thus Consumers cannot also have done so. She acknowledges the possibility of a single used oil waste stream being handled by multiple processors, but appears not to recognize the possibility of multiple generators handling the same used oil.[8] CX 20 ¶ 7.

Complainant has pointed to no authority, nor do the applicable regulations suggest, that there can be only one generator of a particular used oil. An examination of EPA's interpretation of "generator" indicates that there can be more than one generator of a particular regulated substance. The definition of "used oil generator" is based upon the general definition of "generator" in 40 C.F.R. § 260.10 ("any person, by site, whose act or process produces hazardous waste ... or whose act first causes a hazardous waste to become subject to regulation"). In promulgating this definition, EPA provided a very broad interpretation of that term in the following Preamble discussion:

> This definition [of generator] suggests that the operator of a manufacturing process unit or a product or raw material storage tank, transport vehicle or vessel is a generator of a hazardous waste because it is his "act" of storage or transportation or his "process" of manufacturing that produces the hazardous waste. In the case of storage or transportation, the act of holding the product or raw material enables settling of heavy fractions of material to create hazardous waste sludges or sediments and enables hazardous waste residues to adhere to the tank. In the case of manufacturing processes, the process of manufacturing produces the hazardous wastes.
>
> The owner of the product or raw material being stored or transported and the owner of the materials being

---

[8] Complainant, however, appears to acknowledge that Respondent may be a used oil generator, in its suggestion that Respondent may be both a processor and a generator. Complainant's Memorandum n. 19.

> manufactured also fit the definition of “generator” of the hazardous waste because their “acts” cause the product or material to be stored, transported or manufactured which leads to the generation of the hazardous wastes. Additionally, it is constituents in their product or material that “produce” a hazardous waste.
>
> The definition of generator ... also fits the person removing the hazardous waste from a manufacturing process unit or a product or raw material storage tank, transport vehicle or vessel. Although often it is not his “act or process” that produces the hazardous waste, it is his act that causes the hazardous waste to become subject to regulation ....
>
> The definition of generator, depending on the particular factual situation, can include all of the parties discussed above. Both the operator of a manufacturing process unit, or a product or raw material storage tank, transport vehicle or vessel, and the owner of the product or raw material act jointly to produce the hazardous waste generated therein, and the person who removes the hazardous waste from a tank, vehicle, vessel, or manufacturing process unit subjects it to regulation. All three parties are involved and EPA believes that all three (and any others who fit the definition of “generator”) have the responsibilities of a generator.
>
> Because all three parties contribute to the generation of a hazardous waste and because none of the parties stands out in all cases as the predominant contributor, the Agency has concluded that the three parties should be jointly and severally liable as generators.

45 Fed. Reg. 72024, 72026 (October 30, 1980). This interpretation of the definition of “generator” is instructive in interpreting the similarly-worded definitions of “used oil generator” in the Federal and Michigan used oil regulations. There is nothing inconsistent with the foregoing interpretation in the Preamble discussion of the definition of “used oil generator.” *See*, 57 Fed. Reg. 41566 (Sept. 10, 1992). Moreover, the Preamble to the 1994 amendments supports that interpretation, by classifying the cleaning of scrap metal prior to recycling as the generation of used oil rather than as processing. 59 Fed. Reg. at 10557. It may safely be assumed that in general, scrap metal recyclers clean the metal – thus generating used oil -- and receive their used-oil contaminated scrap metal from other persons – thus from other generators.

Thus, if the scrap metal were subject to regulation as "used oil" when received by Respondent, then both the suppliers of scrap metal to Consumers' facility, and Consumers, contributed to the generation of the used oil, and are both generators of used oil. Therefore the issue as to whether the supplier of the scrap metal was a used oil generator is not material to the issue of Respondent's liability for Counts IV and V.

It is concluded that there are no genuine issues of material fact as to Respondent's liability for Counts IV and V, and that Respondent is entitled to judgment as a matter of law that it is not a "used oil processor" under applicable regulations and consequently that Respondent is not liable for the violations alleged in Counts IV and V. Accordingly, those counts will be dismissed with prejudice.

## ORDER

1. Complainant's Motion for Accelerated Decision and Respondent's Motion for Partial Accelerated Decision are **DENIED**, **as to Count I**.

2. The allegations of Count II are merged with Count I.

3. Complainant's Motion for Accelerated Decision is **GRANTED as to Respondent's liability for Count III.** The issue of the penalty to assess for Count III is reserved for further proceedings.

4. As to the issue of Respondent's liability for Counts IV and V, Respondent's Motion for Partial Accelerated Decision is **GRANTED**, and Complainant's Motion for Accelerated Decision is **DENIED.** Counts IV and V are **DISMISSED with prejudice.**[9]

Dated this _____ day of April, 2002.

_____
Spencer T. Nissen
Administrative Law Judge

[9]Although Consumers has had ample time in which to retain substitute counsel, I have not received a notice of appearance and am unaware whether Consumers has done so.. In any event, I intend to be in telephonic contact with the parties in the near future for the purpose of rescheduling the long-delayed hearing in this matter.

In the Matter of Consumers Recycling, Inc., Respondent
Docket No. CAA-05-2001-002; CWA-05-2001-0006, RCRA-05-2001-0008 & MM-052001-001

CERTIFICATE OF SERVICE

I hereby certify that the following **Order on Cross-Motions for Accelerated Decision**, dated April 11, 2002, was sent this day in the following manner to the addresses listed below:

Original + 1 by Pouch Mail to:

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_____
Nelida Torres
Legal Staff Assistant

Dated: April 12, 2002