UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
LYONS FUEL, INC.,	**)**	**DKT. No. CAA-I-97-1001**
	)	
Respondent	**)**	

ORDER GRANTING COMPLAINANT'S MOTION

FOR ACCELERATED DECISION AS TO LIABILITY

This proceeding commenced upon the issuance of a Complaint by Complainant, the Regional Administrator of the United States Environmental Protection Agency, Region I, against Respondent, Lyons Fuel, Inc., pursuant to Sections 205 and 211 of the Clean Air Act ("CAA"), 42 U.S.C. §7524 and §7545. The Complaint alleges violations of the Section 211 of the CAA and of EPA regulations promulgated thereunder at 40 C.F.R. Part 80, pertaining to the regulation of fuels.

I. BACKGROUND

Respondent owns and operates a facility at 6 Dudley Street, Arlington, Massachusetts from which it engages in the sale and distribution of home heating oil, commonly known as Number 2 Fuel Oil. On November 30, 1995, Complainant performed a CAA compliance inspection of Respondent's motor vehicles found at its facility.

Based upon the inspection, on January 6, 1997, the Complaint was filed charging Respondent with three violations of the misfueling provisions of Section 211(g)(2) of the CAA. Specifically, Complainant alleged that Respondent knowingly introduced diesel fuel containing in excess of 0.05 percent sulfur concentration into the fuel tanks of three of its motor vehicles. The Complaint proposes a penalty of $1,500 for each violation, for a total penalty of $4,500.

On February 11, 1997, Respondent, appearing *pro se*, submitted a letter responding to the Complaint disputing the allegations of violations and the proposed penalty and requesting a hearing.

On March 10, 1997, a Prehearing Order was issued in this case requiring, *inter alia*, that both parties submit copies of all documents and the identities of all witnesses they intended to present at the hearing by set dates. In addition, in an effort to clarify Respondent's defenses and to encourage the filing of all available evidence supporting those defenses so as to preserve Respondent's right to introduce such evidence at a hearing, the Prehearing Order specifically directed Respondent to submit as part of its Prehearing Exchange a narrative statement explaining in detail its basis for disputing the allegations in the Complaint and identifying all documents and witnesses supporting its defenses.[(1)] Finally, the Prehearing Order advised the Respondent that if it did not wish to present direct or rebuttal evidence at the hearing, it may choose to defend itself against Complainant's charges through cross-examination of the Complainant's witnesses and a statement to this effect may be submitted in lieu of a listing of documents and witnesses.

Complainant timely filed its Initial Prehearing Exchange. On July 10, 1997, ten days *after* the deadline for filing set in the Prehearing Order, Respondent submitted its Initial Prehearing Exchange. That exchange consisted of a one page letter wherein the Respondent stated that it was "elect[ing] only to conduct cross-examination of Complainant's witnesses and to forego the presentation of direct and/or rebuttal evidence."[(2)] Respondent did not submit a narrative more fully detailing its defenses.

On August 5, 1997, Complainant submitted a Motion for Partial Accelerated Decision as to Liability. Complainant seeks a decision finding Respondent liable for the three violations alleged in the Complaint on grounds that no genuine issue of material fact exists and Complainant is entitled to judgment as a matter of law. To date, no response to the Motion has been received from Respondent.[(3)] The time permitted under the applicable procedural rules, 40 C.F.R. Part 22, for responding to the Motion has elapsed, so the Motion is ripe for decision. 40 C.F.R. §§22.16(b), 22.07(c).

II. STANDARD OF REVIEW

Rule 22.20 of the Consolidated Rules of Practice provides that an accelerated decision may be rendered at any time upon motion "as to all or any part of a proceeding . . . 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." 40 C.F.R. §22.20(a).

An accelerated decision under Rule 22.20 is analogous to summary judgment under Rule 56 of the Federal Rules of Civil Procedure, so standards and Federal court practice on summary judgment are instructive here. *Puerto Rico Aqueduct and Sewer Authority v. EPA,* 35 F.3d 600, 606 (1st Cir. 1994), *cert. denied,* 115 S. Ct. 1096 (1995); *In re CWM Chemical Services, Inc., et al.,* TSCA Appeal No. 93-1, 1995 TSCA LEXIS 10 (EAB, May 15, 1995), *In re ICC Industries, Inc.,* TSCA Appeal No. 9104, 1991 TSCA LEXIS 61 (CJO, December 2, 1991). Federal Courts have established in regard to Rule 56 that the party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). If this is done, "it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute. . . . If the respondent fails to carry that burden, summary judgment should be granted." *City of Mt. Pleasant v. Associated Elec. Coop.,* 838 F.2d 268, 273-74 (8th Cir. 1988), *citing*, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). Federal courts have even required hard evidence to show a genuine dispute: "[T]he nonmovant may not rest upon mere allegations in, say, an unverified Complaint or lawyer's brief, but must produce evidence which would be admissible at trial to make out the requisite issue of material fact." *Kelly v. United States,* 924 F.2d 355, 357 (1st Cir. 1991); *see also, ICC Industries, supra,* slip op. at 13 ("An accelerated decision is comparable to a summary judgment . . . under the federal rules, a party may not respond to a motion for summary judgment by merely relying on the allegations or denials contained in the answer to the complaint . . . but must set forth a specific showing of a factual issue.") The Court of Appeals for the First Circuit warned, "the decision to sit idly by and allow the summary judgment proponent to configure the record is likely to prove fraught with consequence." *Id.* at 358. As the Court of Appeals for the Fourth Circuit has stated, "[a] trial, after all, is not an entitlement. . . [i]t exists to resolve what reasonable minds would recognize as real factual disputes." *Ross v. Communications Satellite Corp.,* 759 F.2d 355, 364 (4th Cir. 1985).

In its Motion for Accelerated Decision, Complainant refers to its Initial Prehearing Exchange with regard to establishing the violations alleged in the Complaint. Documents submitted by Complainant in its Prehearing Exchange include fuels field inspection reports, chain of custody documents for fuel

samples, a narrative report of inspection for Respondent's facility dated March 6, 1996, and fuel analysis reports.

However, as indicated above, despite being given at least two opportunities to proffer evidence in support of its purported defenses, Respondent has chosen not to do so. Although Respondent has elected to forgo filing an opposition to the Motion and to forgo the presentation of any witnesses or documentary evidence at a hearing, in light of Respondent's *pro se* status, the Complaint, Complainant's Prehearing Exchange, and the statements contained in Respondent's letter Answer will be carefully analyzed to determine whether a genuine issue of material fact exists and whether Complainant is entitled to judgment as a matter of law.

III. DISCUSSION

The Complaint charges Respondent with three violations of the misfueling provisions of Section 211(g)(2) of the CAA (42 U.S.C. §7545(g)(2)) which states as follows:

Beginning October 1, 1993, no person shall introduce or cause or allow the introduction into any motor vehicle of diesel fuel which such person knows or should know contains a concentration of sulfur in excess of 0.05 percent (by weight) . . . .

The Complaint alleges that Respondent introduced, or caused or allowed to be introduced, diesel fuel with more than 0.05 percent sulfur into the gasoline tanks of three of its trucks, namely a 1991 Ford oil truck, a 1979 Ford oil truck, and a 1985 GMC oil truck. The Complaint alleges further that Respondent knew or should have known that the diesel fuel introduced into the tanks of its trucks contained sulfur concentrations in excess of 0.05 percent.

In its unverified Answer, Respondent stated that it disputed those allegations. Respondent asserted that it "would like the opportunity to show receipts of diesel fuel bought for all trucks," and that "[f]uel was bought from outside sources." Respondent further asserted that several weeks elapsed between the date EPA took fuel samples and sent them to the lab for testing and months elapsed before they were sent back, and questions how its drivers could know of any high sulfur level when filling at a gas station. In addition, Respondent asserted that the trucks that were allegedly misfueled "were not even being used."

Complainant's Prehearing exhibits 1 and 2, a Fuels Field Inspection Report dated November 30, 1995 and the inspector's narrative report dated March 6, 1996, respectively, show that on November 30, 1995, the Environmental Protection Agency ("EPA") and the Internal Revenue Service jointly performed a compliance inspection at Respondent's facility. The EPA inspector, M. Molly Magoon, stated in her narrative that the inspection was prompted by an anonymous tip claiming that Respondent was fueling its vehicles with high sulfur home heating oil which Respondent delivered as a business. Permission to inspect was requested from and received on site from Sean Lyons, an owner of Respondent company.

Inspector Magoon further indicated in her reports that she was accompanied on the inspection by chemists from EPA's Lexington Lab and that fuel samples were taken from the fuel tanks of four of Respondent's trucks found at the site as part of the inspection. In three out of the four vehicles whose fuel tanks were sampled, "red-dyed diesel" was found. Field tests on the fuel samples were performed during the inspection and those tests revealed that the red-dyed fuel samples exceeded the 0.05 percent weight limit for sulfur. CX 2. Those field test results were subsequently verified by lab tests performed in February of 1996 at the National Fuels and Vehicle Emissions Lab in Ann Arbor, Michigan on fuel samples taken on the day of the inspection. CX 2.[(4)]

Based upon the documents in Complainant's Prehearing Exchange, and on the absence of any conflicting evidence, it is concluded that diesel fuel containing sulfur in excess of 0.05 percent was, in fact, introduced into the fuel tanks of three of Respondent's motor vehicles. The statement by Respondent in its letter Answer regarding the delay in performing the laboratory tests to confirm the results of the field tests does not, by itself, raise any genuine issue as to the invalidity of the test results obtained in the field or the laboratory.[(5)]

The next issue is, therefore, whether *Respondent*, as compared to someone else, introduced, or caused or allowed the introduction, of the high sulfur fuel into the tanks of its motor vehicles. In her narrative report, Inspector Magoon stated that in response to her notification of violations, on the day of the inspection, Sean Lyons, owner of Respondent, claimed that his "trucks fueled at [Mystic Street] Gulf and Dudley Fuel" gasoline stations across the street from Respondent's facility and that "[t]he legitiatmate [sic] fuel source . . . is Mystic St[reet] Gulf." CX 2. The Fuels Field Inspection report indicates that Respondent also told EPA on the day of the inspection that one truck was fueled the day before at the Gulf station and another truck had fueled the week before

at the Gulf station. The Respondent has not denied having complete custody and control over the fueling of the vehicles nor has it alleged anyone else controlled the fueling of the vehicles. Therefore, it is found that Respondent introduced or caused or allowed the introduction of diesel fuel with sulfur in excess of 0.05 percent into its three vehicles.

Therefore, the final issue remaining is whether Respondent

"knew or should have known" it was introducing or causing or allowing the introduction of diesel fuel with a sulfur concentration in excess of 0.05 percent. In its letter Answer, Respondent raises the issue of its knowledge by asserting that it bought the fuel in the trucks from "outside sources" and querys how its drivers could know of the level of sulfur when fueling at a gas station. However, as discussed below, I do not find these allegations to create a contested issue of fact as to whether the Respondent "knew or should have known" it was introducing high sulfur fuel into its vehicles.

As indicated above, "red-dyed" diesel fuel was found in the tanks of Respondent's three motor vehicles with fuel which had a sulfur concentration in excess of 0.05 percent sulfur by weight. The color of the fuel is very telling with regard to the "knew or should have known" issue.

Diesel fuel is dyed red by manufacturers and importers of fuel for the purpose of easily distinguishing between fuel with high sulfur content which is *not* intended for use as fuel in motor vehicles from low-sulfur fuel which *is* intended for motor vehicle use. *See,* Section 211(i) of the CAA, 42 U.S.C. §7545(i) and 59 Fed. Reg. 35854, 35855 (July 14, 1994). Federal Regulations prohibit the manufacture, dispensation, supply, sale or transport of any red dyed diesel fuel for use in motor vehicles. 40 C.F.R. §80.29(a)(1)(iii)(B). Conversely, Federal fuel regulations provide that "[a]ny diesel fuel which does not show visible evidence of being dyed with . . . dye solvent red 164 (which has a characteristic red color in diesel fuel) shall be considered to be available for use in diesel motor vehicles and motor vehicle engines." 40 C.F.R. §80.29(b). Thus, Lyons could not lawfully have purchased red-dyed diesel fuel specifically to use as gasoline for its motor vehicles.

Red-dyed fuel, however, can be lawfully purchased to be used for other purposes, identified as "tax-exempt" purposes under section 4082 of the Internal Revenue Code. For example, red-dyed diesel fuel can be sold for use on a farm or in a boat used for commercial fishing or transportation. More importantly, red-dyed diesel fuel can be sold tax-free to registered heating

oil retailers for resale for use *as heating oil*. 58 Fed. Reg. 63069 (November 30, 1993). Internal Revenue Service (IRS) regulations require, however, that sellers of dyed diesel fuel post conspicuously on any retail pump or delivery facility which dispenses such fuel a notice stating "Dyed diesel fuel, nontaxable use only, penalty for taxable use." 26 C.F.R. §48.4082-2(a).

Thus, even if Respondent lawfully purchased red-dyed diesel fuel, it was put on notice that the fuel could only be used for certain limited purposes. Further, even if the posted notice did not specifically indicate that fueling vehicles with the dyed fuel was prohibited, Respondent, along with everyone else, is charged with constructive knowledge of the Federal regulations. "Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents." *Federal Crop Insurance Corp v. Merrill*, 332 U.S. 380, 384-385 (1947); *see also, United States v. McGaughey,* 977 F.2d 1067, 1074 (7th Cir. 1992, *cert. denied,* 507 U.S. 1019 (1993), *In re Gary Development Co.*, RCRA Appeal No. 96-2, 1996 RCRA LEXIS 5 (EAB, August 16, 1996), slip op. at 19. Those Regulations, set forth above, clearly indicate that red-dyed fuel cannot be used in motor vehicles as gasoline. Moreover, Respondent, a wholesale buyer and retail seller of home heating oil, which may be red-dyed diesel fuel, was in a particularly good position to be familiar with and understand the limits on the used of red-dyed diesel fuel.

Respondent's assertions in its Answer that it bought fuel from outside sources and that it would like the opportunity to show receipts of diesel fuel purchased for the motor vehicles does not create a genuine issue of material fact as to whether Respondent knew or should have know it was introducing high-sulfur fuel into its trucks. The Federal courts have held that a genuine issue exists if there is sufficient evidence supporting the claimed factual dispute to require a choice between the parties' differing versions of the truth at trial. *Griggs-Ryan v. Smith,* 904 F.2d 112, 115 (1st Cir. 1990), citing *Garside v. Osco Drug,* 895 F.2d 46, 48 (1st Cir. 1990). "Neither wishful thinking nor 'mere promises to produce admissible evidence at trial' . . . nor conclusory responses unsupported by evidence . . . will defeat a properly focused . . . motion [for summary judgment]." 904 F.2d at 115 (citations omitted). Similarly, in the administrative context, "Due process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way." *Puerto Rico Aqueduct and Sewer Authority,* 35 F.3d at 606. Here, Respondent had the opportunity in the prehearing exchange to present diesel fuel receipts and any

other evidence to support the assertions in its Answer. By choosing not to file prehearing exchange documents, and to forgo presentation of any direct and rebuttal evidence, Respondent could not establish at a hearing that it bought fuel from outside sources.

Moreover, assuming the truth of Respondent's assertion that it recently fueled its vehicles at outside sources, or assuming that Respondent presented the receipts of purchases from outside sources, would not raise any genuine issue of material fact as to whether Respondent lacked the requisite knowledge. Complainant's exhibits 4, 6 and 7 show that, based upon Respondent's representations to the Inspector on the day of the inspection that its trucks had recently been fueled at Mystic Street Gulf and Dudley Fuel, later the same day, EPA inspected and took diesel fuel samples from those gasoline stations. Fuel analysis reports and fuels field inspection reports submitted as part of Complainant's Prehearing Exchange show that diesel fuel samples taken that day from Mystic Street Gulf and Dudley Fuel Company *did not* exceed 0.05 percent sulfur. CX 4, 6, 7.[(6)] Moreover, invoices and bills of lading for diesel fuel delivered by Gulf Oil to the Mystic Street station shortly before the inspection include a statement that the diesel fuel delivered did not contain visible evidence of dye. CX 8. There is no dispute that the diesel fuel sampled at Dudley Fuel Company and Mystic Street Gulf met the 0.05 sulfur limit. The issue of Respondent's knowledge or lack of knowledge as to the sulfur content of the fuel in its trucks cannot be based upon its knowledge or lack thereof as to the sulfur content of fuel from Dudley Fuel Company or Mystic Street Gulf. Thus, receipts of fuel purchased from these stations would not create a contested issue of fact.[(7)]

Therefore, I conclude that there is no genuine issue of fact with regard to whether Respondent knew or should have known that the fuel it introduced in three of its trucks contained sulfur in excess of 0.05 percent.

Complainant has supported the allegations in the Complaint with documents in its Prehearing Exchange. No genuine issues of material fact have been raised by Respondent. Therefore, Complainant is entitled to judgment as a matter of law on the issue of Respondent's liability. Accordingly, Respondent is hereby found liable for three violations of Section 211(g)(2) of the CAA.

The issue of the amount of penalty to assess for the violations found herein remains controverted. This proceeding will continue for purposes of assessment of an appropriate penalty for the violations.

ORDER

1. Complainant's Motion for Accelerated Decision is GRANTED as to the issue of Respondent's liability for the three violations alleged in the Complaint.

2. The parties shall confer to attempt to reach a settlement as to the amount of penalty to assess for the violations found herein. Complainant shall report on the status of the settlement negotiations 30 days from the date of service of this Order.

_____

Susan L. Biro

Chief Administrative Law Judge

Dated: _____

Washington D.C.

1. [1] The request for a narrative was also prompted by the fact that the Respondent's letter in response to the Complaint, while raising points of contention, did not meet all the requirements of an "Answer" as set forth in Rule 22.15(b) of the Consolidated Rules of Practice. Specifically, Respondent's letter did not fulfill the requirement of Rule 22.15 which requires that "[t]he answer clearly and directly admit, deny or explain each of the factual allegations contained in the complaint . . ." Complainant, however, did not move to strike the letter Answer and so it was accepted for filing.

2. [2] Respondent's late filed Prehearing Exchange was not preceded nor accompanied by a Motion for Extension of Time. However, the undersigned accepted the late document for filing without an extension having been granted because of the Respondent's *pro se* status, Complainant's lack of objection to the late filing and the lack of prejudice resulting from the short delay in filing.

3. [3] In its Motion, Complainant indicates that it notified Respondent that it intended to file the Motion and inquired whether Respondent objected to the relief sought therein. Respondent indicated that it did object, however, to date, Respondent has not filed any document setting forth the factual

and/or legal bases for its objection.

4. [4] The Fuels Field Inspection Report for the inspection of Respondent's facility on November 30, 1995 shows that a diesel fuel sample was taken from each of four motor vehicles: Massachusetts License numbers B68219, 250-560, 250-562 and an unregistered vehicle. The field test results showed the samples from each vehicle contained .0932, .2603, .1029 and .0317, respectively. Thus, only the fuel found in the unregistered vehicle fell below the sulfur threshold of .05 and the narrative report stated that the fuel in that vehicle was found to be "clear." CX 1 and 2. A Fuel Analysis Report, from the Michigan Laboratory dated February 21, 1996, states that the samples from the registered vehicles contained .0931, .2603, and .1028 weight percent of sulfur respectively. CX 3, 4. It is noted, however, that a chemist's Memorandum, dated December 11, 1995, reports sulfur content of 0.2406 percent rather then .2603 in sample number 2 taken in a field screening at Respondent's facility. CX

9. In that both results exceed the .05 threshold, the difference is found to be immaterial.

5. [5] I also do not find that the Respondent's unsupported assertion that the trucks found to be misfueled "were not even being used" to create a contested issue of fact as to when the misfueling occurred, *i.e.*, did it occur after the October 1, 1993 deadline set forth in the statute. While admittedly the Respondent's misfueled vehicles were old and were in all probability in operation before October 1993, Respondent admitted at the time of the inspection to having recently fueled them. The statute only requires that the high sulfur fuel be introduced into the tanks of the vehicles after October 1993; it does not require the vehicles be operated with the high-sulfur fuel.

6. [6] A Memorandum dated December 11, 1995 from EPA chemist Joseph Montanaro who participated in the inspection concerning results of the field screening of diesel fuel on November 30, 1995, reported a diesel fuel sample from Mystic Street Gulf as containing 0.0411 percent sulfur, and three samples from Dudley Fuel as containing 0.0423, 0.0414 and 0.0394 percent sulfur. CX 9. Fuel analysis reports from the Michigan Lab dated February 21, 1996 state that a diesel fuel sample taken at Mystic Street Gulf was 0.0436 weight percent sulfur and the sample at Dudley Fuel Co. was 0.0428 weight percent sulfur. CX 4. Chain of Custody documents for the samples taken at Mystic St. Gulf and Dudley Fuel Company were included in Complainant's Prehearing Exchange. CX 6, 7.

7. [7] For example, the possibility exists that Respondent knowingly mixed low-sulfur fuel from outside sources with other diesel fuel exceeding 0.05 percent sulfur limit resulting in the varying high sulfur levels found in the three vehicles. Even if another party mixed high and low sulfur fuel, Respondent would be on notice of the high sulfur content from the red color, since mixed fuel would still appear red. IRS regulations require that the dye be discernible in diesel fuel even when diluted by a factor of five with undyed diesel, to prevent potential tax evaders from realizing significant illegal profits by mixing taxed and untaxed fuels. 59 Fed. Reg. 35854, 35856 (July 14, 1994); 26 C.F.R. 48.4082-1(b).