3/14/94

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Wayne Chaddock d/b/a Wayne's Oil Service,	)	Docket No. [RCRA]-VII-92-H-0010
	)	
	)	
Respondent	)	

Order on Complainant's Motion For Partial Accelerated Decision on Liability as to Count II of the Complaint

This is a proceeding on a complaint issued by U.S. EPA, under the Solid Waste Disposal Act, as amended ("RCRA"), section 3008(a) and (g), 42 U.S.C. 6928(a) and (g) against Respondent, Wayne Chaddock d/b/a/ Wayne's Oil Service. Count II of the complaint alleges that Respondent marketed used oil to be burned for energy recovery without complying with the requirements of 40 C.F.R. section 266.43 (standards applicable to marketers of use oil).

Specifically, Respondent is alleged in Count II to have marketed used oil burned for energy recovery which Respondent had not analyzed to determine whether it was "specification" used oil, i.e., did not exceed the allowable specification levels of constituents and properties set forth in 40 C.F.R. 266.40(e). In the absence of such analysis, the complaint alleged, the used oil is regulated as "off-specification" oil and the marketer is subject to the requirements set down in 40 C.F.R. 266.43.[1] The complaint

[1] Complaint, Par. 18.

further alleged that Respondent had not complied with those requirements.

Respondent answered, denying that it sold oil to be burned improperly, but admitting the allegations that it marketed used oil burned for energy recovery which it had not analyzed to determine whether it complies with requirements of 40 C.F.R. section 266.40(e).

Settlement discussions proving unproductive, the parties made the prehearing exchange directed by the Presiding Officer.[2]

Complainant has moved for a partial accelerated decision that Respondent is liable for marketing "off-specification" used oil without complying with the standards applicable to the marketing of such oil. The motion is based upon Respondent's admissions in its answer. Among the allegations of the complaint admitted were those of Par. 18 of the complaint that Respondent has not analyzed the used oil he collects and markets to determine whether it was "specification" oil and that the used oil, therefore, is subject to regulation as "off-specification" used oil.

Respondent in reply to the motion now contends that it did not intend to admit that the oil was "off-specification" used oil. Respondent admits that it did not perform any testing on the oil itself but asserts that he relied on the statement of the suppliers that the oil had been blended sufficiently to reduce the contamination below the specified amounts and on his second-hand

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[2] Chief Administrative Law Judge Frazier originally assigned himself as the presiding officer, but by order dated December 22, 1993, reassigned the matter to me.

knowledge of the tests of his supplier. Respondent claims that it should be allowed to amend its answer to conform to what it actually intended to plead. As so amended. Respondent asserts that an issue of material fact exists as to whether the oil was "off-specification", and complainant's motion must be denied.

Discussion

Par. 18 of the complaint, Respondent's admission to which Complainant relies upon as establishing Respondent's liability, alleges as follows:

> Respondent has not analyzed the used oil he collects and markets to determine whether it complies with the requirements set forth in 40 C.F.R. [Section] 266.40(e) for "specification" used oil; therefore, the used oil referred to in paragraph 8 above is subject to the requirements of 40 C.F.R. Part 266, Subpart E as an "off-specification" used oil.

It is evident that the paragraph contains both an allegation of fact and a legal conclusion. The factual allegation is that Respondent has not analyzed the oil he has marketed. Respondent does not dispute this allegation, assuming that by "analyzing" is meant Respondent's actual testing of the oil. The legal conclusion is that under the rule, oil burned for energy recovery that has not been analyzed by Respondent is subject to regulation as "off-specification" used oil.

The pertinent wording of section 266.40(e) is that used oil burned for energy recovery is subject to regulation "unless it is shown not to exceed any of the allowable levels of the constituents and properties" specified in the rule. The allegation that Respondent has not "analyzed" the oil is reasonably read as meaning

Respondent's actual testing of the oil, and as so read, the purport of the complaint is that only by showing that Respondent has tested the oil for the specified constituents and properties can Respondent escape regulation under the rule. I reject a construction of the rule that would preclude a respondent from showing by other credible evidence than its own testing of the oil, that the oil did not exceed allowable levels. That would establish as an irrebuttable presumption, a conclusion that may have no basis in fact when no reason has been shown why the rule should be so construed.[3] Indeed, it would be inconsistent with the regulation which makes used oil subject to regulation "unless the marketer obtains analyses or other information documenting that the used oil fuel meets the specification provided under [section] 266.40(e).[4]

Accordingly, I construe the rule as establishing a presumption that used oil marketed for energy recovery is subject to regulation as "off-specification" oil, which the marketer can rebut not only by tests but by any other credible evidence showing that the oil does not exceed the allowable levels for the specified constituents and properties.[5]

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[3] Cf., Massachusetts v. United States, 856 F. 2d. 378, 383 (1st Cir. 1988) ("Agencies are permitted to adopt and apply presumptions if the proven facts and inferred facts are rationally connected.")

[4] 40 C.f.R. 266.43(b)(1).

[5] Under the rule, the Agency has established a rebuttable presumption that used oil containing more than 1,000 ppm (parts per million) total halogens is a hazardous waste. 40 C.F.R. 266.40(c). I note that the Agency recognizes that this presumption can be rebutted not only by tests but also by other information such as certification from a generator. See 50 Fed. Reg. 49190 (Nov. 29, 1985). If persons claiming that the used oil meets specifications

Respondent will be allowed to amend its answer to show that it does not admit that it was a marketer of "off-specification" used oil. It should not be estopped by its admission to an erroneous legal conclusion from doing so. In any event, amendments to the pleadings should be liberally allowed where, as here, it does not appear that Complainant will be prejudiced by the amendment.[6]

Respondent should submit an amended answer, but it is not necessary to wait for the answer to rule upon Complainant's motion. For purposes of the motion, it will be assumed that Respondent has not admitted in its pleadings that the used oil it has marketed is "off-specification" oil.

An accelerated decision on an issue is granted when it is shown that no genuine issue of material fact exists and a party is entitled to a judgement on the merits as a matter of law.[7] The burden of showing that no genuine issue of fact exists rests upon the movant.[8]

Complainant in its response to Respondent's reply to the

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can rebut the presumption applicable to the concentration of total halogens by other ways besides testing, I see no reason why the Agency would preclude the marketer from showing by other evidence besides its own testing, assuming it is credible evidence, that the oil is "specification" oil.

[6] See Genetech, Inc. v. Abbot Laboratories, 127 FRD 529 (N.D. Cal. 1989).

[7] 40 C.F.R. 22.20(a).

[8] This is the uniform rule under Fed. R. Civ. P. 56 (relating to summary judgements), see 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, Section 2727, p. 121 (2dEd. 1983). So far as I know it has also been the rule in proceedings under 40 C.F.R. 22.20.

motion now cites in support of the motion the report of the inspection of Respondent's premises made on September 18, 1991, a document that has been included in Complainant's prehearing exchange.[9] In that report, signed by the EPA inspector, the inspector states that Mr. Chaddock could not provide the inspector with any certification statement or test results from generators which showed the used oil meets the specifications for unregulated used oil. In answer to the inspector's question as to how Mr. Chaddock determined if the used oil was not hazardous waste, Mr. Chaddock is reported as saying that he smelled it to see if it smells like solvents or paint thinners. He also is reported as saying that he questions his customers about their used oil to determine if they have put any solvents or other materials into the oil but no documentation was apparently offered to support this statement.

In considering the sufficiency of this evidence as support for complainant's motion there are really two questions that must be decided.

The first question is what is complainant's burden with regard to the production of evidence in establishing that the used oil is subject to regulation as "off-specification" oil. The second is whether Complainant has met that burden and shown that there is no genuine dispute over the material facts claimed to establish the violation of not meeting the requirements for marketing "off-specification" oil.

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[9] Complainant's Exhibit 3.

As already noted, the rule by its wording places upon the marketer the burden of showing that the used oil is unregulated "specification" oil. Placing such a burden on the marketer is consistent with the traditional approach that the burden of going forward with evidence to establish a fact normally falls upon the party having knowledge of the facts involved.[10] It is both reasonable to place upon a marketer the responsibility for knowing the chemical constituents and properties of the used oil it is marketing, and to infer that if the marketer cannot show that the used oil meets the specifications for unregulated oil, that the oil is subject to regulation.

Nevertheless, it is not clear that Respondent has really addressed the question of what is or should be Complainant's burden under the rules with respect to going forward with the evidence on whether the used oil is unregulated used oil. Accordingly, Respondent will be given the opportunity to do so.

As to the inspection report now cited by Complainant, the purport of the inspector's statements is that Respondent could not produce any reliable evidence indicating that the used oil met the specifications for unregulated oil. It is noted that the report states that the inspection was made under the authority of RCRA, section 3007, 42 U.S.C. 6927. The procedures followed in the inspection, as described in the report, do not disclose any circumstances that would affect the credibility of the statements

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[10] See Environmental Defense Fund v. EPA, 548 F. 2d 998, 1004 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977).

made. Official notice is taken, accordingly, that the matters stated in the inspection report are prima facie correct.[11] This means that unless Respondent comes forward with evidence explaining or rebutting the statements attributed to him, Complainant's motion will be granted and an accelerated decision will be entered finding Respondent liable for the violation charged in Count II. Respondent's evidence does not have to conclusively show that the oil does not exceed the specification levels prescribed in the rule but only that there is a genuine issue of material fact on this issue.

The unsworn statement in Respondent's response in opposition to the motion that it relied upon the statements and tests of the supplier do not show that a genuine issue of material fact exists with respect to whether the used oil was "off-specification" oil. At the very minimum, Respondent, either by an affidavit by himself or by some other knowledgeable person or by other documents, should provide information that would identify the supplier who gave the information on which Respondent relies and the details of what that information and tests consisted of.

Respondent, accordingly, is given 14 days from the date of this order to submit a further response to Complainant's motion. In this response, Respondent should address the issue of Complainant's burden with respect to the production of evidence on the issue of whether the used oil is subject to regulation as "off-specification" used oil, if he questions what has been said here on

[11] For official notice of facts, see 40 C.F.R. 22.23(f).

that matter. Respondent should also submit the evidence that he relies on to show that there is a genuine issue of material fact on whether the used oil is subject to regulation. Finally, Respondent should, by motion, submit with its supplemental response an amended answer incorporating the matters Respondent said he intended to plead.

Complainant will have 7 days to reply to Respondent's supplemental response and the motion to amend the complaint.

Gerald Harwood
Gerald Harwood
Senior Administrative Law Judge

Dated: March 14, 1994.

In the Matter of Wayne Chaddock, d/b/a Wayne's Oil Service, Respondent
Docket No. RCRA-VII-92-H-0010

Certificate of Service

I certify that the foregoing **Order on Complainant's Motion For Partial Accelerated Decision on Liability as to Count II of the Complaint**, dated March 14, 1994, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Venessa R. Cobbs
Regional Hearing Clerk
U.S. EPA
726 Minnesota Avenue
Kansas City, KS 66101

Copy by Regular Mail to:

Attorney for Complainant:

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Suite 203, Kiel Building
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Maria Whiting
Legal Staff Assistant

Dated: March 14, 1994