UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
JULIE'S LIMOUSINE & COACHWORKS, INC.,	)	**Docket No. CAA-04-2002-1508**
RESPONDENT	)	

ORDER ON COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION, MOTION TO STRIKE AFFIRMATIVE DEFENSES, AND MOTION IN LIMINE

This civil administrative penalty proceeding arises under the authority of Section 113(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(d). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On June 28, 2002, the United States Environmental Protection Agency, Region IV (the "EPA" or "Complainant") filed a Complaint against Julie's Limousine & Coachworks, Inc. ("Respondent"), alleging violations of Sections 114 and 609(c), (d) of the CAA, 42 U.S.C. §§ 7414 and 7671h(c), (d), and the implementing regulations for the servicing of motor vehicle air conditioners ("MVACs") found in 40 C.F.R. Part 82, Subpart B. Specifically, Complainant asserts that Respondent failed to employ properly trained and certified MVAC technicians from January 1, 1997 through approximately June 17, 1998 in violation of Section 609(c) and 40 C.F.R. § 82.34(a)(2) (Count I); failed to use proper MVAC equipment when servicing MVACs for consideration from January 1, 1997 through July 22, 1998 in violation of Section 609(c) and 40 C.F.R. § 82.34(a)(1) (Count II); failed to certify to the EPA that it had acquired and was properly using approved MVAC equipment as well as trained and certified technicians on or before January 1, 1997 in violation of Section 609(d) and 40 C.F.R. § 82.42(a) (Count III); and failed to respond truthfully to a Section 114(a) information request letter (Count IV).

Complainant seeks a civil administrative penalty of $43,018.50 for the alleged violations. Respondent filed an Answer on July 25, 2002, denying or claiming to have insufficient knowledge of the allegations made by Complainant and contesting the EPA's jurisdiction over this matter.

After the parties engaged in a prehearing information exchange, an Order Scheduling Hearing was issued setting May 5, 2003 as the date for hearing. On April 1, 2003, Complainant filed a Motion for Partial Accelerated Decision and Motion to Strike Affirmative Defenses and Memorandum of Law in Support ("Motion"), along with a Motion in Limine. Complainant's Motion requested an accelerated decision on Counts II, III, and IV of the Complaint and an order striking affirmative defenses 1-4, 6-11, and 14-16 from Respondent's Answer, while the Motion in Limine sought to prevent Respondent from introducing certain evidence at the hearing.

Respondent opposes Complainant's motions and on April 17, 2003, filed its Response to Complainant's Motion for Partial Accelerated Decision and Motion to Strike Affirmative Defenses ("Response"), along with its Response to Complainant's Motion in Limine ("Response to Motion in Limine"). On April 28, 2003, Complainant filed its Reply to Respondent's Response to EPA's Motion for Partial Accelerated Decision and Motion to Strike Affirmative Defenses ("Reply") and Reply to Respondent's Response to Complainant's Motion in Limine ("Reply to Response to Motion in Limine") to address the arguments raised in the Response and Response to Motion in Limine, respectively.

Standard for Adjudicating a Motion for Accelerated Decision

Section 22.20(a) of the Rules of Practice authorizes the Administrative Law Judge to "render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if *no genuine issue of material fact exists* and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a) (emphasis added).

As the EPA has noted, motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP").[1]

[1] The FRCP are not binding on administrative agencies, but many times these rules provide useful and instructive guidance in applying the Rules of Practice. *See Oak Tree Farm Dairy, Inc. v. Block*, 544

See, e.g., In re BWX Technologies, RCRA (3008) Appeal No. 97-5, 9 E.A.D. 61, 74-5 (EAB, April 5, 2000); *In the Matter of Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65 at *8 (ALJ, September 11, 2002). Rule 56(c) of the FRCP provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue of any material fact* and that the moving party is entitled to a judgment as a matter of law" (emphasis added). Therefore, federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision. *See CWM Chemical Service*, TSCA Appeal 93-1, 6 E.A.D. 1 (EAB, May 15, 1995).

The United States Supreme Court has held that the burden of showing that no genuine issue of material fact exists is on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59; *see also Cone v. Longmont United Hospital Assoc.*, 14 F.3d 526, 528 (10th Cir. 1994). Summary judgment on a matter is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In assessing materiality for summary judgment purposes, the Supreme Court has determined that a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding. *Anderson*, 477 U.S. at 248; *Adickes*, 398 U.S. at 158-159. The substantive law involved in the proceeding identifies which facts are material. *Id.*

The Court has found that a factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in favor of the nonmoving party. *Id.* In determining whether a genuine issue of fact exists, the judge must decide whether a finder of fact could reasonably find for the nonmoving party under the evidentiary standards in a particular proceeding. *Anderson*, 477 U.S. at 252.

Once the party moving for summary judgment meets its burden

F.Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); *Wego Chemical & Mineral Corporation*, TSCA Appeal No. 92-4, 4 E.A.D. 513 at 13 n. 10 (EAB, February 24, 1993).

of showing the absence of genuine issues of material fact, Rule 56(e) requires the opposing party to offer countering evidentiary material or to file a Rule 56(f) affidavit. Under Rule 56(e), "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial." The Supreme Court has found that the nonmoving party must present "affirmative evidence" and that it cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson*, 477 U.S. at 256 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)).

More specifically, the Court has ruled that the mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment, as Rule 56(e) requires the opposing party to go beyond the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322 (1986); *Adickes*, 398 U.S. at 160. Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57 at *22 (ALJ, September 9, 2002). A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. *Id.* at 22-23; *see In re Bickford, Inc.*, Docket No. TSCA-V-C-052-92, 1994 TSCA LEXIS 90 (ALJ, November 28, 1994).

The Supreme Court has noted, however, that there is no requirement that the moving party support its motion with affidavits negating the opposing party's claim or that the opposing party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex*, 477 U.S. at 323-324. The parties may move for summary judgment or successfully defeat summary judgment without supporting affidavits provided that other evidence referenced in Rule 56(c) adequately supports its position. Of course, if the moving party fails to carry its burden to show that it is entitled to summary judgment under established principles, then no defense is required. *Adickes*, 398 U.S. at 156.

The evidentiary standard of proof in the matter before me, as in all other cases of administrative assessment of civil penalties governed by the Rules of Practice, is a "preponderance of the evidence." 40 C.F.R. § 22.24. In determining whether or not there is a genuine factual dispute, I, as the judge and

finder of fact, must consider whether I could reasonably find for the nonmoving party under the "preponderance of the evidence" standard.[2]

Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. Even if a judge believes that summary judgment is technically proper upon review of the evidence in a case, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. *See Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

Discussion

Under the standard for adjudicating motions for accelerated decision, the evidentiary material presented must be viewed in the light most favorable to the Respondent as the non-moving party, and all reasonable inferences must be drawn in favor of the non-movant. Although Complainant asserts that there are no genuine issues of material fact as to Counts II, III, and IV of the Complaint, there is a clear dispute between the parties regarding the alleged violations of Section 609 of the CAA and the MVAC regulations in 40 C.F.R. Part 82, Subpart B, and whether Respondent replied truthfully to the Section 114(a) information request letter. Furthermore, Respondent has raised justifiable concerns regarding the applicability of the cited regulations to the violations alleged prior to January 29, 1998.

Count II of the Complaint alleges that Respondent failed to use proper equipment while servicing MVACs for consideration between January 1, 1997 and July 22, 1998 in violation of Section 609(c) of the CAA and 40 C.F.R. § 82.34(a)(1). Section 609(c) of the CAA states that:

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[2] Under the governing Rules of Practice, an Administrative Law Judge serves as the decisionmaker as well as the fact finder. *See* 40 C.F.R. §§ 22.4(c), 22.20, and 22.26.

> Effective January 1, 1992, no person repairing or servicing motor vehicles for consideration may perform any service on a motor vehicle air conditioner involving the refrigerant for such air conditioner without properly using approved refrigerant recycling equipment and no such person may perform such service unless such person has been properly trained and certified.

42 U.S.C. § 7671h(c).

Similarly, the regulations at section 82.34(a) provide that:

> No person repairing or servicing MVACs for consideration…may perform any service involving the refrigerant for such MVAC...:
> (1) Without properly using equipment approved pursuant to § 82.36;
> (2) Unless any such person repairing or servicing an MVAC has been properly trained and certified by a technician certification program approved by the Administrator pursuant to § 82.40...

40 C.F.R. § 82.34(a)(1)-(2).

The primary areas of dispute between the parties on Count II involve the questions of whether Respondent performed "service for consideration"[3] or "service involving refrigerant"[4] on any MVACs as those terms are defined in 40 C.F.R. § 82.32, and the applicability of the cited regulation prior to January 29, 1998. For example, Complainant contends that Respondent's own in-house service records show "more than 56 instances of MVAC work on Respondent's fleet of limousines," and Respondent has admitted to the "topping off" of MVAC systems. Motion, p. 8. Although Respondent incorrectly asserts that "recover equipment is only

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[3] "Service for consideration" is defined as "being paid to perform service, whether it is in cash, credit, goods, or services. This includes all service except that done for free." 40 C.F.R. § 82.32(g).

[4] "Service involving refrigerant" is defined as "any service during which discharge or release of refrigerant from the MVAC or MVAC-like appliance to the atmosphere can reasonably be expected to occur. Service involving refrigerant includes any service in which an MVAC or MVAC-like appliance is charged with refrigerant but no other service involving refrigerant is performed (i.e., a 'top-off')." 40 C.F.R. § 82.32(h).

required when the topping off involves dismantling the air conditioner" (Response, p. 20),[5] I find that Respondent has raised genuine issues of material fact regarding whether its MVAC work involved "service involving refrigerant" as defined by 40 C.F.R. § 82.32(h) in light of the alleged fraud by Emmanuel Panagiotis (Response, pp. 10-12, 16-17), and the assertions that Gary Roberts[6] "performed no service on Julie's MVACs involving refrigerant during the relevant time period in 1998" (Response, p. 17) and "was not involved in any topping off during the relevant time period in 1998" (Response, p. 20).

Furthermore, there has been a substantial amount of discussion by the parties regarding the applicability of Section 609(c) and the current regulations in 40 C.F.R. Part 82, Subpart B, which became effective on January 29, 1998, to the violations alleged prior to that date.[7] Although the Complaint does not specify which type of refrigerant was allegedly used by Respondent in its vehicles, both parties now seem to agree that only the refrigerant known as "HFC-134a" or "R-134" is at issue in this matter. Motion, pp. 3, 15-20; Response, p. 9. Also,

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[5] The definition of "service involving refrigerant" was expanded in regulations effective on January 29, 1998 to clarify that such activity includes topping off. 62 Fed. Reg. 68026, 68029 (Dec. 30, 1997). Any topping off of MVACs, as well as any other repair that requires some dismantling of an air conditioner, is included in the definition of "service involving refrigerant" because "each of these operations involves a reasonable risk of releasing refrigerant to the atmosphere." 62 Fed. Reg. 68037-38 ("The preamble to the final 1992 section 609 rule stated that MVAC servicing includes 'repairs, leak testing, and 'topping off' of air-conditioning systems low on refrigerant, as well as any other repair which requires some dismantling of the air conditioner. Each of these operations involves a reasonable risk of releasing refrigerant to the atmosphere' 57 FR 31246."). Thus, Respondent is mischaracterizing the language in the preamble when it states that "recover equipment is only required when the topping off involves dismantling the air conditioners."

[6] Count II of the Complaint alleges that "[f]rom January 1, 1997 through July 22, 1998, Respondent, through its MVAC technician, Gary Roberts, regularly performed MVAC work involving refrigerant, on twenty-one limousines and coach vehicles, for consideration." Complaint, ¶ 22.

[7] Respondent initially raised this issue on August 9, 2002 in its Motion to Dismiss, or in the Alternative, for a Bill of Particulars. By Order dated November 26, 2002, I denied the Motion to Dismiss, finding that the issue was not ripe for adjudication because the parties had not yet fully developed and briefed the issue.

both parties agree that the term "refrigerant" as defined by Section 609(b)(1) of the Act was expanded to include HFC-134a on November 15, 1995,[8] and that it became unlawful on that date to knowingly vent HFC-134a pursuant to Section 608(c).[9] Motion, pp. 16-17; Response, pp. 2-3.

However, there is no dispute that at least since January 29, 1998, the effective date of the EPA's final rule establishing "standards and requirements for the servicing of MVACs that use any refrigerant other than CFC-12,"[10] the regulations have required the use of approved HFC-134a recover/recycling equipment, HFC-134a recover only equipment, and technicians trained and certified in the use of such equipment. Motion, p. 17; Response, p. 7. Thus, the dispute between the parties here involves the applicable requirements for MVACs that used HFC-134a

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[8] Section 609(b)(1) defines the term "refrigerant" as "any class I or Class II substance used in a motor vehicle air conditioner. Effective 5 years after November 15, 1990, the term 'refrigerant' shall also include any substitute substance." 42 U.S.C. § 7671h(b)(1). As the EPA points out, the preamble to the 1992 final rule establishing 40 C.F.R. Part 82, Subpart B states that "refrigerant" is defined to mean "any class I or class II substance used in a MVAC, and effective November 15, 1995 (five years after enactment of the CAA), any substitute substance, such as HFC-134a." 57 Fed. Reg. 31242, 31246 (July 14, 1992).

[9] Section 608(c), 42 U.S.C. § 7671g(c), provides that:

(1) Effective July 1, 1992, it shall be unlawful for any person, in the course of maintaining, servicing, repairing, or disposing of an appliance or industrial process refrigeration, to knowingly vent or otherwise knowingly release or dispose of any class I or class II substance used as a refrigerant in such appliance (or industrial process refrigeration) in a manner which permits such substance to enter the environment. De minimis releases associated with good faith attempts to recapture and recycle or safely dispose of any such substance shall not be subject to the prohibition set forth in the preceding sentence.
(2) Effective 5 years after November 15, 1990, paragraph (1) shall also apply to the venting, release, or disposal of any substitute substance for a class I or class II substance by any person maintaining, servicing, repairing, or disposing of an appliance or industrial process refrigeration which contains and uses as a refrigerant any such substance, unless the Administrator determines that venting, releasing, or disposing of such substance does not pose a threat to the environment.

[10] 62 Fed. Reg. 68026 (Dec. 30, 1997).

between November 15, 1995 and January 29, 1998.

As an initial proposition, both parties cite language in the preamble to the 1998 final rule stating that:

> Because HFC-134a is a non-ozone-depleting chemical, and is therefore not classified as a class I or class II substance, the regulations set forth under Title VI of the Act governing its use are somewhat different. Section 609 of the Act defines "refrigerant" so that, beginning on November 15, 1995, the term includes any substance that substitutes for a class I or II substance used in an MVAC. Section 608 of the Act provides that, beginning on November 15, 1995, any substance substituting for a class I or class II substance may not be vented into the atmosphere. Therefore, on that date, it became illegal to vent HFC-134a, even though it does not contribute to ozone depletion. (Venting of CFC-12 substitutes that contain class II substances was already prohibited.) Because venting was prohibited, *recovery of HFC-134a has been de facto required since November 15, 1995*. Recycling HFC-134a in approved equipment, however, has not been required. The publication today of standards for equipment that recovers and recycles HFC-134a initiates a requirement to recycle HFC-134a, beginning on the effective date of this rule.(emphasis added).

62 Fed. Reg. 68027.

Complainant submits that the de facto recovery requirement for HFC-134a mandated the use of approved refrigerant recovery equipment for Respondent beginning on November 15, 1995. Motion, pp. 16-17. In its Reply, Complainant cites language from the preamble to the 1992 final rule stating that "[HFC-134a] must be recycled under the Act, effective November 15, 1995."[11] Reply, p. 3. In addition, Complainant alleges that the definition of "approved refrigerant recycling equipment" in Section

[11] The language quoted by Complainant notes that "[s]everal automobile manufacturers have announced that HFC-134a is the designated replacement for motor vehicle air conditioners in new cars beginning as early as 1992 in some models. This substitute must be recycled under the Act, effective November 15, 1995." 57 Fed. Reg. 31248.

609(b)(2)(B)[12] contemplated the use of grandfathered equipment for HFC-134a bought before the standards in the 1998 final rule became effective, and required Respondent to use such equipment beginning on November 15, 1995. Reply, pp. 4-7. On the other hand, Respondent contends that even though it was necessary to use recovery equipment to prevent the venting of HFC-134a prior to January 29, 1998, "no particular recover equipment or training was required because there were no regulations or procedures in place for EPA approval or certification of the recovery equipment or training of individuals who used the recovery equipment." Response, pp. 5-9.

In addressing the merits of these arguments, the regulatory scheme implementing Section 609 of the Act is instructive. On July 14, 1992, the EPA published a final rule in the Federal Register establishing standards and requirements for the servicing of MVACs that use CFC-12 as a refrigerant. 57 Fed. Reg. 31242 (July 14, 1992). Those regulations were codified at 40 C.F.R. Part 82, Subpart B, and became effective on August 13, 1992. The EPA noted that "[t]he equipment standards in Appendix A are designed for equipment that recovers and recycles CFC-12 refrigerant. As necessary, EPA will adopt additional standards that will govern the approval of equipment designed to recover/recycle other refrigerants." 57 Fed. Reg. 31247. On May 2, 1995, the EPA published a final rule that established a standard for approval of recovery-only equipment that extracts CFC-12 from MVACs. 60 Fed. Reg. 21682 (May 2, 1995). This standard was promulgated as Appendix B to the regulations in 40 C.F.R. Part 82, Subpart B, and became effective on June 1, 1995. Thus, when the term "refrigerant" in Section 609(b)(1) was expanded on November 15, 1995 to include HFC-134a, specific standards for the regulation of HFC-134s from MVACs had not been established.

On December 30, 1997, the EPA published a final rule establishing "standards and requirements for the servicing of MVACs that use any refrigerant other than CFC-12." 62 Fed. Reg. 68026 (Dec. 30, 1997). Specifically, the regulations established standards "for recover/recycle equipment that extracts and recycles HFC-134a from MVACs" in Appendix C, "recover-only equipment that extracts HFC-134a from MVACs" in Appendix D, and revised "the criteria for approval of technician training and

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[12] Section 609(b)(2)(B) states that "[e]quipment purchased before the proposal of regulations under this section shall be considered certified if it is substantially identical to equipment certified as provided in subparagraph (A)." 42 U.S.C. § 7671h(b)(2)(B).

certification programs to reflect the use of recover/recycle and recover-only equipment designed to service MVAC systems that use refrigerants other than CFC-12." 62 Fed. Reg. 68029. Additionally, the EPA stated in the preamble that "[a]t this time, 27 organizations have been approved by EPA to train and certify technicians in the use of CFC-12 recover-only and recover/recycle equipment," adding that "EPA's approval of these organizations has been limited to CFC-12 equipment." 62 Fed. Reg. 68043.

Count II of the Complaint alleges that Respondent violated Section 609(c) of the Act and 40 C.F.R. § 82.34(a)(1), which states that no person may service MVACs for consideration without properly using[13] *approved refrigerant recycling equipment*. The term "approved refrigerant recycling equipment" is defined in Section 609(b)(2)(A) as "equipment certified by the Administrator (or an independent standards testing organization approved by the Administrator) to meet the standards established by the Administrator and applicable to equipment for the extraction and reclamation of refrigerant from motor vehicle air conditioners." 42 U.S.C. § 7671h(b)(2)(A). However, it appears that equipment for the recycling and recovery of HFC-134a from MVACs was not certified by the Administrator until the final rule effective on January 29, 1998. Although Complainant points out that Section 609(b)(2)(B) and the current regulations allow the grandfathering of equipment that is "substantially identical" to certified equipment bought before the proposed standards were promulgated for HFC-134a (Reply, pp. 4-7), there is still an issue regarding when such a determination was made for HFC-134a equipment.[14] At

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[13] Under Section 609(b)(3), "properly using" means "with respect to approved refrigerant recycling equipment, using such equipment in conformity with standards established by the Administrator and applicable to the use of such equipment. Such standards shall, at a minimum, be at least as stringent as the standards of the Society of Automotive Engineers in effect as of November 15, 1990, and applicable to the use of such equipment (SAE standard J-1989)." 42 U.S.C. § 7671h(b)(3).

[14] According to the final rule published on December 30, 1997, "Today's rule applies the Act's 'substantially identical' provision to recover/recycle and recover-only equipment that services HFC-134a MVACs, recover/recycle equipment intended for use with both CFC-12 and HFC-134a MVACs, and equipment that recovers but does not recycle single, specific replacement refrigerants other than HFC-134a. These types of equipment will be considered approved if they are substantially identical to equipment approved under § 82.36(a) and if they were purchased prior to March 6, 1996, the date on which today's

the very least, it remains unclear how Respondent should have complied with the requirements of Section 609(c) and 40 C.F.R. § 82.34(a)(1) before specific standards for MVACs that use HFC-134a became effective on January 29, 1998. Without a clear statement on the law applicable to this count, Complainant's Motion for Accelerated Decision must be denied.[15]

Count III of the Complaint alleges that Respondent failed to submit MVAC equipment to the EPA for certification on or before January 1, 1997 in violation of Section 609(d)(1) of the Act and 40 C.F.R. § 82.42(a). Section 609(d)(1) states that:

> Effective 2 years after November 15, 1990, each person performing service on motor vehicle air conditioners for consideration shall certify to the Administrator either -
> (A) that such person has acquired, and is properly using, approved refrigerant recycling equipment in service on motor vehicle air conditioners involving refrigerant and that each individual authorized by such person to perform such service is properly trained and certified; or
> (B) that such person is performing such service at an entity which serviced fewer than 100 motor vehicle air conditioners in 1991.

42 U.S.C. § 7671h(d)(1).

Given the genuine issues of material fact that remain on Count II regarding Respondent's use of approved refrigerant recycling equipment, granting accelerated decision on Count III would be inappropriate at this time.

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rule was proposed." 62 Fed. Reg. 68041.

[15] Although the EPA notes in its Reply that "Respondent is confusing the establishment of EPA standards for R-134a MVAC equipment in 1997 with the requirement to recover and recycle R-134a that began in 1995" (Reply, p. 1), the regulations as applied in this proceeding are far from self-explanatory. While the EPA may be entitled to some deference in its interpretation of its own rules, *U.S. v. Mead Corp.*, 533 U.S. 218, 226-31 (2001), such deference does not attach until the Agency's final position is pronounced. In other words, deference is not accorded to the EPA's arguments advanced during administrative enforcement actions. Also, an accelerated decision is inappropriate at this stage because regulatory uncertainty may be relevant to the assessment of a civil penalty. *See Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649 (D.C.Cir. 1991).

Count IV of the Complaint alleges that Respondent failed to fully and truthfully respond to a CAA Section 114 information request letter in violation of Section 114(a), 42 U.S.C. § 7414(a). According to Section 114(a):

> "For the purpose of...(iii) carrying out any provision of this chapter...(1) the Administrator may require any person who owns or operates any emission source...or who is subject to any requirement of this chapter...to...(F) submit compliance certifications in accordance with subsection (a)(3) of this section; and (G) provide such other information as the Administrator may reasonably require...

42 U.S.C. § 7414(a).

Complainant alleges in its Motion that Respondent, in a letter dated on July 14, 1998 and signed by owner Julie Herring, failed to report that Emmanuel Panagiotis was one of Respondent's MVAC technicians, submitted false and inaccurate statements that it did not have MVAC recycling equipment, and significantly altered a MVAC certification letter from the National Association of Automotive Excellence for Gary Roberts. Motion, pp. 23-25; Reply, pp. 13-14. In contrast, Respondent contends that Mr. Panagiotis was not listed because he instructed Ms. Herring that "he had not performed any intrusive MVAC work" and the "EPA knew he had provided MVAC services to Julies," that its statements regarding recycling equipment were not inaccurate because it used but did not own such equipment, that Ms. Herring was unaware of the redactions made by Gary Roberts to the certification letter, and that the omission of an expiration date is immaterial since the "regulations do not require recertification or recognize an 'expiration' of a certification." Response, pp. 25-27. Based on these conflicting allegations concerning Respondent's alleged liability under Section 114(a), there are genuine issues of material fact warranting further hearing. *See Rogers Corp.*, 275 F.3d at 1103; 40 C.F.R. § 22.20(a).

In conclusion, based on the record before, I find that genuine issues of material fact exist on Counts II, III, and IV concerning Respondent's alleged liability under Section 609(c) and 114(a) of the Act and the MVAC regulations in 40 C.F.R. Part 82, Subpart B, and that Complainant has not established that it is entitled to judgment as a matter of law. I emphasize that in making this threshold determination, I have not weighed the evidence and determined the truth of the matter, but have simply determined that Respondent has adequately raised genuine issues of fact for evidentiary hearing and that Complainant has not

established that it is entitled to judgment as a matter of law. As such, Complainant's Motion for Partial Accelerated Decision must be denied.

Standard for Adjudicating Complainant's Motion to Strike Affirmative Defenses and Motion in Limine

Since motions to strike are not addressed in the Rules of Practice applicable to this administrative proceeding, federal court practice following the Federal Rules of Civil Procedure may be looked to for guidance. *In the Matter of J/S Chem Corp.*, Docket No. CWA-02-2000-3407, 2001 EPA ALJ LEXIS 183 (ALJ, October 12, 2001). Motions to strike under FRCP 12(f) are the appropriate remedy for the elimination of impertinent or redundant matter in any pleading, and are the primary procedure for objecting to an insufficient defense. *Van Schouwen v. Connaught Corp.*, 782 F.Supp. 1240, 1245 (N.D.Ill. 1991); *see* 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1380, at 644 (2d ed. 1990). However, Rule 12(f) motions to strike are "generally viewed with disfavor 'because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic.'" *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001) (quoting 5A Wright & Miller, Federal Practice & Procedure § 1380, at 647); *see Van Schouwen*, 782 F.Supp. at 1245 ("Indeed, motions to strike can be nothing other than distractions. If a defense is clearly irrelevant, then it will likely never be raised again by the defendant and can be safely ignored").

A motion in limine, on the other hand, is the appropriate vehicle for excluding testimony or evidence from being introduced at hearing. Motions in limine are generally disfavored, and should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose. *In the Matter of USA Remediation Servs., Inc.*, Docket No. CAA-03-2002-0159, 2003 EPA ALJ LEXIS 6 at *3-4 (ALJ, February 10, 2003). Thus, denial of a motion in limine does not mean that all evidence contemplated by the motion will be admitted at trial, but only that without the context of trial the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989). Pursuant to Section 22.22(a) of the Rules of Practice, "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, or of little probative value..." 40 C.F.R. § 22.22(a). Complainant's Motion in Limine, which seeks to exclude or limit certain evidence and testimony from being introduced at the hearing, will be adjudicated under this standard. *See In the Matter of Coast*

Wood Preserving, Inc., EPCRA-9-2000-0001, 2001 EPA ALJ LEXIS 151 at *5 (ALJ, August 24, 2001).

Discussion

As part of its Motion for Accelerated Decision, Complainant seeks to exclude several defenses related to Respondent's liability on Counts II, III, and IV of the Complaint, as well as other defenses which it argues are insufficient as a matter of law, redundant, immaterial, impertinent, and significantly confuse the issues in this matter. Motion, pp. 1-2. Respondent asserts that the "Grounds of Defense and Disputed Factual Issues" listed in its Answer are "not so much affirmative defenses on which the Respondent bears the burden of proof, but simply statements intended to give the Complainant notice of particular issues which Respondent disputed," and that such statements remain at issue and should not be stricken from the proceedings. Given the contentious nature of this matter and the genuine issues of material fact that exist on all Counts of the Complaint, I must decline to strike any defenses at this stage in the proceedings. For affirmative defenses that are properly raised at the hearing, I note that Respondent has the burdens of presentation and persuasion following Complainant's establishment of a prima facie case. *See* 40 C.F.R. § 22.24(a).

In its Motion in Limine, Complainant seeks to preclude Respondent from introducing evidence and testimony at the hearing related to Resource Conservation and Recovery Act ("RCRA") inspections; clarify the scope of Julie Herring's expected testimony; limit the scope of Gary Roberts' expected testimony; strike the testimony of attorneys Robert Merkle, Beth Coleman, and Stuart Markham; limit the scope of Dan Witowski's expected testimony; and strike Carmen Datello and Carl Kramer as witnesses who may testify at the hearing. Respondent objects to the Motion in Limine in its entirety, arguing that the evidence and testimony it may present at the hearing is material and relevant to this proceeding. In fact, Respondent has adequately demonstrated in its Response to the Motion in Limine that the evidence sought to be excluded is not clearly inadmissible for any purpose. As such, I defer any evidentiary rulings until the hearing on this matter.

As a final matter, I observe that generally pleadings should be treated liberally and a party should have the opportunity to support its contentions at trial. *In the Matter of Shawano County*, Docket No. V-5-CAA-013, 1997 EPA ALJ LEXIS 136 at *8 (ALJ, June 9, 1997); *In the Matter of Sheffield Steel Corp.*, Docket No. EPCRA-V-96-017, 1997 EPA ALJ LEXIS 100 at *8 (ALJ,

November 21, 1997) (finding that "defenses are not appropriate subjects of a motion to strike, if there is any possibility that the defenses could be made out at trial"); *In the Matter of J/S Chem* Corp., 2001 EPA ALJ LEXIS 183 at *5 (finding that a party is not required to explain the relevancy of its prehearing exchange exhibits to the issues presented); *In the Matter of Wooten Oil Company*, Docket No. CAA-94-H001, 1996 EPA ALJ LEXIS 119 at *5 (ALJ, January 31, 1996) ("Wherever reasonably possible, it serves justice to decide a case on the merits, rather than on some procedural point"). In the instant matter, even if the arguments raised by Respondent in its Answer and prehearing exchange do not constitute complete defenses to liability, they may raise issues that are relevant to the determination of any penalty. *See In the Matter of Nibco*, Docket No. RCRA-VI-209-H, 1996 EPA ALJ LEXIS 73 at *40 (ALJ, May 29, 1996); *In the Matter of Scotts-Sierra Crop Protection Company*, Docket No. FIFRA-09-0864-C-95-03, 1996 EPA ALJ LEXIS 138 at *3-4 (ALJ, August 19, 1996).

For these reasons, Complainant's Motion to Strike Affirmative Defenses and Motion in Limine are denied. Granting such a motion at this stage in the proceeding is unnecessary and may result in further delay. *See Sheffield Steel Corp*., 1997 EPA ALJ LEXIS 100 at *12. Appropriate consideration will be given to the testimony and defenses raised by Respondent at the hearing on this matter if such evidence is found to be relevant or material to liability or the determination of any penalty, and Complainant shall be free to renew its objections at that time. *See* 40 C.F.R. § 22.22(a).

Order

Complainant's Motion for Partial Accelerated Decision, Motion to Strike Affirmative Defenses, and Motion in Limine are DENIED.

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Barbara A. Gunning
Administrative Law Judge

Dated: May 2, 2003
Washington, DC